

UNITED STATES

v.

ANGELINE GALBRAITH

IBLA 91-226

Decided October 12, 1995

Appeal from a decision of Administrative Law Judge Ramon M. Child holding that Native allotment application F-14780 was legislatively approved pursuant to section 905(a)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(1) (1988). F-14780.

Affirmed in part, reversed in part, and remanded.

1. Administrative Procedure: Administrative Record–Evidence: Generally–Hearings–Rules of Practice: Generally–Rules of Practice: Appeals: Hearings

Where the Board of Land Appeals, based on the record before it, orders the issuance of a contest complaint, the record which was before the Board should be offered and admitted into evidence at any subsequent hearing unless otherwise expressly provided by the Board.

2. Alaska: Native Allotments–Alaska National Interest Lands Conservation Act: Native Allotments

In order for legislative approval to apply to an allotment application which has been amended pursuant to sec. 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), the allotment applicant must first establish that the

new description embraces the land for which he or she originally intended to make application.

3. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

Under sec. 905(a)(5)(B) of ANILCA, 43 U.S.C. § 1634(a)(5)(B) (1988), the timely filing of a valid protest by the State of Alaska prevents the application from being legislatively approved and requires adjudication of the application under the Native Allotment Act of 1906. The subsequent withdrawal of such a protest does not obviate the statutory requirement to adjudicate the application.

4. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

Under sec. 905(a)(5)(C) of ANILCA, 43 U.S.C. § 1634(a)(5)(C) (1988), the timely filing of a valid protest by an individual claiming ownership of improvements on land sought for allotment prevents the application from being legislatively approved and requires adjudication of the application under the Native Allotment Act of 1906. The fact that the improvements may have been constructed on the land without color of right has no bearing on the requirement that the allotment applicant must show qualifying use and occupancy of the land sought.

5. Administrative Procedure: Generally--Alaska: Native Allotments--Contests and Protests: Generally--Evidence: Prima Facie Case--Rules of Practice: Generally

Where the Government files a contest complaint against a Native allotment application, the Government bears the burden of presenting a prima facie case establishing that evidence of record does not affirmatively show compliance with all of the statutory and regulatory requirements necessary to obtain title to a Native allotment under the Native Allotment Act of 1906.

6. Administrative Procedure: Generally--Alaska: Native Allotments--Hearings--Rules of Practice: Appeals: Generally--Rules of Practice: Hearings

The voluntary decision of a contestee not to proceed but rather to challenge a ruling by an Administrative

Law Judge that a prima facie case has been presented at a hearing constitutes a waiver of the contestee's right to present evidence on his or her own behalf. Should the appeal of the ruling be unsuccessful, the contestee will not ordinarily be afforded an additional hearing.

7. Administrative Procedure: Generally--Alaska: Native Allotments--Hearings--Rules of Practice: Appeals: Generally--Rules of Practice: Hearings

Where, at the close of the Government's case-in-chief, a contestee moves for dismissal of the complaint on the ground that a prima facie showing has not been made, it is error for an Administrative Law Judge to take the motion under advisement and direct the contestee to proceed with its presentation.

APPEARANCES: F. Christopher Bockmon, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management; William E. Caldwell, Esq., Alaska Legal Services Corporation, Fairbanks, Alaska, for Angeline Galbraith.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The Bureau of Land Management (BLM) has appealed a decision of Administrative Law Judge Ramon M. Child, dated March 5, 1991, holding that Angeline Galbraith's Native allotment application (F-14780) was legislatively approved pursuant to section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(1) (1988). For reasons we set forth below, we reverse this determination and remand the matter back to the Hearings Division.

The subject Native allotment application has already been the subject of two prior decisions by this Board in which the factual background of this application was exhaustively explored. See Angeline Galbraith, 97 IBLA 132, 94 I.D. 151 (1987); Angeline Galbraith (On Reconsideration), 105 IBLA 333 (1988). We will not repeat herein the lengthy factual analyses undertaken in those decisions. Suffice it for our present purposes to note that, pursuant to section 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), Galbraith had sought to amend the land sought in her allotment application from the NE¹/₄ SW¹/₄ NE¹/₄, S¹/₂ SW¹/₄ NE¹/₄, W¹/₂ SE¹/₄, and E¹/₂ lot 2, sec. 6, T. 2 S., R. 2 W., Fairbanks Meridian, to lot 5, sec. 6, T. 2 S., R. 2 W., Fairbanks Meridian. After notification of the proposed amendment, as required by section 905(c) of ANILCA, the State of Alaska filed a protest pursuant to section 905(a)(5)(B). Protests were also filed by Pete and Phyllis Haggland and by Joyce, Evelyn J., and Claude A. Demoski.

By decision dated June 13, 1984, the Fairbanks District Office held that, because of the protests filed by the Hagglands and the State of Alaska, 1/ the Galbraith application was not legislatively approved, but rather was required to be adjudicated under the terms of the 1906 Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed by section 18 of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C.

1/ With respect to the Demoski protest, the decision held that, since the protestants failed to allege that lot 5 was the site of improvements claimed by them, they had failed to file a valid protest. See Marshall McManus, 126 IBLA 168 (1993); Eugene M. Witt, 90 IBLA 330 (1986).

§ 1617 (1988)). Insofar as the Hagglands' protest was concerned, the decision noted that the improvements on lot 5 which they claimed they owned (250 feet of an airport runway plus a connecting road and powerline) were, indeed, present within the allotment. The decision went on to hold, however, that while the existence of these improvements clearly established that Galbraith's use in the area of the improvements could not have been exclusive, these improvements would not, by themselves, be sufficient to bar approval of the allotment since the area of nonexclusive use constituted less than one-fourth of the total acreage within lot 5, citing 43 CFR 2561.0-8.

The decision then turned to the protest filed by the State of Alaska. The decision noted that, while Galbraith's use of the land prior to 1968 had been qualifying use under the Native Allotment Act, her use of lot 5 subsequent to her move to Anchorage in 1968 had apparently been intermittent and, as such, was insufficient to prevent the initiation of third-party rights to the parcel in question. See generally United States v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981). Since the original application which Galbraith had filed did not describe lot 5, the June 16, 1972, refiling of State selection application F-031959, which sought all available lands within T. 2 S., R. 2 W., attached to lot 5 as of that date and the rights of the State under that selection application precluded any subsequent effort by Galbraith to amend her application to embrace lot 5.

Moreover, as an independent basis for disallowing the amendment of the allotment application, the BLM decision, relying on the plurality opinion in Andrew Petla, 43 IBLA 186 (1979), held that since the land which Galbraith sought to include within her application had been surveyed in 1919, her failure to correctly describe this parcel in her original application could not be attributed to the inability of appellant to identify the site on a protraction diagram and, thus, the application was not properly subject to an amendment. Based on the foregoing, the District Office held the allotment application for rejection. Galbraith was, however, afforded an opportunity to submit additional information disputing any material facts on which the decision had been based.

Thereafter, Galbraith submitted three affidavits in support of her claim to lot 5. By decision dated December 7, 1984, the District Office formally rejected the Native allotment application. In this decision, BLM reiterated many of the findings of the June 13, 1984, decision, including the finding that Galbraith had used the land and satisfied the use and occupancy requirements of the Native Allotment Act. This decision did not, however, revisit the question of intermittent use subsequent to 1968. Rather, it based rejection of the Native allotment application solely on application of section 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), concluding that the right to amend an application afforded by that section did not apply to situations in which an applicant sought to amend the application to embrace lands which were surveyed at the time that the

original application was filed. Galbraith thereupon appealed the rejection of her application to this Board.

By decision dated May 6, 1987, styled Angeline Galbraith, supra, we set aside the decision of the Fairbanks District Office and remanded the matter back to the District Office with instructions to issue a contest complaint against the allotment application. As an initial matter, the Board reversed BLM's interpretation of section 905(c) of ANILCA as limited only to amendments describing lands unsurveyed as of the time of the original application, concluding that, so long as the applicant could establish that the new description correctly identified the lands for which the applicant had originally intended to file, the fact that the lands now described had been surveyed prior to the filing of the original application would not, of itself, preclude allowance of the amendment. The Board then turned to the question of the adequacy of the record to support allowance of the amendment.

The Board noted that allowance of the amended application was dependent upon two discrete findings. First, under section 905(c), Galbraith was required to show that the land now sought was the land which she intended to apply for in 1971. Second, assuming Galbraith made that showing, she was then required to establish use and occupancy of the land described in the amended application in conformity with the requirements of the Native Allotment Act. The Board's analysis of the record on appeal

led it to the conclusion that Galbraith had failed to establish either prerequisite to the grant of the allotment. See Angeline Galbraith, supra at 147-70, 94 I.D. at 159-71. ^{2/} Since the Board had determined that the record, as it presently existed, failed to establish entitlement to an allotment, the Board, citing John Nusunginya, 28 IBLA 83 (1976), directed the District Office to issue a contest complaint against the allotment application.

Galbraith petitioned for reconsideration of the Board's decision. By order dated August 18, 1987, the Board granted the petition with respect to that portion of the Board's decision dealing with appellant's substantive compliance with the requirements of the 1906 Act. ^{3/} Following additional briefing, the Board essentially reaffirmed its prior analysis, though it took pains to clarify the status of berry-picking as a

^{2/} Since, for reasons delineated subsequently in the text, it is impossible at the present time to fairly adjudicate either of these issues with finality, we will not repeat the lengthy factual analyses undertaken by the Board in its initial consideration of this allotment application. It is adequate for our present purposes to note that the Board expressly reversed BLM's finding that the existing record showed that Galbraith's use and occupancy of lot 5 was in conformity with the requirements of the 1906 Act. See Angeline Galbraith, supra at 148.

^{3/} The Board also expressly rejected an argument pressed by Galbraith that the Board lacked authority to consider issues on appeal which were not raised by the parties. The Board noted that the same argument had been made by the appellant in Schade v. Andrus, 638 F.2d 122 (9th Cir. 1981). In rejecting Schade's argument, the Court declared:

"His position is contrary to the now established principle that the Secretary of the Interior has 'broad plenary power over the disposition of public lands,' and that throughout the appeals process, so long as legal title remains in the government, there is continuing jurisdiction in the Department to consider all issues in land claims."
Id. at 124-25 (citations omitted).

predicate for issuance of an allotment. Thus, while the Board noted that it had never questioned whether berrypicking was a qualifying use under the Native Allotment Act, the issues presented by the Galbraith application involved two subsidiary questions "whether and in what circumstances berrypicking, by itself, could be deemed a 'substantial' use, and, second, when it might be judged 'potentially exclusive of others.'" Angeline Galbraith (On Reconsideration), supra at 338. We concluded:

In summary, we believe that where the use claimed is berrypicking and the like, the questions which must be examined are whether the use claimed is substantial, and, assuming that this question is answered in the affirmative, whether that use, giving due consideration to all relevant factors including the situs of the land, was at least potentially exclusive of others. Use of a parcel of land solely for berrypicking can serve as an adequate basis for the grant of a Native allotment where the record establishes that the use was both substantial and potentially exclusive.

Id. at 340.

On March 27, 1989, pursuant to the instructions of the Board, the Alaska State Office, BLM, issued a contest complaint against the allotment application charging (1) that Galbraith had failed to establish that the amended application correctly described the lands for which she had originally intended to apply and (2) that Galbraith had failed to establish that her use and occupancy of the lands described in the amended application had been substantially continuous and potentially exclusive of others. Galbraith duly denied the charges and a hearing was set before Administrative Law Judge Child.

At the outset of the hearing, counsel for the State of Alaska announced that the State had reached a settlement agreement with Galbraith and moved to withdraw its protest. ^{4/} The motion was granted and the State was dismissed as a party to the proceedings. See Tr. 21-22. After the State's dismissal, BLM proceeded with its case-in-chief. It called only two witnesses. The first witness was Linda Butts, a Lead Land Law Examiner in the Fairbanks District Office. Her testimony was elicited primarily to serve as a basis for the admission of a number of the documents which had been before the Board during its consideration of the original appeal and the petition for reconsideration. The only other individual to testify was James Peter (Pete) Haggland, one of the individual protestants.

Haggland testified that, since 1971, he had owned property which bordered lot 5 on the east. He noted that, prior to the construction of the Cripple Creek Road in the early 1980's, the only practical means for mechanized access to lot 5 was through his property and then down along the runway which crossed into the SE quadrant of lot 5 for approximately 250 feet (Tr. 98-99). He stated that, from his personal observations, this was not a particularly good area for berrypicking. He stated that, although he was a year-round resident, he had never seen Galbraith on lot 5 (Tr. 104). Indeed, under cross-examination, he averred that he had never seen any Native use in the vicinity until approximately 1974 or 1975 (Tr.

^{4/} The withdrawal was conditioned on the allotment being subject to certain easements to which the State and Galbraith had agreed. See Tr. 12-20. Included in these easements were easements designed to allow the continued use of the airstrip and associated power lines.

108-09). During cross-examination, Haggland was asked whether, in light of the easements to which Galbraith had agreed, he would be willing to withdraw his protest. Haggland testified that it was his understanding that his protest had been disallowed and that, in effect, it had already been withdrawn (Tr. 116). ^{5/} When specifically asked by counsel if he would withdraw his protest, Haggland responded, "It's been withdrawn for me."

After the close of the contestant's case-in-chief, Galbraith moved to have the contest dismissed on two separate bases. The first basis was that BLM had failed to present a prima facie case. See Tr. 152-53. The second ground offered for dismissal was that, since the protests had been withdrawn, the allotment should be considered to be legislatively approved under section 905(a) of ANILCA. See Tr. 154. Rather than ruling on either of these motions, Judge Child took the motion to

^{5/} When Haggland expressed his interpretation of the prior adjudications by BLM, Judge Child agreed with his assessment, noting, "That's what I heard read into the Record, that was, the protest was disallowed because it was in fact an encroachment on public lands to begin with" (Tr. 116). Both Haggland and Judge Child, however, misinterpreted BLM's actions on the Hagglands' protest. While the Demoski protest was denied in the decision of June 13, 1984, the Haggland protest was, in fact, recognized as a valid protest, sufficient to require adjudication of the application under the 1906 Act. Indeed, this Board expressly recognized in Eugene M. Witt, 90 IBLA 265 (1986), that section 905(a)(5)(C) of ANILCA, 43 U.S.C. § 1634(a)(5)(C), merely requires that the land sought in a Native allotment be the situs of improvements claimed by an individual and does not require the assertion of a property interest in the land covered by the allotment application. Thus, a trespasser could, indeed, file a valid protest and require that the allotment applicant establish compliance with the requirements of the 1906 Act, even though such a party would lack standing to appeal from a substantive determination that an applicant had complied with that Act. See, e.g., Eugene M. Witt, supra; Fred J. Schikora, 89 IBLA 251 (1985).

dismiss under advisement, at which point counsel for Galbraith decided not to submit any further evidence. See Tr. 159.

In his March 5, 1991, decision, Judge Child took up Galbraith's motion to dismiss. Judge Child first explored the question whether BLM had presented a prima facie case as to (1) whether it was Galbraith's original intent to apply for lot 5 at the time she filed her Native allotment application and (2) whether her use and occupancy of lot 5 had been substantially continuous and potentially exclusive of others. See Decision at 3. Noting that BLM had essentially submitted the record which was before this Board in its earlier review of the application and which the Board had determined was inadequate to show either that Galbraith had intended to apply for lot 5 or that her use and occupancy of lot 5 was sufficient under the 1906 Act, Judge Child concluded that BLM had submitted sufficient evidence, "if barely so," to constitute a prima facie case. He held that "at least some additional evidence in support of Ms. Galbraith's claims is required before a decision to grant her application for lot 5 can be justified, both on the issue of original intent and on the issue of use and occupancy" (Decision at 4).

While Judge Child opined that Galbraith should be given a new opportunity to present any evidence she had to overcome the Government's case, he declined to do so. Since he ultimately determined that the case could be decided on a different ground, namely, his conclusion that the effect of

the withdrawal of the State's protest 6/ was to revive the applicability of section 905(a)(1) and result in the Congressional approval of the allotment application. See Decision at 5-10. Based on this conclusion, he dismissed the contest complaint. Contestant duly filed a notice of appeal from this decision.

On appeal, counsel for the Government attacks not only Judge Child's determination that the effect of the withdrawal of the State's protest was to reactivate legislative approval of the allotment, but also the failure of his decision to determine for which land appellant had intended to apply, as well as the assertion in the decision that, but for the determination that the application should be considered legislatively approved, Galbraith would be afforded another opportunity to present evidence of entitlement to an allotment. Galbraith has responded generally supportive of Judge Child's decision, though she challenges the finding that the Government presented a prima facie case.

[1] Before turning to the issues argued by the parties, however, there is a subsidiary problem manifested in the record before us which we feel warrants specific comment. We are constrained to point out that the failure of BLM to submit the entire record which was before the Board at the time of its initial consideration to the Administrative Law Judge was

6/ Judge Child did not find that the Hagglands' protest had been similarly withdrawn. Rather, he noted that "the Hagglands' protest was earlier considered by BLM and denied on the merits " (Decision at 7). But see note 5, supra.

plain error. It may be that, where BLM initiates a contest of a Native allotment application on its own volition, there may exist good and sufficient reasons not to offer the entire BLM case file, though as a general matter we would expect the record would be offered and received into evidence. ^{7/} Be that as it may, however, where a hearing is being conducted pursuant to an order of the Board, the record which was before the Board and which precipitated its actions is, as a matter of course, to be offered and received into evidence. Failure to do so results in the anomalous situation wherein the record subject to review on an appeal from an Administrative Law Judge's decision (see 43 CFR 4.24(a)(2)) may not contain all of the documents which constituted the record before the Board during its initial consideration.

Indeed, the instant case manifests precisely the type of problem which can arise when the entire record before the Board is not offered and received at the hearing. Thus, Galbraith, in her brief in the most recent appeal, refers to her previous argument relating to the Board's authority to consider matters sua sponte, but notes that "[a]ppellee does not seek to relitigate the issue here, but merely preserve it in the event of future federal-court review" (Appellee's Answer Brief at 3 n.4). As noted above,

^{7/} We are well aware that the BLM records are often voluminous and frequently contain many items which do not directly bear on the questions at issue. It seems to us, however, far more preferable to receive the entire BLM case file into evidence as an initial matter and then request the parties to delineate those documents on which they wish to most rely rather than to endure the piecemeal and often lengthy submission of multiple documents from the case files, case files which would, in any event, be subject to official notice. See 43 CFR 4.24(b).

the Board had rejected this argument in its order of August 18, 1987. The problem, however, is that this order was not introduced into evidence and was, therefore, not included in the record now before the Board. Similarly, the record developed at the hearing does not contain three witness statements which Galbraith submitted in 1981 in support of her claim to the E $\frac{1}{2}$ of lot 2 and the W $\frac{1}{2}$ SE $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 6, T. 2 S., R. 2 W., Fairbanks Meridian, i.e., the lands for which Galbraith now says she never intended to apply, which, we pointed out in our decision, were submitted by appellant to BLM at a time that Galbraith knew "as an irrefutable fact, that they were false." See Angeline Galbraith supra at 153, 94 I.D. at 166. These documents clearly bore on the question of intent and were of probative value in the Board's determination that a contest complaint should issue yet are now absent from the record on appeal.

Should Galbraith eventually wish to pursue Federal court review, a review which could easily challenge legal and factual analyses made in our initial decision as well as similar conclusions made after the hearing, it would be difficult for the Board to fairly and accurately certify the record which was before it since that record, itself, would expand or contract dependent not only upon the issue being litigated but with respect to the specific time frame involved. In order to minimize the potential for such problems, the Board hereby directs that at any hearing held pursuant to an order of this Board, the record which was before the Board when it originally considered the matter is to be offered and

admitted at the hearing unless otherwise expressly provided by the Board. ^{8/}

[2] Turning to the issues pressed on appeal, it is absolutely apparent that BLM is correct in its assertion that Judge Child's decision is internally flawed. Thus, Judge Child first found that BLM had presented a prima facie case that lot 5 was not the land for which Galbraith intended to apply but then found that the amended application which described lot 5 had been legislatively approved. The problem with this analysis, as BLM correctly points out, is that it is only after a determination has been made that the land in the amended description is the land which an applicant had originally intended to describe that legislative approval applies to that application. Absent the establishment of this predicate fact, there can be no legislative approval under section 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988). See State of Alaska, 119 IBLA 260, 267-68 (1991); see also Alyeska Pipeline Service Co., 127 IBLA 156 (1993); Hermann T. Kroener, 124 IBLA 57 (1992). Thus, Judge Child's finding that a prima facie case existed that lot 5 was not the land originally intended and that Galbraith would have to submit further evidence to buttress her claim necessarily barred application of legislative approval with respect

^{8/} We recognize that participants to contest hearings often object to many statements and conclusions found in BLM files. They are certainly free to identify and challenge any statements or judgments with which they disagree and neither the Administrative Law Judge nor this Board are bound by the conclusions therein espoused.

to the amended application. On this basis, alone, his decision could not stand.

[3] A more fundamental error in the decision under review lay in its conclusion that withdrawal of the protest filed by the State somehow served to resurrect legislative approval of the allotment application. Judge Child's conclusion flowed both from an analysis of the decisional precedent in the Department relating to the question of legislative approval which led him to conclude that this Board's decision in Stephen Northway, 96 IBLA 301 (1985), had been overruled by its decision in State of Alaska, 109 IBLA 339 (1989), as well as his independent speculation as to the scope and ambit of section 905(a) of ANILCA. Neither prong of his reasoning, however, withstands analysis.

Insofar as controlling Departmental precedents are concerned, we note that Judge Child's analysis in his decision in the instant case was a replication of an earlier analysis which he had formulated in a hearing concerning the Native allotment application of Zack Rastopsoff. In our decision in United States v. Rastopsoff, 124 IBLA 294 (1992), the Board reviewed the various cases analyzed by Judge Child and concluded that his reliance on our decision in State of Alaska, *supra*, was "completely misplaced." *Id.* at 298. We reiterated the continuing vitality of the Northway precedent, though we declined an invitation by appellant to revisit the question of whether or not Northway ought to be reconsidered, since legislative approval was clearly barred in any event because

the land sought by Rastopsoff was not unreserved on December 13, 1968, as required by section 905(a)(1) of ANILCA as a precondition for legislative approval. Id. at 299-300. While we believe that the Rastopsoff decision more than adequately deals with Judge Child's assertion that the decision in State of Alaska constituted a sub silentio overruling of Northway, we feel that a more detailed analysis might be warranted with respect to the critical issue resolved in Northway, viz., what is the effect of the withdrawal of a State protest with respect to legislative approval?

As an initial matter, it is useful to have before us the applicable provisions of section 905 of ANILCA, 43 U.S.C. § 1634 (1988). Section 905(a)(1) provides, in relevant part:

Subject to valid existing rights, all Alaska Native allotment applications * * * which were pending before the Department of the Interior on or before December 18, 1971, and which describe either land that was unreserved on December 13, 1968, or land within the National Petroleum Reserve—Alaska [9] * * * are hereby approved on the one hundred and eightieth day following December 2, 1980, except where provided otherwise by paragraph (3), (4), (5), or (6) of this subsection, or where the land description of the allotment must be adjusted pursuant to subsection (b) of this section, in which cases approval pursuant to the terms of this subsection shall be effective at the time the adjustment becomes final.

^{9/} The Act of Oct. 14, 1992, 106 Stat. 2112, made various changes in section 905 of ANILCA relating to lands within Fort Davis and certain lands within the Naval Petroleum Reserve—Alaska which had been selected, interimly conveyed, or patented to a Village or Regional corporation. This Act did not, however, impact upon appellant's situation nor upon the statutory analysis of section 905 which appears subsequently in the text of this decision.

This section clearly establishes both preconditions to eligibility for legislative approval (e.g., the application must have been pending on or before December 18, 1971, and must not describe land which was reserved on December 13, 1968) as well as exceptions for certain applications otherwise eligible. Five specific exceptions were provided. Thus, where the application described lands determined to be valuable for minerals other than oil, gas, or coal (paragraph (3)), or where the application described lands within the boundaries of a unit of the National Park System established on or before December 2, 1980, or certain lands patented, validly selected by or tentatively approved to the State of Alaska (paragraph (4)), the allotment application was required to be adjudicated under the provisions of the 1906 Act. A third exception to legislative approval was provided for allotment applications which had been knowingly and voluntarily relinquished by the applicant after December 18, 1971 (paragraph (6)). Another exception related to adjustments necessitated because of a conflict between two or more allotment applications due to overlapping land descriptions, in which case legislative approval would be effective not within 180 days of December 2, 1980, but rather as of the time the adjustment terms became final (subsection b). One last exception to legislative approval was provided (paragraph 5). Since this is the provision at issue herein, rather than paraphrase it, we will set it out verbatim:

Paragraph (1) of this subsection and subsection (d) of this section shall not apply and the Native allotment application shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended, if on or before the one hundred and eightieth day following December 2, 1980—

(A) A Native Corporation files a protest with the Secretary stating that the applicant is not entitled to the land described in the allotment application, and said land is withdrawn for selection by the Corporation pursuant to the Alaska Native Claims Settlement Act; or

(B) The State of Alaska files a protest with the Secretary stating that the land described in the allotment application is necessary for access to lands owned by the United States, the State of Alaska, or a political subdivision of the State of Alaska, to resources located thereon, or to a public body of water regularly employed for transportation purposes, and the protest states with specificity the facts upon which the conclusions concerning access are based and that no reasonable alternatives for access exist; or

(C) A person or entity files a protest with the Secretary stating that the applicant is not entitled to the land described in the allotment application and that said land is the situs of improvements claimed by the person or entity.

43 U.S.C. § 1634(a)(5).

We have quoted the entire relevant text from both section 905(a)(1) and section 905(a)(5) because it highlights the essential problem with the position espoused both by Judge Child and Galbraith. There is simply no statutory language which could be construed so as to provide that the withdrawal of a valid State protest resuscitates legislative approval. On the contrary, the legislative scheme disclosed in section 905 is relatively straightforward. Thus, an eligible allotment application is legislatively approved effective 180 days after December 2, 1980, *i.e.*, June 1, 1981, unless one of the enumerated types of protest is filed by that date. If, however, a valid protest is filed, the application is not legislatively

approved but is, instead, required to be adjudicated under the 1906 Act. What happens to a qualifying protest after it has been timely filed is simply irrelevant to the statutory mandate since the protest does not, of itself, defeat the allotment but merely prevents legislative approval from attaching to it. And this result is accomplished merely by the timely filing of the protest. See Edward N. O'Leary, 132 IBLA 337, 345 (1995).

Neither Galbraith nor Judge Child point to any other statutory language which could support their argument that the withdrawal of a timely-filed valid protest resuscitates legislative approval. ^{10/} Instead, they essentially appeal to the admitted legislative desire to speed the settlement of all Native land claims and argue that, since legislative approval of previously protested claims would foster this end, the withdrawal of the protest should be deemed to revive legislative approval. See Appellee's Answer Brief at 14-21. However, the fact that one course of action might "speed up" the settlement of Native land claims scarcely establishes that Congress has chosen to adopt this approach. Indeed, the desire for a rapid settlement of Native land claims in Alaska was also one of the expressed goals of the Alaska Native Claims Settlement Act in 1971 (see 43 U.S.C. § 1601(b) (1988)), yet no one would suggest that Congress

^{10/} Thus, while Galbraith references the language of section 905(c) of ANILCA which deals with amendments of descriptions in an allotment application, that section merely provides that "[i]f the allotment application is amended, this section shall operate to approve the application or to require its adjudication, as the case may be, with reference to the amended land description only." It does not, in any manner, affect the substantive operation of section 905(a).

provided for the legislative approval of pending Native allotment applications at that time. There are, in fact, many differing adjudicatory schemes which might accelerate the resolution of land claims in Alaska. ^{11/} But the conceptualization of such an approach is not the legal equivalent of a congressional enactment.

[4] In any event, as we noted earlier in our review of the history of this allotment, legislative approval of this application was prevented not only by the filing of a valid State protest, it was also interdicted by the filing of a valid private protest by the Hagglands. Judge Child's dismissal of this protest with the observation that "the Hagglands' protest was earlier considered by BLM and denied on the merits," totally misses the point that the issue of whether or not the improvements which the Hagglands claimed on lot 5 were sufficient to defeat the allotment only arises in the context of an adjudication of the allotment application's conformity with the 1906 Allotment Act. In other words, the necessity of examining whether or not the existence of the Hagglands' improvements prevented Galbraith's alleged use from being potentially exclusive of others and defeated her allotment application arises solely because the allotment has not been

^{11/} As but one example, had Congress limited the right to protest to those who claimed an ownership interest in the land described in an allotment application, those who had constructed improvements on that land without color of right could not have filed a valid protest. Such a limitation, by cutting down on the number of protests, would certainly have expedited resolution of Native land claims. Congress, however, chose to allow anyone who claimed "improvements" on the land to protest and thus, as this Board has consistently held, even those who had merely a trespass interest could file a valid protest under section 905(a)(5)(C). See note 5, supra.

legislatively approved. Thus, even if Judge Child were correct in his view that withdrawal of a State protest resuscitates retroactive legislative approval, this would have no effect on the instant application since the filing of the Hagglands' protest independently barred legislative approval.

We recognize that counsel for Galbraith attempted to ascertain whether Pete Haggland would withdraw his protest since his rights to use that portion of the airport runway located on lot 5 would be protected under the easements proposed by the State of Alaska. However, not only did Haggland never actually agree to do so, ^{12/} but there was absolutely no evidence that Haggland was authorized or intended to withdraw the protest filed by his wife. Cf. Estate of Guy Groat, Jr., 46 IBLA 165, 172 (1980) (relinquishment of Native allotment application ineffective where there was no evidence that the widow of deceased Native had authority to act for all of the heirs at the time of the relinquishment). Thus, at a minimum, the protest filed by Phyllis Haggland would continue to bar legislative approval of the Galbraith application even if there were any statutory basis for the interpretation espoused by Judge Child and Galbraith that withdrawal of a valid protest results in the nunc pro tunc legislative approval of an allotment application.

^{12/} Even though Haggland was of the erroneous view that BLM had rejected and, in effect, withdrawn his protest (when, in point of fact, it had recognized his protest as valid but concluded that his use of part of the parcel would not bar a finding that Galbraith's use of lot 5 was potentially exclusive of others), he, nevertheless, never once actually agreed to withdraw the protest on his own volition. See Tr. 115-16.

It may be that Congress might some day determine to adopt the approach advocated by Galbraith and Judge Child. And Congress, being vested with plenary authority over the public lands, would clearly be capable of effectuating such a result. But the transcendent reality of this case, a reality which is not effectively obscured by counsel's fulsome encomiums directed to the virtue of rapid resolution of Native land claims, is that Congress, for whatever reason, ^{13/} simply did not provide that withdrawal of a valid protest resulted in retroactive legislative approval of the application. And, absent such Congressional mandate, neither can this Department.

[5] We now turn to the final two issues which are inextricably intertwined, *i.e.*, did the Government present a prima facie case of invalidity and, if so, should Galbraith be afforded an additional opportunity to attempt to overcome the Government's showing. As an initial matter, we note that this Board's decision in United States v. Estabrook, 94 IBLA 38 (1986), must be seen as settling any question as to whether the Government is obligated to establish a prima facie case of invalidity in the context of a contest of a Native allotment application. ^{14/} The more particular

^{13/} It may well be that Congress was simply inattentive to such a possibility. Or, it is possible that Congress was afraid that such an approach might generate a number of protests filed for the sole purpose of extorting concessions from an allotment applicant. In any event, all speculation as to the reasons why it failed to act is essentially beside the point. Congress simply did not provide that the withdrawal of a valid protest would result in the retroactive legislative approval of the claim.

^{14/} Whether or not the Government was obligated to present a prima facie case in a contest of a Native allotment application was clearly left an open question by this Board's seminal decision in Donald Peters, 26 IBLA

question which this case presents relates to the quantum of evidence necessary to establish such a prima facie showing where the Board has, in a prior review of the evidence, expressly held that the record, as it then existed, was insufficient to show compliance with the 1906 Act.

The Board has defined "prima facie" to mean "that the case is adequate to support the Government's contest of the claim and that no further proof is needed to nullify the claim." United States v. Williamson, 45 IBLA 264, 278, 87 I.D. 34, 42 (1980). Galbraith argues that Judge Child erred in finding that a prima facie case

fn. 14 (continued)

235, 83 I.D. 308 (1976), which determined that, consistent with the analysis of the Ninth Circuit Court of Appeals in Pence v. Kleppe, 529 F.2d 135 (1976), where BLM had determined that a Native allotment application should be rejected because of the applicant's failure to show use and occupancy of the land or to meet other requirements of the regulations, BLM should issue a contest complaint and afford the allotment application a hearing on any disputed issue of fact. In Peters, the Board did not direct that BLM was required to establish a prima facie case of invalidity. Rather, it stated:

"At the hearing BLM, represented by the Solicitor, will first go forward with its evidence. The applicant will follow with a presentation of his case. All parties will have the right to cross-examine and to rebut. The ultimate burden of proof as to entitlement to an allotment rests with the Native applicant."

Id. at 243, 83 I.D. at 312.

Subsequently, in Elizabeth G. Cook, 90 IBLA 152 (1985), in response to a challenge from an allotment applicant that the Government had failed to present a prima facie case of invalidity, the Board declared that "[w]ith respect to appellants' concerns regarding establishment of a prima facie case and the burden of proof in applications for allotments, we note that the burden of proof is on the Native allotment applicant to establish compliance with the use and occupancy requirements of the Native Allotment Act." Id. at 158. Notwithstanding the foregoing, however, the Board clearly assumed in Estabrook that the Government bears the burden of establishing a prima facie case as to an allotment application's invalidity in a contest hearing. United States v. Estabrook, supra at 44-45. We will, accordingly, follow that precedent herein.

exists particularly since, Galbraith asserts, his finding was essentially premised on the Board's previous decisions in this matter.

Thus, Galbraith argues:

BLM's contention and the ALJ's holding that the Board's prior decision (directing the initiation of a contest proceeding) relieves the government of its obligation to establish a prima facie case is supported by no citation of authority and is unsupportable. Nothing in the Board's decision remanding this case purported to alter the established rule that the government must present evidence sufficient, without more, to nullify the allotment claim. * * * This Board did not find that the cold BLM file in this case presented a prima facie case, nor could it have made such a finding. Such a finding can only be made, in the first instance, by a finder of fact, not a board of review. All the Board determined from the cold, unelucidated record it reviewed was that sufficient questions were raised to call for a contest proceeding. The Board made no reference to the prima facie rule, and it would be a denial of due process to treat the Board's decision, which was not subject to cross-examination by appellee, as establishing a prima facie case as a matter of law.

(Appellee's Answer Brief at 25-26). In our view, the foregoing argument proceeds from both a misapprehension as to what constitutes a sufficient showing to reject an allotment claim as well as a misunderstanding both of this Board's authority and the effect of its prior determinations.

Galbraith's argument clearly presupposes that, in order to establish a prima facie case, the Government must show that she did not meet the requisite use and occupancy requirements. This is not correct. Insofar as Native allotment applications are concerned, the Department has consistently ruled that, in order to establish entitlement under the 1906 Act,

the applicant must affirmatively show that he or she has met the requirements of the Act and its implementing regulations. See, e.g., Angeline Galbraith, supra at 155, 94 I.D. at 163; State of Alaska, 85 IBLA 196, 199 n.7 (1985); Donald Peters, supra at 243, 83 I.D. at 312. Thus, in order to make a prima facie case, all the Government need do is to establish that the evidence of record does not affirmatively show compliance with all of the statutory and regulatory requirements necessary to obtain title to a Native allotment under the 1906 Act. 15/ The burden then devolves upon the allotment applicant to establish compliance with these requirements.

In our original consideration of this allotment application, we expressly held that (1) "[i]t was manifest error for the District Office based on the record before it, to find, as it did, that appellant had, at all times, intended to file on lot 5," and (2) "the District Office's finding of qualifying use and occupancy cannot be sustained." Angeline Galbraith, supra at 165-66, 94 I.D. at 169. These were, indeed, findings of fact that the record before the Board failed to show entitlement to an allotment. They did not, of course, technically constitute a finding that

15/ Thus, our decision in State of Alaska, supra, declared: "Although we recognize that the use and occupancy requirements must be applied consistently with Native culture and customs, there must be clear, credible, and convincing evidence in the record that these requirements have been satisfied." Id. Similarly, in Galbraith, we noted that "as an initial matter, it is the applicant's obligation to establish her entitlement to an allotment of land," further noting that "[w]here this is not done, BLM is required to provide an allotment applicant with notice and an opportunity for a hearing at which appellant may attempt to show compliance." Angeline Galbraith, supra at 155, 94 I.D. at 163 (emphasis supplied).

a prima facie case of invalidity existed for the simple reason that the concept of a prima facie case has no vitality except in the course of a hearing or an appeal from such a hearing. However, as a matter of logical tautology, inasmuch as the Board expressly found that the facts of record failed to establish either a consistent intent to apply for lot 5 or the requisite use and occupancy of lot 5, admission of the case record at the hearing, without more, would necessarily establish a prima facie case since the evidence does not affirmatively show compliance with the law and regulations. The facts of record admitted below, which were scrutinized in great detail in our prior decisions, were clearly sufficient to establish a prima facie case. Thus, unless other evidence adduced during the Government's presentation undercut this showing, there is no question but that a prima facie case existed.

Galbraith suggests that precisely such additional information was developed. See Appellee's Answering Brief at 26-27. The record of the hearing, however, simply fails to support this assertion. 16/ Indeed, Haggland's testimony clearly brought into doubt the extent to which Galbraith could have picked berries on lot 5 since he testified that, until

16/ While Galbraith indulges in a number of broad generalizations to characterize the difference between the record before the Board and that developed at the hearing (see, e.g., Appellee's Answering Brief at 26 asserting that the Board did not "know that the BIA provided erroneous land descriptions in the majority of the thousands of Alaska Native allotment applications" (emphasis in original)), the factual basis for many of these assertions did not arise from the testimony of either Butts or Haggland, but from Galbraith's interpretation of certain sections of the Native Allotment Handbook, which provisions were not even submitted to Judge Child until after the hearing was concluded. They scarcely constituted part of the Government's case-in-chief.

the upgrading of the Rosie Creek road, commencing in 1975, it was virtually impossible to obtain access to lot 5 until after the ground had frozen because of the bad condition of the lower stretch of the road (Tr. 110-11, 118). Moreover, his testimony (while admittedly hearsay) that lot 5 was also the original situs of improvements placed there by a homestead entryman (Benson) in the early 1960's (Tr. 113-24) would also tend to undercut any assertion by Galbraith of potential exclusivity with respect to a substantial part of lot 5. We will not further belabor the instant decision by recounting all the difficulties apparent from the record with respect to the instant application. Suffice it to note that we have no difficulty in affirming Judge Child's determination that the Government presented a prima facie case that Galbraith had not established her entitlement to the grant of lot 5. The more vexing question is whether or not Galbraith should be afforded another opportunity to attempt to establish entitlement to the parcel.

[6] As a general matter, where, after the close of the Government's case-in-chief, a contestee makes a motion to dismiss a contest complaint for failure of the Government to present a prima facie case, there are two possible outcomes: the motion may be granted, in which case the Government may appeal, or the motion may be denied. If the motion is denied, the contestee is then faced with a choice as to whether to decline to present any evidence and simply appeal or, alternatively, to proceed to present evidence on his or her behalf, knowing full well that, consistent with numerous decisions of this Board, any evidence which the contestee

presents could be used to establish the ultimate validity of the Government's complaint.

In the situation where the motion to dismiss has been granted, an unsuccessful appeal by the Government would normally end the matter. ^{17/} Similarly, in the situation where the motion to dismiss is denied because the Administrative Law Judge has found that a prima facie case was presented by the Government, a successful appeal by the contestee results in the dismissal of the contest complaint.

On the other hand, in those cases in which a motion to dismiss has been granted, a successful appeal by the Government results in a remand of the matter back to the Administrative Law Judge to permit the contestee an opportunity to overcome the Government's showing. This is because it was the action of the Administrative Law Judge in granting the motion to dismiss the contest which precluded the contestee from presenting evidence of his or her own behalf. Reversal of the Administrative Law Judge's decision

^{17/} There is one important caveat with respect to this point. The only matters finally resolved would be those actually charged in the contest complaint. A finding that the Government had not presented a prima facie case with respect to certain issues would not preclude the filing of another complaint based on other grounds. As an example, the failure of the Government to present a prima facie case that a mining claim is invalid on the ground that there is insufficient quantity and quality of mineral to support a finding of discovery as of the date of a withdrawal of the land would not foreclose a future challenge to the claim's validity based on the assertion that, at the present time, the claim is not supported by a discovery, either because of economic or technological changes or simply because the mineral deposit has been mined out. See generally United States v. Knoblock, 131 IBLA 48, 78, 101 I.D. 123, 139 (1994).

requires that the contestee be afforded the opportunity which the Administrative Law Judge's decision effectively foreclosed. Where, however, an Administrative Law Judge finds that a prima facie case exists, an unsuccessful appeal by the contestee would not generally result in a remand to the Administrative Law Judge but in the issuance of a decision finding that those charges in the contest complaint supported by the prima facie case have been proven and the claim is rejected accordingly. The reason for this varying result lies in the fact that, in this last situation, the failure of the contestee to present evidence at the hearing was not caused by actions of the Administrative Law Judge but rather represented an exercise of volition on the part of the contestee to waive the presentation of evidence on his or her own behalf. That this course of action may ultimately prove to be ill-conceived provides, of itself, no basis for awarding the contestee a further opportunity to submit evidence which was intentionally withheld. Having made a tactical gamble, the contestee must bear the consequences if it goes awry. Thus, the denial of the appeal in the instant case would normally result in a final determination that Galbraith had not shown entitlement to an allotment of lot 5 and that her allotment application should, accordingly, be rejected.

[7] Notwithstanding the foregoing, however, two factors compel us to the conclusion that Galbraith should be afforded another opportunity to present evidence establishing her entitlement to lot 5. First of all, we recognize that while Judge Child did, indeed, deny the motion to dismiss with respect to the question of a prima facie case, he also granted a

motion to dismiss based on his interpretation of section 905 of ANILCA. While, admittedly, Judge Child's decision with respect to section 905 of ANILCA did not occur at the hearing and, therefore, it could not be said that his decision precluded the presentation of evidence by the contestee,

his ultimate treatment of the motion to dismiss had clearly been foreshadowed by his actions in the Rastopsoff case. Thus, Galbraith may have been reluctant to proceed to present evidence, regardless of Judge Child's ultimate determination of the prima facie evidence question, because she fully expected the complaint to be dismissed on an alternative ground.

More importantly, we feel that the exercise of choice by the contestee was fatally compromised by the failure of Judge Child to timely rule on the motion to dismiss for failure to present a prima facie case. At the hearing, Judge Child, rather than rule on the motion, took it under advisement and then proceeded to inquire whether Galbraith wished to proceed. See Tr. 157-59. This, we believe, was error.

A motion to dismiss for failure to present a prima facie case loses its essential value if it is not ruled upon before a contestee is required to proceed with his or her case. The Administrative Law Judge's ruling on the motion is absolutely critical in correctly ascertaining whether or not to proceed since, in many cases, challenges to credibility constitute a vital element in the contestee's case. Given the weight afforded by this Board to determinations of credibility based on demeanor evidence by an Administrative Law Judge (see, e.g., BLM v. Carlo, 133 IBLA 206 (1995)),

a contestee cannot fairly be forced to decide whether to present his or her own evidence or rely on the failure of the Government to present a prima facie case in the absence of a ruling by the judge on the motion to dismiss.

We recognize that in certain cases involving complex factual scenarios or unusual legal arguments an Administrative Law Judge might be reluctant to rule on the sufficiency of the Government's evidentiary showing absent reflection or research. ^{18/} The correct course of action in such circumstances, however, is to suspend the proceedings until such time as the Judge is prepared to rule on the motion. Only after such a ruling has been entered can a contestee be fairly forced to choose between presenting additional evidence or standing on the motion and running the risk that he or she will never be afforded the opportunity to present evidence supportive of the claim. Since Judge Child failed to rule on the motion and then required contestee to elect to proceed or rest without the benefit of a ruling, we feel that justice compels that she be granted another opportunity to establish her entitlement to the allotment of lot 5. Accordingly, we will remand this case back to the Hearings Division.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the determination

^{18/} As, in the instant case, Judge Child was clearly unprepared to rule on the motion since he had not yet even read the previous decisions of the Board with respect to the Galbraith allotment application. See Tr. 158.

of Judge Child that the allotment was legislatively approved is reversed, his finding that a prima facie case was presented is affirmed, and the matter is remanded in order for Galbraith to establish her entitlement to an allotment of lot 5.

James L. Burski
Administrative Judge

I concur.

C. Randall Grant, Jr.
Administrative Judge

