



INTERIOR BOARD OF INDIAN APPEALS

United States v. Aimee Marion Bowan (Edenshaw) and Phyllis Josephine Kimball

8 IBIA 218 (02/12/1981)

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# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

UNITED STATES

v.

AIMEE MARION BOWAN (EDENSHAW)

AND PHYLLIS JOSEPHINE KIMBALL

IBIA 80-22 DE

Decided February 12, 1981

Appeal from order by Chief Administrative Law Judge Laurie K. Luoma in Alaska Native Disenrollment contest requiring the Bureau of Indian Affairs to retain appellees on the roll of beneficiaries of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1628 (1976).

Reversed.

1. Indian Tribes: Alaskan Groups--Alaska Native Claims Settlement Act: Aboriginal Claims--Alaska Native Claims Settlement Act: Enrollment

The provisions of the Alaska Native Claims Settlement Act defining the class of persons entitled to share in benefits under the Act are not ambiguous so as to require reference to the legislative history to determine whether persons becoming United States citizens after Dec. 18, 1971, the effective date of the Act, are entitled to be enrolled.

2. Alaska Native Claims Settlement Act: Enrollment--Administrative Practice--Statutory Construction: Administrative Construction

Interpretation of the Alaska Native Claims Settlement Act by the Bureau of Indian Affairs contemporaneous with the enactment of the statute and continued over the succeeding 9 years is relevant to a determination of the application to be given to the statute. The Agency refusal to enroll persons who were not United States citizens on Dec. 18, 1971, the effective date of the Act, is a reasonable application of the Act and of Departmental regulations implementing the Act, and gives the language of the statute (43 U.S.C. § 1604 (1976)) its common and ordinary meaning.

APPEARANCES: Carol Shapiro, Esq., for appellees; Bruce Schultheis, Esq., Anchorage Regional Solicitor's Office, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Procedural and Factual Background

On February 26, 1980, the Bureau of Indian Affairs (BIA), U.S. Department of the Interior, appealed from a determination by the Department's Chief Administrative Law Judge that appellees Aimee Marion Bowen and Phyllis Josephine Kimball (contestees below) should remain enrolled as Alaska Natives under the Alaska Native Claims Settlement Act, the Act of December 18, 1971, 85 Stat. 688 (hereinafter ANCSA), 43 U.S.C. §§ 1601-1628 (1976) (further references to U.S.C. are to 1976 edition).

Appellees are sisters who were born prior to 1934 in Canada, the daughters of a Canadian father and an American mother. Both parents were members of the Haida Tribe of Indians. The appellees' father was born in Masset, British Columbia, as were appellees. Appellees' mother was born at Hydaburg, Alaska.

The family moved to Hydaburg in 1940. Appellees' father did not become a United States citizen; however, appellees obtained United States citizenship by naturalization in 1974. Both women are married to American citizens. They were enrolled as Alaska Natives for the purpose of obtaining benefits under ANCSA in 1973 based upon applications which represented them both to be American citizens. Appellees explain their representations concerning nationality were based upon a belief encouraged by their parents that they enjoyed dual citizenship. The easy access given them between the United States and Canada when they traveled between the two countries is cited by them as support for their past belief they were Americans, although they now no longer contend they were American citizens before naturalization in 1974.

#### Issue on Appeal

The issue to be resolved on appeal concerns whether the Chief Administrative Law Judge correctly found that acquisition by appellees of United States citizenship after December 18, 1971, the effective date of ANCSA, does not preclude their enrollment for benefits as Alaska Natives.

Discussion and Decision

Following an analysis of contestees' circumstances, the fact-finder below correctly applied United States law respecting determination of contestees' nationality, holding

[a]s their father was born in Canada to a Canadian father and was never naturalized as a U.S. citizen, contestees cannot claim derivative citizenship through him. Nor can they claim citizenship by birth to a U.S. citizen mother because the statute expressly provides for derivative citizenship through fathers only. Although Congress amended the law in 1934 by granting citizenship rights to foreign-born children of citizen mothers (see 48 Stat. 797), contestees cannot benefit from the amendment as it was specifically made prospective only (see Montana v. Kennedy, 366 U.S. 308 (1961); Lee Chuck Ngow v. Brownell, 152 F. Supp. 427 (1957)). [Act of February 10, 1855) 10 Stat. 604.]

(Decision dated Jan. 31, 1980, at p. 4).

The opinion continues on to conclude that ANCSA is ambiguous concerning whether the Act limits benefits only to persons who were citizens on December 18, 1971. The opinion thus questions whether Congress intended to create a definite, closed class of beneficiary or an open-ended classification capable of continuing enlargement, and proceeds to find in an analysis of the legislative history of the Act an interpretation which permits contestees to share in the benefits conferred by the statute based upon considerations of equity. This determination and the legislative analysis stated for its rationale are erroneous and require reversal.

a. The statute is not ambiguous

If a statute is unambiguous its legislative history is irrelevant. United Air Lines v. McMann, 434 U.S. 192, 199 (1977). ANCSA defines "Native" at 43 U.S.C. § 1602(b) as one entitled to share in the benefits of the Act who is "a citizen of the United States who is a person of one-fourth degree or more Alaska Indian \* \* \* Eskimo, or Aleut blood, or combination thereof." At section 1604(a) the Secretary is required to prepare a roll of all Natives "born on or before, and who are living on, December 18, 1971." The roll of eligible Natives must be prepared within 2 years from the effective date of the Act.

The Act is intended, according to the statutory declaration of purpose, to benefit only Natives who are "citizens of the United States or of Alaska" (43 U.S.C. § 1601(c)). ANCSA repeals all prior Alaskan Indian allotment authority, except that pending applications for allotment may be approved provided the applicants shall not then be eligible to receive benefits under ANCSA (43 U.S.C. § 1617). ANCSA also revokes prior Indian reserves (43 U.S.C. § 1618(a)) unless an election is made to retain prior reservations in lieu of benefits offered by ANCSA (43 U.S.C. § 1618(b)).

December 18, 1971, is established by 43 U.S.C. § 1617 as the ending date for purposes of elections to be made under ANCSA. One must choose between benefits available under ANCSA or the earlier allotment statutes as of that date; moreover, the eligibility must, of necessity,

depend upon the status of the Native concerned upon the date of the Act. <sup>1/</sup> Thus, the Act provides at 43 U.S.C. § 1617(a), "[n]o Native covered by the provisions of this chapter, and no descendant of his, may hereafter avail himself of an allotment." At section 1617(b), provision is made that any allotments elected to be taken in lieu of benefits under the Act must be offset against the land grant provided under ANCSA. In light of the foregoing, ANCSA clearly establishes December 18, 1971, as the day upon which agency administration of the Act's provisions is to turn.

A subsequent Act amending ANCSA, the Act of January 2, 1976, 89 Stat. 1145, refers to and approves the Departmental regulations respecting enrollment and administration of the Departmental regulations by the Secretary. The 1976 amendment extends the time for enrollment, but specifically limits enrollment to "those Natives \* \* \* who would have been qualified if the \* \* \* [extended] deadline had been met." The thrust of the statutory language throughout ANCSA (as amended) is directed by deadlines which focus on the effective date of the Act for all purposes of enforcement of the Act's provisions.

The opinion below, finding the Act to be ambiguous, postulates an equitable basis for permitting enrollment of appellees based upon their claim of aboriginal title. While considerations respecting aboriginal title are the common unifying thesis of ANCSA (as the opinion appealed from observes), all prior claims of any nature based upon such title are

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<sup>1/</sup> Dwight Tevok (Deceased), 29 IBLA 160 (1977) (rev'g prior decision, 22 IBLA 296 (1975)).

extinguished by the Act, whether compensated or not. United States v. Atlantic Richfield Co., 435 F. Supp 1009 (D. Alaska 1977); Koniag v. Kleppe, 405 F. Supp. 1360 (D.D.C. 1975), aff'd in part, rev'd in part, 580 F.2d 601 (1978), cert. denied, 99 S. Ct. 733 (1979)). The decision below assumes, however, that compensation is required for every type of claim which may be based upon aboriginal title regardless whether the claim is cognizable under ANCSA. 2/ This thesis, which is at the center of the holding requiring appellees to be enrolled under ANCSA, is at odds with the holding in Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955), and a series of earlier cases which establish the principle that aboriginal title is subject to extinguishment without compensation at the will of Congress. 3/ These cases remain a correct statement of American law on this point. Since claims based upon aboriginal title are not compensable of right, and since nothing outside the terms of the statutory grant entitles appellees to share in the benefits created by

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2/ The decision also opines that correctness of determination of claims is subordinate to speed in settling them. ("Congress was obviously not too concerned about the extent to which Natives could actually prove their claims" (Decision dated Jan. 31, 1980, at p. 5).) This finding is contrary to the logic of judicial determinations mandating due process administrative standards in ANCSA determinations which are binding upon the Department. Cf. Koniag v. Andrus, 580 F.2d 601, 609 (D.C. Cir. 1978).

3/ Cf. United States v. Santa Fe Pacific R. Co., 314 U.S. 339 (1941). Thus, prior to ANCSA there was conflict concerning whether aboriginal title in Alaska was extinguished by the treaty of cession or later acts or whether it continued until ANCSA. Cf. Miller v. United States, 159 F.2d 997 (9th Cir. 1947), and Tlingit and Haida Indians of Alaska v. United States, 177 F. Supp. 452 (Ct. Cl. 1959). Contrary to the assumption implicit in the opinion below, there was not consensus on the question whether Native titles survived transfer of Alaska to United States control.

ANCSA, the fact that appellees were not qualified on account of citizenship to be enrolled prevents their retention on the rolls. <sup>4/</sup>

b. Contemporaneous and practical interpretation  
of the Act bars contestees claims

The BIA contends that the continued and contemporaneous administration by that agency of ANCSA through the application of implementing Departmental regulations indicates the interpretation properly to be given to the statute in practice. It has apparently been BIA policy to regard the Departmental regulations appearing at 25 CFR Part 43h as limiting the class of beneficiaries entitled to enrollment under ANCSA to a closed group fixed by the December 18, 1971, effective date. It is an axiom of statutory construction that long continued contemporaneous and practical interpretation of a statute by the executive officers charged with its administration is entitled to consideration when determining the statutory meaning. Palmore v. United States, 411 U.S. 389 (1973). It is also true that the interpretation of an act made by the agency charged with enforcement of the statute is considered to be an appropriate means to demonstrate that the agency interpretation embodies the common and ordinary meaning of the law. Oil Shale Corp. v. Morton, 370 F. Supp. 108 (D. Colo. 1973). The agency position here is a

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<sup>4/</sup> As the Court points out in Koniag v. Kleppe, above, at 405 F. Supp. 1364-5, the Act establishes a sort of quid pro quo--all claims are extinguished in exchange for benefits under the Act for qualified claimants and corporations. Citizenship is a crucial factor in the determination of qualification for individuals.

reasonable interpretation consistent with the internal logic of the Act and the common and ordinary meaning of the words of section 1604. It is inconsistent with the language of ANCSA to permit enlargement of the beneficiary class by naturalization while excluding native American children born after the effective date of the Act, and yet to use the December effective date (or enlargements of that date permitted by amendment) to determine all other claims under the Act. The Act does not contemplate the creation of an ever-expanding enrollment by naturalization of newly qualified members who will become entitled to share in the fixed estate created by Congress for Native Alaskans. 5/

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed. Appellees are not Alaska Natives as defined by ANCSA and are not entitled to enrollment for benefits under the Act. Agency officials of the BIA charged with enforcement of Departmental regulations respecting enrollment are directed to take appropriate action to

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5/ Cf. 43 U.S.C. § 1601(b) (1976). The reference to the legislative history of the Act in the decision below seeks to find a basis for enrollment in the provisions of the Act which extinguish whatever aboriginal title remains in Alaskan Natives or Native groups. This rationale assumes the existence of such title, an assumption not justified by the Act, prior decisions, or the legislative history. ANCSA extinguishes whatever aboriginal title remains; it does not recognize such title, nor does the legislative history indicate any intent to do so. (See H.R. Rep. Nos. 3100, 7039, 7432, and 92-10, 92d Cong., 1st Sess. May 3, 4, 5, 6, and 7, 1971; H.R. Rep. No. 92-523, 92d Cong., 1st Sess. reprinted in [1971] U.S. Code Cong. & Ad. News 2198; Conf. Rep. 92-746 reprinted in U.S. Code Cong. & Ad. News 2253.)

disenroll appellees consistent with this opinion, which is final for the Department.

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Franklin Arness  
Administrative Judge

I concur:

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//original signed  
Wm. Philip Horton  
Chief Administrative Judge