



INTERIOR BOARD OF INDIAN APPEALS

Reindeer Herders Association v. Juneau Area Director, Bureau of Indian Affairs

23 IBIA 28 (11/13/1992)

Also published at 99 Interior Decisions 219

Judicial review of this case:

Affirmed, *Williams v. Babbitt*, No. A94-245 CIV (JWS) (D. Alaska Apr. 26, 1995)

Reversed, 115 F.3d 657 (9th Cir. 1997)

Certiorari denied, *Kawerak Reindeer Herders Ass'n v. Williams*, No. 97-1280 (1998)



United States Department of the Interior

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

REINDEER HERDERS ASSOCIATION

v.

JUNEAU AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-182-A

Decided November 13, 1992

Appeal from a decision holding that non-Native commercial reindeer operations in Alaska are permissible in certain circumstances under the Reindeer Industry Act of 1937.

Reversed and remanded.

1. Administrative Procedure: Standing--Board of Indian Appeals:
Generally--Bureau of Indian Affairs: Administrative Appeals:
Generally

An organization need not be incorporated in order to have standing to appeal under 25 CFR Part 2.

2. Board of Indian Appeals: Generally--Intervention

An intervenor in an appeal before the Board of Indian Appeals is normally limited to the issues raised by the appellant.

3. Board of Indian Appeals: Jurisdiction--Constitutional Law:
Generally--State Laws

The Board of Indian Appeals has no authority to declare a Federal statute violative of the United States Constitution or in conflict with a state constitution.

4. Alaska: Reindeer--Alaska: Statehood Act--Indians: Alaska Natives: Reindeer--Statutory Construction: Implied Repeals--Statutory Construction: Indians

The Reindeer Industry Act of 1937, 25 U.S.C. §§ 500-500n (1988), was not repealed by the Alaska Statehood Act, 72 Stat. 339.

5. Alaska: Reindeer--Indians: Alaska Natives: Reindeer--Statutory Construction: Indians--Statutory Construction: Legislative History

The legislative history of the Reindeer Industry Act of 1937, 25 U.S.C. §§ 500-500n (1988), makes it clear that Congress intended to reserve the reindeer industry in Alaska for the exclusive benefit of Alaska Natives.

6. Alaska: Reindeer--Indians: Alaska Natives: Reindeer--Statutory Construction: Administrative Construction

Courts commonly give deference to the construction of a statute by the agency charged with its administration, particularly one which was contemporaneous with the statute and has been consistently followed by the agency.

7. Alaska: Reindeer--Indians: Alaska Natives: Reindeer--Statutory Construction: Indians

Ambiguities in the Reindeer Industry Act of 1937, 25 U.S.C. §§ 500-500n (1988), must be construed in favor of the Alaska Natives who are the intended beneficiaries of the Act.

8. Alaska: Reindeer--Indians: Alaska Natives: Reindeer--Statutory Construction: Generally

In a case where the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters, the intention of the drafters, rather than the strict language, controls.

APPEARANCES: Eric Smith, Esq., Anchorage, Alaska, for appellant; Roger L. Hudson, Esq., Office of the Regional Solicitor, Alaska Region, U.S. Department of the Interior, Anchorage, Alaska, for the Area Director; Thomas E. Williams, pro se.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Reindeer Herders Association seeks review of a May 27, 1992, decision of the Juneau Area Director, Bureau of Indian Affairs (Area Director; BIA), which concluded that the Reindeer Industry Act of 1937 (Reindeer Act), 25 U.S.C. §§ 500-500n (1988), 1/ does not preclude a person who is not an Alaska Native from importing reindeer into Alaska and engaging in commercial reindeer operations with those imported reindeer and their progeny. For the reasons discussed below, the Board reverses the Area Director's decision and remands this matter to him for further action.

Background

Appellant is an unincorporated association with a membership of 17 Alaska Native reindeer herders, whose 16 herds are located on or near the Seward Peninsula. 2/ Appellant states that

1/ Except where otherwise noted, all further references to the United States Code are to the 1988 edition.

2/ According to R. Stern et al., Eskimos, Reindeer and Land at 98 (Univ. of Alaska, 1980), appellant is funded by BIA and was "incorporated in 1971 (formerly the Northwest Alaska Reindeer Herders Association, organized in 1964) through a grant to Kawerak, Inc., the nonprofit social services arm of the Bering Straits Native Corporation."

In 1986, appellant's corporation was involuntarily dissolved by the State of Alaska. Appellant states that it continues as an unincorporated association and a project of Kawerak, Inc.

On Dec. 6, 1991, intervenor Thomas E. Williams was issued a certificate of incorporation by the State of Alaska for a new corporation named "Reindeer Herders Association, Inc." Based on his state certificate of incorporation, Williams challenges appellant's right to continue using the name "Reindeer Herders Association."

Assuming arguendo that it has jurisdiction to address this question, the Board declines to do so because the question has no bearing on the issue in this appeal.

[t]hese herders operate their herds for providing meat to local community members, through outlets in Nome, Kotzebue, Barrow, and Bethel, and to a specialty market of reindeer sausage makers. [Appellant] represents the herders on matters relating to their welfare, including protection of the health and strength of the reindeer herding industry.

(Appellant's Opening Brief at 2). Appellant's members conduct their reindeer operations pursuant to the Reindeer Act.

The history of reindeer in Alaska and the conditions leading to enactment of the Reindeer Act are described in the 1937 House report on the bill:

The coming of the white man to the western and northwestern parts of Alaska brought disaster to the natives. The sources of native food on both land and sea were materially depleted and in some cases almost exterminated. By the year 1890 the Eskimos of northwestern Alaska, for the reasons mentioned, were faced with starvation. To save them, 1,280 reindeer were imported from Siberia between the years 1892 and 1902. The reindeer so imported have multiplied until they now number several hundreds of thousands. Reindeer today form the most important single element in the Eskimo economy. This is due to two factors: The variety of uses to which reindeer can be put, and their peculiar and unique adaptation to the climate and to the land and forage of that region. * * *

The security of the Eskimos in the reindeer industry is threatened by nonnative ownership of deer and by nonnative occupation and control of the range. * * * In the year 1914 white men first entered the reindeer business. At the present time approximately one-third of all the reindeer in Alaska are owned by others than natives, and on certain ranges of outstanding importance to the Eskimos, the percentage is higher. Those ranges which are most attractive to nonnative owners invariably coincide with or overlap ranges essential to the welfare of the native Eskimos. * * *

Attempts to occupy range jointly by the Eskimo and non-Eskimo owners have not been successful. Bitter conflicts have grown out

of the mixing of the herds and these conflicts threaten irreparable damage not only to the reindeer industry but to the entire life and economy of the Eskimos.

H.R. Rep. No. 1188, 75th Cong., 1st Sess. 1-3 (1937). ^{3/} During the early 1930's, the Department of the Interior undertook a number of investigations and studies of the reindeer situation in Alaska and in 1936, the Senate Committee on Indian Affairs held hearings on the matter. See generally R. Stern at 61-70. In 1937, identical bills were introduced in the House and Senate, providing for purchase by the Federal Government of non-Native owned reindeer and establishment of a Native reindeer industry. ^{4/} The

^{3/} Prior to 1937, Congress had made some substantive provisions for reindeer operations in the context of appropriations acts. See, e.g., 48 U.S.C. § 39 (1934), derived from provisions in various appropriations acts enacted between 1907 and 1927:

"All reindeer owned by the United States in Alaska shall as soon as practicable be turned over to missions in or natives of Alaska, to be held and used by them under such conditions as the Secretary of the Interior shall prescribe. The Secretary of the Interior may authorize the sale of surplus male reindeer and make regulations for the same. The proceeds of such sale shall be turned into the Treasury of the United States. The Commissioner of Education is authorized to sell such of the male reindeer belonging to the Government as he may deem advisable and to use the proceeds in the purchase of female reindeer belonging to missions and in the distribution of reindeer to natives in those portions of Alaska in which reindeer have not yet been placed and which are adapted to the reindeer industry."

By regulation of the Department of the Interior, female reindeer distributed to Alaska Natives were made subject to restrictions against alienation. See Solicitor's Opinion, Apr. 2, 1930, 53 I.D. 71; Solicitor's Opinion M-26690, Sept. 16, 1931, I Op. Sol. on Indian Affairs 281. Reindeer controlled by Natives were held not to be taxable by the Territory of Alaska. Solicitor's Opinion, May 27, 1925, 51 L.D. 155. Restricted reindeer were held to be subject to the Secretary's authority to probate trust and restricted Indian estates. Solicitor's Opinion M-27127, July 26, 1932, 54 I.D. 15, I Op. Sol. on Indian Affairs 320.

^{4/} H.R. 5126 was introduced on Feb. 25, 1937, by Delegate Dimond of Alaska. Shortly thereafter, S. 1722 was introduced by Senator Thomas of Oklahoma. The Secretary of the Interior recommended a number of amendments, all of which were accepted. See H.R. Rep. No. 1188 at 4.

Senate bill, as amended, was enacted by Congress and signed by the President on September 1, 1937.

Section 1 of the Reindeer Act, 25 U.S.C. § 500, provides:

[A] necessity for providing means of subsistence for the Eskimos and other natives of Alaska is hereby declared to exist. It is also declared to be the policy of Congress, and the purpose of this subchapter, to establish and maintain for the said natives of Alaska a self-sustaining economy by acquiring and organizing for and on behalf of said natives a reindeer industry or business, by encouraging and developing native activity and responsibility in all branches of the said industry or business, and by preserving the native character of said industry or business thus established.

The Act authorized the Secretary of the Interior to acquire non-Native owned reindeer, as well as certain kinds of equipment, 25 U.S.C. § 500a; to distribute the acquired reindeer to Alaska Natives, 25 U.S.C. § 500g; 5/ and to organize and manage a reindeer industry for the Natives, 25 U.S.C. § 500f. It required non-Native reindeer owners to file declarations of ownership. 25 U.S.C. § 500b. It imposed restrictions upon the alienation of reindeer acquired under the Act and reindeer belonging to Alaska Natives, 25 U.S.C. § 500i, and authorized the Secretary to regulate reindeer grazing on public lands, 25 U.S.C. § 500m. Finally, it authorized an appropriation of \$2,000,000 for purposes of carrying out the Act. 25 U.S.C. § 500 note.

5/ Section 500g was amended in 1986 to add a proviso: "That during the period of trust, income derived directly from the sale of reindeer and reindeer products as provided in this subchapter shall be exempt from Federal income taxation." This amendment followed the Ninth Circuit Court of Appeals' decision in Karmun v. Commissioner, 749 F.2d 567 (9th Cir. 1984), cert. denied, 474 U.S. 819 (1985), holding that such income was subject to Federal income taxation.

Pursuant to the Act, the Department of the Interior purchased all non-Native-owned reindeer in Alaska. The acquisition program was completed in the winter of 1939-40. ^{6/} Thereafter, it seems to have been generally assumed that the Reindeer Act precluded the re-entry of non-Natives into the reindeer industry in Alaska. This assumption apparently prevailed, at least within the Department of the Interior, until the events giving rise to this appeal were initiated. ^{7/} See, e.g., Regional Solicitor's January 26, 1987, memorandum, discussed infra, at 1-2; letter from Deputy Solicitor to Senator Ted Stevens, July 1, 1970, II Op. Sol. on Indian Affairs 2016. A BIA report prepared in 1953 concluded, inter alia, that the Reindeer Act

^{6/} The acquisitions followed the completion in 1938 of a congressionally authorized study to estimate the number of reindeer in Alaska, and the appropriation of funds in 1939. See H.R. Doc. No. 174, 76th Cong., 1st Sess. (1939); R. Stern at 71-73. 84,001 reindeer were purchased. Although Congress appropriated \$720,000 for the program, the actual cost was less: \$330,003 for reindeer purchased, \$112,925.72 for improvements purchased, and \$45,673.48 for administrative expenses, for a total of \$491,602.20 (R. Stern at 72-73).

^{7/} It appears that the State of Alaska also shared this view, at least through 1979. According to a Sept. 8, 1992, Memorandum of the Assistant Attorney General, Natural Resources-Anchorage, State of Alaska, a 1979 Alaska Attorney General's memorandum took the position that the Reindeer Act "had the effect of limiting ownership of reindeer in Alaska to Alaska Natives or the United States in trust for Natives" (Sept. 8, 1992, Memorandum at 4 n.5). The 1992 memorandum overrules the 1979 memorandum. No copy of the 1979 memorandum has been submitted to the Board.

A Mar. 18, 1982, memorandum of an Alaska Assistant Attorney General, which commented on draft BIA regulations, was inconsistent with the 1979 memorandum but did not overrule it. The 1982 memorandum took the position, presumably for the first time by the State, that non-Natives may engage in commercial reindeer operations without violating the Act.

The 1982 and 1992 memoranda were submitted to the Board by intervenor Williams. The 1992 memorandum, which appears to have been drafted with this appeal in mind, was received after the close of briefing. Williams failed to seek permission to make a supplemental filing. See 43 CFR 4.311 (b). Although the document was improperly filed, the Board accepts it for the limited purpose of noting that it agrees with the Area Director's decision on appeal here and that it authorizes the issuance of State reindeer grazing leases to non-Natives.

"should be amended to allow for greater flexibility in developing the reindeer industry and not restrict it to Natives only." ^{8/} (R. Stern at 94). In 1961, the Bureau of Land Management (BLM) promulgated reindeer grazing regulations, which restrict grazing privileges on public lands to Natives and Native organizations. See 43 CFR 4310.2.

In December 1986, Thomas E. Williams, a non-Native resident of Alaska, informed the Area Director that he intended to purchase reindeer outside Alaska, import them into the state, and establish a private herd for commercial purposes. He requested an opinion from the Area Director as to whether the Reindeer Act would apply to his proposed enterprise. The Area Director sought advice from the Regional Solicitor's Office. By memorandum of January 26, 1987, an attorney in the Regional Solicitor's Office responded, stating in conclusion:

In our view there is nothing in the 1937 Reindeer Act to prohibit a non-Native such as Mr. Williams from importing live reindeer from outside of the State of Alaska and raising them within the State as either a hobby or a business. He would be, however, subject to the reporting requirement of 25 U.S.C. § 500b, and the requirement that he file a declaration of ownership would apply not only to animals initially imported, but on an annual basis to any increase in his herd through calving as well. While it is true, as you observed, that establishment of non-Native commercial herds could have a serious impact on the Alaska Native reindeer industry, the Secretary of the Interior has the statutory authority to ameliorate or eliminate such impact at such time as he determines that it is necessary to acquire the

^{8/} This recommendation appears to reflect the termination policy of the time in which it was made. It indicates, however, that BIA believed amendment of the Reindeer Act was necessary to allow non-Natives to enter the reindeer industry.

non-Native owned reindeer by purchase or exercise of the power of eminent domain.

(Jan. 26, 1987, Regional Solicitor's Memorandum at 8). 9/ In support of these conclusions, the memorandum states in part:

As a means of assuring continued dominance of the industry by Alaska Natives, 25 U.S.C. § 500i prohibited any form of sale or transfer of ownership of reindeer to non-Native individuals. Criminal penalties were provided for willful violations by any buyer or other transferee. This prohibition remains on the books, and in fact continues to be enforced. But a careful reading of the statutory language demonstrates that it does not absolutely prevent an individual such as Mr. Williams from entering into commercial reindeer herding as a business. The "loophole" in the statute, if it may be fairly so characterized, arises from the specification of the animals to which the restrictions on alienation apply. Specifically, § 500i bars alienation of the following animals:

Live reindeer in Alaska, and the increase thereof, acquired by the Secretary of the Interior pursuant to this subchapter, and live reindeer in Alaska, and the increase thereof, owned by the said natives of Alaska or corporations, associations, or other organizations of said natives, however acquired

This language cannot fairly be interpreted as including within the statutory prohibition against alienation reindeer which were neither physically located within the Territory of Alaska at the time the law was passed, nor later descended from animals that were. Therefore, there is nothing in the statute to prohibit a non-Native from acquiring reindeer from outside this State's borders as Mr. Williams proposes to do. * * * Although Congress might have seen fit to expressly prohibit prospectively the importation of reindeer from outside the State, it evidently did not do so.

* * * * *

9/ The two Regional Solicitor's Office memoranda discussed in this decision were signed by an attorney in that office, rather than the Regional Solicitor himself. However, for ease of reference, they are referred to as Regional Solicitor's memoranda.

[T]he requirement with respect to filing of declarations of ownership set forth in § 500b refers to “Alaskan reindeer.” ^{10/} The most straight-forward interpretation would be that Alaskan reindeer are reindeer located within the borders of the State of Alaska. Therefore, in our view the filing requirement in § 500b attaches to any reindeer brought into the State of Alaska, since they become, in effect, Alaskan reindeer by virtue of their presence within the borders of the State, and notwithstanding the circumstances that they may have been born, reared, and purchased in some other locality.

Likewise, the calves born to imported reindeer within the State of Alaska would be subject to the § 500b filing requirement. A reasonable interpretation relative to the progeny of imported reindeer would require one annual filing with respect to calves at the conclusion of each calving season.

The just-stated interpretation as to the applicability of § 500b is not only consistent with the express language of the statute, but also makes sense in terms of the structure and purposes of the 1937 Act as a whole. In order for the Secretary to make appropriate determinations as to the necessity of acquiring reindeer from non-Native owners for the purpose of preserving the Native character of the industry, he must have a means of determining the extent of non-Native ownership, the identity of individual owners, and the number of animals they own. An interpretation of § 500b which failed to impose information filing requirements across the board would be inconsistent with the general purpose and scheme of the legislation.

Id. at 3-4 and 6-7.

^{10/} 25 U.S.C. § 500b provides:

"All persons, other than natives of Alaska, who upon September 1, 1937, claim title to any Alaskan reindeer shall, within one year after September 1, 1937, file in Alaska, with the duly authorized agent or agents of the Secretary of the Interior, declarations of their ownership. Similar declarations concerning Alaskan reindeer acquired by any person not a native of Alaska by purchase or by gift at any time after September 1, 1937, shall be filed as aforesaid within thirty days of such acquisition. Records of all declarations thus filed shall be made and kept open to public inspection in Alaska. If any owner of Alaskan reindeer, to whom the foregoing provisions are applicable, shall fail to file the required declaration within the stated period, he shall be barred thereafter from asserting his claim of title."

On March 19, 1987, Williams reported to the Area Director that he had imported 19 reindeer from Canada. He stated that the reindeer were owned by a corporation named Alaska Reindeer, Inc., for which he was the registered agent. He stated further:

[W]hile most of the stockholders of this corporation have some native blood, none desire to claim ownership as natives. Specifically, this herd of animals is to be a commercial herd of reindeer whose uses are not to be limited by the Act of 1937.

These animals are to be used for shows, expositions, racing, recreation, breeding, and selling as pets. At a later date, we will sell antlers, hides, and meat, but at this time we have no intention of competing with the Alaska Native reindeer industry which we believe is solely dedicated to food production.

On December 6, 1988, Gary Arnold Engelstad, an Alaska Native and an employee of Alaska Reindeer, Inc., wrote to the Area Office, requesting a loan of trust reindeer for the purpose of starting a new herd in south central Alaska. Engelstad stated that he intended to organize a new corporation, to be called Matanuska Reindeer, Inc., of which he would own at least 51 percent of the stock. He stated further that the new corporation would lease land from Williams Farms, where it would operate a feed lot, and would raise reindeer for antler and meat production.

Following further correspondence, it became apparent that Williams would own 49 percent of the stock of the new corporation and would also be the corporation's attorney, as well as Engelstad's personal attorney (Jan. 19 and Mar. 27, 1989, Letters from Williams to Area Office).

The Area Director sought advice from the Regional Solicitor concerning whether 25 U.S.C. § 500i would preclude a corporation organized in the manner proposed by Engelstad and Williams from engaging in a reindeer business. The Area Director also requested the Regional Solicitor to reconsider his January 26, 1987, memorandum in light of a memorandum prepared by a Native American Rights Fund (NARF) attorney concerning interpretation of the Reindeer Act.

The Regional Solicitor responded on May 11, 1989. His memorandum states:

Addressing ourselves first to the specific issue regarding non-Native stock ownership, we hasten to indicate our agreement with your conclusion that the statutory prohibition is absolute and unequivocal. 25 U.S.C. § 500i, which sets forth the restriction on alienation of Alaskan reindeer, includes the following statement:

. . . No stock or other interest in any corporation, association, or other organization of said natives, engaged in or organized for the purposes of engaging in the reindeer industry or business, shall be transferred, by descent, devise, or in any other manner whatsoever, to anyone other than said natives of Alaska, the United States for and on behalf of said natives, or corporations, associations, or other organizations of said natives.

In our view, this language is unmistakable; a non-Native can hold no ownership interest at all in a corporation engaged in the business of owning, raising, or otherwise dealing in Alaskan reindeer. We would construe the prohibition of "transfer" of corporate stock broadly to preclude also the initial issuance of stock in connection with the incorporation of a reindeer business. * * *

* * * * *

In response to your request that we reconsider our January 26, 1987 memorandum interpreting the Reindeer Industry

Act, we have carefully reviewed NARF's March 10, 1989 opinion letter, as well as the Act itself, but having done so we remain unpersuaded of the necessity for revision of our prior opinion. While the legislative history of the 1937 Act is replete with statements which indicate an intent, at least on the part of some, to permanently preclude non-Natives from owning live Alaska reindeer, the issue we must address in implementing the law is the legal effect of the congressional enactment. As we indicated two years ago, we can identify no express provision of the Act which appears to have been violated by Mr. Williams' importation and ownership of Canadian reindeer.

There is no particular ambiguity on the face of the statute which would require us to refer to the legislative history as an aid to interpretation on the point in question. Unlike some statements made by proponents prior to enactment of the statute, the legislation's explicitly stated purpose is not permanent exclusive Native ownership, but rather establishment and maintenance for Alaska Natives of a self-sustaining economy. 25 U.S.C. § 500. Likewise, § 500a directs the Secretary of [the] Interior to acquire, inter alia, reindeer he deems necessary to effectuation of the Act's purpose, but does not expressly mandate purchase of all non-Native owned animals. The logical inference we draw is that these less-than-absolute provisions go hand in hand with a congressional reluctance to write a "blank check" in regard to the cost of implementing the law. In other words, Congress may have wanted to provide for permanent exclusive Native ownership, but a depression-era legislature was not willing to dictate achievement of such a goal at any cost. Rather, the statute directed the Secretary to exercise his discretion in acquiring reindeer so as to establish and maintain a Native reindeer industry.

* * * * *

Nor do we believe our literal interpretation "thwarts the purpose of the overall statutory scheme or leads to an absurd result." The stated purposes of establishing and maintaining a self-sustaining economy and preserving the Native character of the reindeer industry or business have not been seriously threatened thus far by the allowance of non-Native importation of non-Alaskan reindeer, and [the NARF attorney] concedes that the Secretary of [the] Interior retains both the means and the obligation to accomplish those purposes even under our reading of the statute. Indeed, your own memorandum expresses the view that Mr. Williams' current operation presents no threat to the Native reindeer industry. [11/]

11/ The Area Director's Apr. 12, 1989, memorandum to the Regional Solicitor states:

However, our principal reason for sticking by our original interpretation is that we can discern no statutory grounds upon which we could confidently proceed against Mr. Williams or any other individual in like circumstances. The only criminal penalty provided is a \$500 fine for a willful violation of the alienation restrictions of § 500i, and we don't believe we could establish such a willful violation in Mr. Williams' case. On the civil side, the most obvious remedies would be a judicial declaration of non-ownership under § 500b, an injunction against additional imports, or local sales, or some sort of monetary damage claim for lost profits brought on behalf of Native reindeer owners. None of these forms of actions appears at present to have either a high likelihood of success or a promise of great benefit to Alaska Native reindeer herders. [Emphasis in original; footnotes omitted.]

(Regional Solicitor's May 11, 1989, Memorandum at 1-5).

During 1989, an extensive correspondence developed between Williams and the Area Office. Williams filed a large number of Freedom of Information Act requests and also asked several questions concerning enforcement of the Reindeer Act. Other correspondence concerned a purchase of 30 live reindeer from an Alaska Native. BIA requested that Williams file a report on the purchase; Williams responded that the reindeer had been purchased by and were the sole property of Engelstad. ^{12/}

Following an August 29, 1989, meeting at which Williams, Williams' wife, Engelstad, BIA staff, and Solicitor's office staff were present,

fn. 11 (continued)

"The Bureau does not feel that Mr. Williams' operation will ever be a threat to the Native reindeer industry, so long as he is never able to obtain additional reindeer. We understand that Canadian policy has changed, so he is unable to buy reindeer from Canada now; however, that policy could change again. With U.S. Department of Agriculture quarantine regulations, live reindeer could not be shipped to Alaska from any other reindeer producing region in the world, with the possible exception of Greenland."

^{12/} As a Native, Engelstad was not subject to the requirement in 25 U.S.C. § 500b for filing declarations of ownership. See note 10.

the Area Director sent Williams three letters in which he, inter alia, (1) recognized Engelstad as the owner of the purchased reindeer, 13/ (2) announced a policy that would allow Natives to pledge reindeer as security for loans as long as a non-Native lender complied with 25 U.S.C. § 500i, and (3) promised to prepare regulations for publication and for interim use as Area Office policy. 14/

In March 1990, Williams imported 179 reindeer from Canada. In November 1990, Williams reported to BIA that Engelstad had sold all his interest in reindeer at Williams Farm to another Alaska Native, Dorinda Gastelum. 15/

In August 1991, Williams reported that Alaska Reindeer, Inc., owned 248 reindeer and Matanuska Reindeer owned 54 reindeer.

13/ In one of two letters dated Sept. 25, 1989, the Area Director explained BIA's concern about the reindeer purchase. He stated:

"Our past concerns regarding whether Mr. Engelstad was a bona fide purchaser arose out of circumstances that were substantially confirmed by you and your wife in the aforementioned meeting; namely, that Mr. Engelstad is an employee of Williams Farms; that you loaned Mr. Engelstad the money on an unsecured personal note to buy and transport the deer to a farm owned by your wife; and that the deer were being kept (at least on July 18) in another pen of the same corral with the deer owned by Alaska Reindeer, Inc."

14/ There are also a number of draft letters in the administrative record, some of which contain what are described as interim rules. It is not clear from the record what status the Area Office considers these "rules" to have.

At present, BIA's published regulations under the Reindeer Act are far from comprehensive, addressing only the filing of declarations of ownership. See 25 CFR Part 243. (As noted above, reindeer grazing on public lands is regulated by BLM under 43 CFR Part 4300.) Statements in the record indicate that BIA prepared draft regulations in 1982 or 1983 but that these fell victim to the Administration's policy favoring de-regulation. It appears, however, that BIA's difficulties in promulgating comprehensive regulations under the Reindeer Act began in the 1940's. See R. Stern at 81-82.

15/ Gastelum is vice-president and a director of Williams' new corporation Reindeer Herders Association, Inc. See "Notification [of] Appointment of Officers and Directors" accompanying the certificate of incorporation.

In 1991, appellant filed suit against BIA, challenging the interpretation of the Reindeer Act espoused in the two Regional Solicitor's memoranda. Reindeer Herders Association v. Cesar, No. A91-511 Civ (D. Alaska). Appellant filed a motion for summary judgment on April 30, 1992. By letter of May 14, 1992, an Assistant United States Attorney, who represented BIA in the litigation, suggested to appellant's counsel that she would move for dismissal of the case based on appellant's failure to exhaust administrative remedies.

Appellant agreed to pursue an administrative remedy rather than litigate the procedural issue in court. On May 27, 1992, the Area Director issued a decision formally adopting the two Regional Solicitor's memoranda. This was done in order to provide appellant with a decision appealable through the administrative appeal process.

Appellant's notice of appeal from the Area Director's decision was received by the Board on June 8, 1992. In its July 7, 1992, notice of docketing, the Board approved the request of appellant and the Area Director for expedited briefing. On July 28, 1992, Williams filed a motion to intervene. His motion was granted. All parties filed briefs.

Expedited consideration by the Board has been requested by appellant, the Area Director, and the Assistant Secretary - Indian Affairs. Expedited consideration is granted. 16/

16/ Williams opposed expedited consideration as well as expedited briefing. Although Williams was served with a copy of the notice of appeal in this case, and subsequently has had notice of all proceedings, the Board did

Discussion and Conclusions

Before proceeding to the merits of this appeal, the Board addresses an apparent challenge to appellant's standing to bring the appeal. Williams contends that appellant, "an unincorporated association, and lacking the 'minimal attributes' necessary to be accountable for process and results of legal proceedings, does not have the capacity to sue and may not represent the real party in interest in this matter" (Williams' Brief at 4).

[1] An organization need not be incorporated to order to have standing before BIA or this Board. Under Board regulations, any interested party affected by a final BIA decision may file an appeal. 43 CFR 4.331. Board regulations do not define "interested party." For purposes of appeals from BIA decisions, therefore, the Board employs the definition in BIA's appeal regulations at 25 CFR Part 2. See Noyo River Indian Community v. Acting Sacramento Area Director, 19 IBIA 63 (1990). 25 CFR 2.2 defines "interested party" as "any person who could be adversely affected by a decision in an appeal." The section defines "person" to include "an Indian or non-Indian individual, corporation, tribe, or other organization." (Emphasis added.) The record here is replete with evidence that appellant is in

fn. 16 (continued)

not receive his motion to intervene and his objections to expedited briefing and expedited consideration until July 28, 1992, after expedited briefing had been approved. Despite his belated request, Williams was given an opportunity to file a brief.

Briefing has now been concluded. The Board does not see how Williams can be harmed by the Board's expedition of its consideration of this appeal. In any event, the Board finds that the reasons given by appellant, the Area Director, and the Assistant Secretary are sufficient to warrant expedition of the appeal over Williams' objection.

fact a functioning organization and has been in existence for a long time. The Board finds that appellant has standing to bring this appeal.

The substantive issue raised by appellant is, as the parties agree, a relatively straightforward one: Does the Reindeer Act preclude a person who is not an Alaska Native from importing reindeer into Alaska and engaging in a commercial reindeer enterprise with those imported reindeer and their progeny?

Appellant contends that the Reindeer Act does prohibit such activity even though the prohibition is not explicitly stated in the Act. Appellant argues that Congress intended to reserve the reindeer industry in Alaska exclusively to Alaska Natives; that such an intent is readily apparent in the legislative history of the Act; and that, read as a whole, the Act effectively expresses the intent of Congress to prevent the importation and commercial herding of reindeer by non-Natives.

The Area Director's position is set out, in large part, in the two Regional Solicitor's memoranda quoted above. In his brief before the Board, the Area Director argues that the Reindeer Act should not be interpreted to include a ban on importation of reindeer because (1) Congress must have been aware that reindeer could be imported because importation was the acknowledged original source of reindeer in Alaska; (2) Congress knew how to express a blanket prohibition of impermissible conduct; (3) in accord with the maxim "expressio unius est exclusio alterius," the restrictions on alienation in 25 U.S.C. § 500i should not be extended to imported

reindeer; (4) the range management provision of the Reindeer Act was viewed by Congress as a key to achievement of the statutory purposes set forth in 25 U.S.C. § 500; and (5) there is no statutory enforcement mechanism or remedy against an importer of reindeer.

The Area Director contends that

the authority to put Mr. Williams out of business through purchase of his reindeer, either by agreement or condemnation, and the authority to exclude him from federal grazing range, are the only direct authorities over his activities which the statute provides. * * * The Juneau Area Director does not dispute the fact that he has a responsibility to exercise his discretion under [section 500a], and stands ready to do so at such point in time as the circumstances indicate the necessity to acquire non-Native-owned imported reindeer in order to accomplish the statutory purpose.

(Area Director's Brief at 14-15).

Williams supports the Area Director's decision in part and challenges it in part. With respect to the issue raised by appellant, Williams states that he is in agreement with the Area Director. However, in other respects, Williams takes issue with the Area Director, either directly or impliedly. In fact, Williams contends that the Reindeer Act does not apply to him at all. Such a contention is a clear challenge to the Area Director's findings that Williams is required to file declarations of ownership under 25 U.S.C. § 500b and that his reindeer are subject to acquisition by the Secretary under 25 U.S.C. § 500a.

[2] To the extent Williams challenges the Area Director's decision, alleging errors different than those alleged by appellant, it is arguable that he is not properly before the Board. Williams did not file a notice of appeal from the Area Director's decision. As an intervenor, he would normally be limited to the issues raised by appellant. See Navajo Nation v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 15 IBIA 179, 185, 94 I.D. 172, 175 (1987); cf. Estate of Ethel Edith Wood Ring Janis, 15 IBIA 216 (1987). Williams clearly should have filed his own notice of appeal in order to raise some of the issues he now seeks to put before the Board. The Board notes, however, that the Area Director's decision does not show that a copy of the decision was sent to Williams. It is possible, therefore, that Williams would have a continuing right to appeal the Area Director's decision under 25 CFR 2.7 unless his challenges to the Area Director's decision are considered in the context of this appeal. ^{17/} In order to avoid further delays in this matter, the Board will consider Williams' arguments as if he had properly filed a notice of appeal from the Area Director's decision.

[3] The Board turns to Williams' arguments before proceeding to the principal issue in this appeal. Some of his arguments, however, raise issues which are beyond the scope of this Board's jurisdiction. He argues, for instance, that, if interpreted as appellant advocates, the Reindeer Act

^{17/} Williams became aware of the Area Director's decision at the time he was served with appellant's notice of appeal to the Board, even if he was not aware of it earlier. Under 25 CFR 2.7, however, an aggrieved person's right to appeal continues until proper notice is given by the BIA deciding official.

may be in violation of the Alaska State Constitution and may therefore compel the State to terminate services to Native reindeer herders. This Board has no authority to determine whether a Federal statute conflicts with the Alaska Constitution. In any case, the Board's task here is to interpret Federal law, not State law. Accordingly, even if the Board had authority to make determinations concerning State law, it would not need to do so in this case.

William also argues that the Reindeer Act is racially discriminatory. It appears that he may have intended to argue in this regard that the Act violates the Constitution of the United States as well as the Alaska Constitution. The Board has no authority to determine the constitutionality of a Federal statute. E.g., Redleaf v. Muskogee Area Director, 18 IBIA 268 (1990). The Board observes, however, that the authority of Congress to legislate for the benefit of Indians and Alaska Natives as a class is well established. See, e.g., United States v. Antelope 430 U.S. 641, 645 (1977) ("Legislation with respect to these 'unique aggregations' has repeatedly been sustained by this Court against claim of unlawful racial discrimination").

Alaska Natives have long been considered to possess the same legal status as Indians and to be subject to the same plenary authority of Congress to legislate for their benefit. E.g., Pence v. Kleppe, 529 F.2d 135, 138 n.5 (9th Cir. 1976); Eric v. Secretary of HUD, 464 F. Supp. 44, 46 (D. Alaska 1978); Solicitor's Opinion M-26915, Feb. 24, 1932, 53 I.D. 593, I Op. Sol. on Indian Affairs 303. Congress has, on occasions other

than the Reindeer Act, specifically allowed Alaska Natives certain privileges, including economic ones, which it has denied to non-Natives. For instance, Congress provided an exemption for Alaska Natives from the moratorium imposed on the taking of marine mammals by the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407. Under 16 U.S.C. § 1371(b), certain Alaska Natives are allowed to take marine mammals if the taking is for subsistence purposes or "for purposes of creating and selling authentic native articles of handicrafts and clothing." This Native exemption has been construed in United States v. Clark, 912 F.2d 1087 (9th Cir. 1990), cert. denied, 111 S. Ct. 705 (1991), and Katelnikoff v. United States Dept. of the Interior, 657 F. Supp. 659 (D. Alaska 1986). From the legislative history of the exemption, as quoted and discussed in these cases, it clearly appears that the exemption was intended to protect, not only Native subsistence, but also the cash economy of the coastal Natives. Thus it appears that the purpose of the Native exemption in the Marine Mammal Protection Act is very similar to the purpose of the Reindeer Act. Both statutory provisions are components of a much larger body of Federal statutory law concerning Alaska Natives. The Board sees no reason to believe that a court would find the Reindeer Act unconstitutional as racially discriminatory.

[4] Next, Williams argues that the Reindeer Act was repealed, at least in part, by the Alaska Statehood Act of 1958, 72 Stat. 339, the Alaska Omnibus Act of 1959, 73 Stat. 141, and/or the Alaska Constitution. Specifically, he contends, the provisions of the Reindeer Act which affect non-Natives, such as the reindeer acquisition authority in 25 U.S.C. § 500a and the reporting requirement in section 500b, were repealed because they

were "Territorial laws" within the meaning of subsection 8(d) of the Statehood Act.

Subsection 8(d) of the Statehood Act defines "Territorial laws" to include "all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Alaska prior to the admission of the State of Alaska into the Union." Certain Territorial laws, as defined in the Statehood Act, were terminated by section 3 of the Alaska Omnibus Act. Williams contends that the provisions of the Reindeer Act affecting non-Natives were "governmental functions" and thus subject to this provision. He does not, however, support his contention with any analysis.

It is apparent that Williams' contention must be rejected on the basis of the very statutory language he relies upon. The Territorial laws subject to repeal or termination were those whose validity was "dependent solely upon the authority of the Congress to provide for the government of Alaska." The provisions in the Reindeer Act affecting non-Natives were clearly not enacted solely, if at all, under Congress' power to govern the Territory. Rather, the validity of those provisions, and the validity of the Reindeer Act as a whole, is grounded first and foremost in the plenary power of Congress to legislate for the benefit of Alaska Natives. The Board rejects Williams' argument that the Reindeer Act has been repealed in part.

The Board returns to the principal issue in this appeal--whether a non-Native may engage in the reindeer industry in Alaska, using imported reindeer, without running afoul of the Reindeer Act.

At the outset, the Board observes that the Area Director's interpretation of the Reindeer Act is not an unreasonable one. As the Area Director persuasively argues, no provision in the Reindeer Act explicitly prohibits the importation of reindeer into Alaska or explicitly precludes a non-Native from entering the reindeer business, using imported reindeer. However, even though reasonable, the Area Director's interpretation is clearly adverse to the interests of the Natives for whose benefit the statute was enacted. Under rules of statutory construction applicable to Indian legislation, discussed infra, an interpretation of a statute, even though reasonable, must be rejected if another interpretation is possible, which is more favorable to the Native beneficiaries.

Appellant contends that its interpretation of the Reindeer Act is both reasonable and supported by the statutory language and the legislative history. First, it argues that Congress' intent to exclude non-Natives from the reindeer industry is evident in 25 U.S.C. § 500, quoted supra, which indicates that a purpose of the Reindeer Act is to "preserv[e] the native character of the industry." In appellant's view, the reindeer industry can be Native in character only if it is exclusively Native.

It is arguable, however, that the "reindeer industry" with which section 500 is concerned is not the entire reindeer industry in Alaska, but

only the reindeer industry which the Act created for Natives. Under this interpretation, a non-Native reindeer industry, parallel to the Native industry, might exist in Alaska without offending section 500. ^{18/} A provision in 25 U.S.C. § 500i, however, appears to resolve any ambiguity in section 500 with respect to the scope of the reindeer industry encompassed by the Act. Section 500i, inter alia, authorizes the Secretary of the Interior to promulgate regulations governing transfer of reindeer "for the purpose[] of preserving the native character of the reindeer industry or business in Alaska." This explicit statement makes clear that the Act was intended to encompass the entire reindeer industry in Alaska. The Board therefore concludes that Congress intended in the Reindeer Act to require preservation of the Native character of the entire reindeer industry in Alaska. Even so, it does not necessarily follow, from this language alone, that Congress intended the reindeer industry in Alaska to be exclusively Native. It is conceivable that the industry could be Native in character even though not exclusively Native.

Appellant further contends that the explicit restrictions in 25 U.S.C. § 500i demonstrate an intent not to allow non-Native ownership of reindeer. In particular, appellant notes, Congress explicitly prohibited the re-importation of live reindeer previously exported from Alaska and reasons that, given this prohibition, Congress could not have intended to allow importation of foreign reindeer.

^{18/} This is the theory espoused in the Mar. 18, 1982, Alaska Assistant Attorney General's memorandum submitted by Williams in this appeal. See note 7.

25 U.S.C. § 500i provides in its entirety:

Live reindeer in Alaska, and the increase thereof, acquired by the Secretary of the Interior pursuant to this subchapter, and live reindeer in Alaska, and the increase thereof, owned by the said natives of Alaska or corporations, associations, or other organizations of said natives, however acquired, shall not be sold or transferred, by descent, devise, or in any other manner whatsoever, to anyone other than the said natives of Alaska[,] the United States for and on behalf of said natives, or corporations, associations, or other organizations of said natives, except with the consent in writing of the Secretary of the Interior or his duly authorized agent, stating that such consent is given upon the condition that the reindeer, and any increase thereof, sold or otherwise transferred with said consent, shall either be butchered in the Territory of Alaska within thirty days or shipped out of said Territory and never brought back alive into said Territory. Sales or other transfers of said reindeer, if made without the consent in writing herein required, or, although made with such consent, if followed by failure to comply with the condition therein required, shall be null and void, and shall not pass any title to or right to possession of any reindeer or increase thereof. No stock or other interest in any corporation, association, or other organization of said natives, engaged in or organized for the purposes of engaging in the reindeer industry or business, shall be transferred, by descent, devise, or in any other manner whatsoever, to anyone other than said natives of Alaska, the United States for and on behalf of said natives, or corporations, associations, or other organizations of said natives. Any willful violation of the provisions of this section by any vendee or other transferee shall be punishable by a fine of not more than \$500: Provided, That no title to any reindeer, or any reindeer products, owned by the United States for and on behalf of the said Natives of Alaska, nor any title to reindeer, or reindeer products, owned by any of said natives or said corporations, associations, or other organizations of said natives, nor any stock or other interest in said corporations, associations, or other organizations of said natives, shall be transferred by descent, [devise] or in any other manner whatsoever, except pursuant to regulations promulgated by the Secretary of the Interior for the purposes of preserving the native character of the reindeer industry or business in Alaska and effectuating the other purposes of this subchapter: Provided further, That nothing herein contained shall prevent any native of Alaska who owns any reindeer or any interest therein through stock ownership, or otherwise, in any corporation or association or other organization owning reindeer, from transferring his reindeer, or any interest therein, to his children or other native relatives by gift, sale, devise, or bequest, or prevent the same from being transferred or passed by descent.

Appellant and the Area Director have widely divergent views of the import of this section. While appellant sees evidence of Congress' attempts to keep live reindeer out of the possession of non-Natives, the Area Director invokes the maxim "expressio unius est exclusio alterius" to contend that, since the section specifically mentions only reindeer owned by the United States, Natives, or Native corporations, Congress must have intended to exclude reindeer owned by others from the scope of the section.

It is true that the principal thrust of the section is to impose restrictions upon the alienation of Native and Government-owned reindeer. The section does much more, however. The restrictions imposed upon these reindeer differ markedly from the usual restrictions imposed upon Indian trust or restricted property in that they continue to affect the property after it has left Native ownership. These continuing restrictions upon reindeer in the hands of non-Native transferees ensure that the transferees do not retain ownership of live reindeer in Alaska. It seems indisputable that the purpose of these post-transfer restrictions was to preclude the re-emergence of a non-Native reindeer industry descended from reindeer purchased from Natives. As appellant contends, there would seem to be little point to these detailed restrictions if they could so easily be circumvented with imported reindeer. Certainly, the extent to which the Native reindeer industry would be adversely affected by non-Native commercial reindeer operations does not depend upon the source of the reindeer with which the non-Native operations are launched.

[5] Appellant places substantial reliance on the legislative history of the Reindeer Act, which, on the whole, is very supportive of its position. There are a number of explicit statements in the legislative history which reflect an understanding that the bill under consideration, if enacted, would result in the permanent elimination of non-Native reindeer ownership in Alaska.

For instance, the House report states:

At the present time only one solution [to the problems caused by conflicts between Natives and non-Natives] seems practicable and that lies in the purpose of the bill under consideration for the purchase by the Government of all nonnative-owned reindeer and such reindeer range equipment as may be useful and the distribution of the same among the natives or the holding of such reindeer and other property by the Government in trust for the use of the natives. With the permanent elimination in this manner of the nonnative owners, the problem will be a comparatively simple one, for then all of the deer will be native deer and the deer may be distributed and the ranges allocated in an equitable manner satisfactory to the natives. [Emphasis added.]

H.R. Rep. No. 1188 at 3. The House report also includes a letter from the Secretary of the Interior recommending amendments to the original bill but supporting its enactment. The Secretary stated:

The experience of the Department in the administration of the affairs of the natives of Alaska and of the Reindeer Service convinces me that nonnative ownership of deer must be eliminated and the industry must be operated in a manner guaranteeing the economic security to the native residents of the reindeer areas. * * * It is believed that the reindeer industry will not be assured permanently to the natives of Alaska unless all possibility of white ownership be eliminated. It will therefore be necessary to buy all the deer of a nonnative owner on a given range or all interests in ownership. If only deer are purchased

which are run through a corral or chute, normative ownership will still attach to escaped deer on the range or to stray deer on other ranges. [19/] Such a situation would be calamitous and we would in a space of a few years be faced with the same situation we now seek to eliminate entirely and avoid forever. [Emphasis added.]

Id. at 5.

Statements made on the House floor by the House sponsor of the bill, Delegate Dimond of Alaska, are in accord. At one point, he stated:

The purpose of the bill is to purchase all of the reindeer of Alaska, now owned by others than natives, * * * and that thereafter the reindeer in Alaska shall be reserved as to ownership and grazing for the natives alone, so that all others than natives will be excluded from the reindeer business or industry. * * *

We are now seeking to do the thing that should have been done when reindeer were first brought to Alaska. From the very beginning the reindeer should have been reserved for the use or benefit of the natives and no one but natives should ever have been permitted to own or graze a reindeer in the Territory. [Emphasis added.]

81 Cong. Rec. 9471. Delegate Dimond's remarks were made during an extended debate on the House floor, in which he forcefully advocated enactment of the bill. The bill proved controversial in the House because it was considered costly and because it was thought by some to be a bail-out for the Northwestern Livestock Corporation, formerly Lomen and Company, which owned most

^{19/} The original bill provided that "all reindeer purchased must be actually counted in corrals or through chutes or in some other effective manner." 81 Cong. Rec. 9471 (1937) (remarks of Delegate Dimond). In accordance with the Secretary's recommendation, this provision was deleted.

of the non-Native reindeer in Alaska. This company was in financial difficulty at the time and was generally considered to have been the principal catalyst of the conflict between Native and non-Native reindeer owners. Supporters of the bill acknowledged that it was costly but argued that its effects would be permanent and would ultimately result in a cost benefit to the Federal Government because the Natives would become self-supporting. See, e.g., Remarks of Rep. Green, 81 Cong. Reg. 9480: "If we pass this bill, the result we hope will be, and I think it will be, that as the white Alaskan reindeer owner vanishes from Alaska the native owner and the native Eskimo will be enabled to survive without the Federal Government having to contribute to his existence." In the end, despite heated opposition, the bill was passed by a vote of 109 to 51. It is apparent from a reading of the complete debate that House members were well aware that the bill was proposed as a measure which would, inter alia, preclude the future involvement of non-Natives in commercial reindeer operations in Alaska.

Consideration of the bill in the Senate was considerably less protracted than in the House. See 81 Cong. Rec. 4278-80, 9569-70. The legislative history shows, however, that the Senate's understanding of the bill was similar to that of the House. Senator Thomas of Oklahoma, the sponsor of the bill in the Senate, explained the bill on the floor of the Senate, stating in part: "The pending bill has for its purpose the taking of title to reindeer in northern Alaska and holding the title in the Government for the benefit of the Eskimos. * * * It provides further for the operation of the reindeer industry as a governmental institution for the benefit of the Eskimos." 81 Cong. Rec. 4278. Senate Report No. 474, 75th Cong., 1st Sess. (1937), states at page 3:

These problems [concerning conflicts between Native and non-Native reindeer owners], together with the charges and countercharges of distraught and bewildered reindeer owners, have been the subject of several lengthy investigations and voluminous reports. A review of the entire matter, the scope, details, and seriousness of which this presentation can only indicate, forces the conclusion that the rehabilitation of the Eskimo started in 1892 can be safeguarded and continued only if complete ownership of deer and control of the range is again established in the natives or in the Government on behalf of the natives. [Emphasis added.]

While acknowledging that many statements in the legislative history support appellant's position, the Area Director also invokes the legislative history in support of his own position. He contends that it supports his argument that Congress depended in large part upon the range management provision of the Act, 25 U.S.C. § 500m, to accomplish the purposes of the Act. 20/ He contends that "the grazing management provision, rather than any prohibition of non-Native importation of reindeer, was seen as the key to preserving the Native character of the industry" (Area Director's Brief at 12). 21/

20/ 25 U.S.C. § 500m provides:

"In order to coordinate the use of public lands in Alaska for grazing reindeer with the purposes of this subchapter, the Secretary of the Interior is hereby authorized to regulate the grazing of reindeer upon said lands. He may, in his discretion, define reindeer ranges and regulate the use thereof for grazing reindeer; issue grazing permits; regulate and control all round-ups, handlings, markings, and butcherings of reindeer upon said public lands; and may issue rules and regulations to carry into effect the provisions of this section. Any person who willfully violates any of the rules and regulations promulgated for the purpose of carrying into effect the provisions of this section shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment for not more than one year or by a fine of not more than \$500."

21/ Appellant charges the Area Director with inconsistency in making this argument. It contends that, although 25 U.S.C. § 500m does not explicitly restrict reindeer grazing to Natives, the Area Director is here willing to read such a restriction into the section, when he is unwilling to find that the Act as a whole restricts the reindeer industry to Natives.

There is no doubt that Congress viewed the range management provision as an important aspect of the Act. This provision was not a part of the original bill, however, but was added pursuant to a recommendation of the Secretary of the Interior, whose expressed concern was for preservation of the range. In recommending the amendment, the Secretary stated:

One of the factors basic in insuring the food supply of the natives of Alaska from reindeer is the proper use of the range. At the present time certain ranges have become so overgrazed as to constitute a serious menace to the continuation of the reindeer industry in those regions and it is believed to be highly important that this bill providing for a self-sustaining economy for the natives of Alaska should contain authority for the regulation of reindeer grazing, round-ups, handlings, marketing, and butchering.

H.R. Rep. No 1188 at 6. It is true, as the Area Director contends, that Delegate Dimond made statements indicating that a purpose of the range management provision was to exclude non-Natives from the reindeer industry. See, e.g., his remarks at 81 Cong. Rec. 9472: "[I]t is necessary to purchase these deer as are owned by the white men and distribute them among the natives and forever forbid, through the control of the range, white men from going into the business so that we will never have to go back and do

fn. 21 (continued)

It was actually BLM which, in implementing the Act, explicitly restricted reindeer grazing on Federal lands to Natives. 43 CFR 4310.2. No explanation of this restriction appears in the Federal Register preambles to the proposed and final rulemaking. See 26 FR 6476 (July 19, 1961); 26 FR 12696 (Dec. 29, 1961). Given the lack of any explicit restriction in 25 U.S.C. § 500m, the Board assumes that BLM considered its authority to impose the restriction as deriving from the Reindeer Act as a whole.

It is certainly arguable, as appellant's contention suggests, that the Area Director's present position is inconsistent with the BLM regulation.

this job all over again." However, most of the floor comments about range management reflected the concern expressed in the Secretary's recommendation, *i.e.*, the need to prevent overgrazing. *See, e.g.*, Remarks of Rep. Knutson, 81 Cong. Rec. 9481; Rep. Dempsey, 81 Cong. Rec. 9484, 9492; Rep. Engelbright, 81 Cong. Rec. 9485. Further, although it is clear that Congress viewed the presence of non-Native herders on the range as a problem, it is also clear that it did not consider range management alone adequate to solve the problem. Indeed, the House rejected the suggestion made at one point during the debate that the entire purpose of the bill could be accomplished by regulation of the range. 22/ Clearly, if Congress had believed that regulation of the range would be adequate to accomplish the purpose of the Act, once the initial reindeer acquisitions had been made, it would not have seen a need to enact the elaborate post-transfer restrictions upon reindeer in 25 U.S.C. § 500i. *See* discussion, *supra*. In any event, regulation of the range in Federal ownership, even if it had been adequate at one time to enforce the Act, can hardly be considered adequate now, because much of the formerly Federal land has passed out of Federal ownership. The Board rejects any implication in the Area Director's argument that Congress saw range management as the exclusive means of enforcing the Act.

22/ Rep. Taber stated:

"I do want to say one other thing now with reference to the bill. It appears that every bit of this grazing land is in Government ownership. This is the statement of the Delegate from Alaska. It is under Government control, and everything that is needed to do to maintain this grazing land for the Eskimo is for the Government, by law or otherwise, to establish a regulation so that only the Eskimo can have this privilege. There is not any sense at all in going through all this rigmarole and spending all this money to accomplish something that can be done in a very simple way." 81 Cong. Rec. at 9488.

[6] Appellant next contends that the Department of the Interior, contemporaneous with enactment of the Reindeer Act, construed the Act to restrict the reindeer industry to Natives. It further contends that the Department's contemporaneous interpretation is entitled to respect.

It is clear that the Department initially interpreted the Act as authorizing and requiring the Department to eliminate all non-Native ownership of reindeer. This understanding is reflected not only in the statements made to Congress by the Secretary of the Interior, but also in the fact that the Department proceeded as soon as possible to acquire all non-Native-owned reindeer. Further, as noted above, until very recently, the Department appears to have maintained the view that only Natives could engage in the reindeer industry.

In Udall v. Tallman, 380 U.S. 1, 16 (1965), the Supreme Court stated:

When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. * * * “Particularly is this respect due when the administrative practice at stake ‘involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.’” [Citations omitted.]

The Court also places value on the consistency of an administrative interpretation. See, e.g., Watt v. Alaska, 451 U.S. 259, 272-73 (1981) (“The Department’s contemporaneous construction carries persuasive weight. * * * The Department’s current interpretation, being in conflict with its

initial position, is entitled to considerably less deference.” (Citations omitted.) This does not mean, of course, that an agency is precluded from ever changing a longstanding interpretation of a statute. Cf. Montana v. Blackfeet Tribe, 471 U.S. 759, 768 n.7 (1985). It suggests, however, that such a change should be made with caution and only upon a conclusion that the Department’s initial interpretation was clearly erroneous.

Finally, appellant contends that its position is supported by principles of statutory construction governing the interpretation of statutes enacted for the benefit of Indians. Appellant cites Winters v. United States, 207 U.S. 564 (1907), and Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918), in support of its position. Appellant’s reliance on these cases suggests that, in a broad sense, appellant views Congress as having purchased a “reservation” for Alaska Natives, consisting of the reindeer industry in Alaska. 23/

Although the Reindeer Act is unique, its underlying intent is somewhat analogous to one of Congress’ traditional reasons for establishing Indian reservations--to enable the Indians to remain or become self-sustaining through undisturbed utilization of reservation resources.

23/ Cf. F. Cohen, Handbook of Federal Indian Law 409 (U.S. Dept. of the Interior, 1942): “The most important law relating to reindeer is the Act of September 1, 1937, which is designed to establish for the natives of Alaska a self-sustaining economy by acquiring for them the whole reindeer business, and to develop native activity in all branches of the industry (Emphasis added; footnote omitted)”; Senator Thomas’ statement on the floor of the Senate: “The pending bill has for its purpose the taking of title to reindeer in northern Alaska and holding the title in the Government for the benefit of the Eskimos.” 81 Cong. Rec. 4278 (emphasis added).

The Supreme Court has interpreted some of the treaties and statutes creating reservations as having impliedly reserved for the Indians certain property or rights not specifically mentioned in the authorizing enactments. In Winters, the Court held that an 1888 agreement establishing the Fort Belknap Reservation included an implied reservation of water sufficient for irrigation purposes. In Alaska Pacific Fisheries, the Court held that the statute setting aside "the body of lands known as Annette Islands" for the Metlakatla Indians impliedly reserved as well the adjacent waters and submerged land. In both cases, the Court found that the implied reservations were necessary to carry out the purposes of the Congressional enactments. In both cases, also, the Court invoked the rule of construction which requires that ambiguities in treaties and statutes be resolved in favor of the Indians. In Winters, the Court stated that this rule should "certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it." 207 U.S. at 577. See also Alaska Pacific Fisheries, 248 U.S. at 89.

The circumstances present in Alaska Pacific Fisheries present a number of interesting parallels to the case at issue here. The Metlakatla Indians had emigrated from Canada in 1887 and settled on one of the Annette Islands because, the Court noted, "the fishery adjacent to the shore would afford a primary means of subsistence and a promising opportunity for industrial and commercial development." 248 U.S. at 88. Four years later, Congress set apart for their benefit "the body of lands known as Annette Islands." In 1916, a non-Indian corporation built a fish-trap approximately 600 feet

from the high-tide line of the island on which the Indians lived. The Court noted that operation of the fish-trap would "tend materially to reduce the natural supply of fish accessible to the Indians." 248 U.S. at 87.

In determining what Congress meant by the term "the body of lands known as Annette Islands," the Court observed that

[t]he purpose of creating the reservation was to encourage, assist and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining and advance to the ways of civilized life. * * * The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. * * * Evidently Congress intended to conform its action to their situation and needs.

Id. at 89. The Court concluded that the reservation "embrac[ed] the intervening and surrounding waters as well as the upland," continuing:

This conclusion has support in the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians. * * * And it has further support in the facts that, save for the defendant's conduct in 1916, the statute from the time of its enactment has been treated, as stated in the opinion of the Alaska court, by the Indians and the public, as reserving the adjacent fishing grounds as well as the upland, and that in regulations prescribed by the Secretary of the Interior on February 9, 1915, the Indians are recognized as the only persons to whom permits may be issued for erecting salmon traps at these islands. [Citation omitted.]

Id. at 89-90.

In this case, it is clear from the face of the Reindeer Act and its legislative history that Congress sought to encourage and protect Alaska Natives in their efforts to become self-sustaining through a reindeer industry. It is abundantly evident that Congress was aware that the entry of non-Natives into the reindeer business had proved devastating to the Native industry in the past, and numerous explicit statements in the legislative history illustrate an intent to exclude non-Natives from the industry permanently. There can be no doubt that, in enacting the Reindeer Act, "Congress intended to conform its action to [the Natives'] situation and needs." In this case, the Natives' recognized need was an opportunity to develop and manage a reindeer industry unthreatened by non-Native competition.

Further, as was the case in Alaska Pacific Fisheries, the Reindeer Act has been treated by the Department of the Interior, the Natives, and the public, at least until Williams appeared on the scene in 1986, as having reserved the privilege of engaging in the reindeer industry in Alaska exclusively to Alaska Natives.

Finally, as in Alaska Pacific Fisheries, the Department of the Interior has promulgated regulations recognizing Natives as the only persons to whom reindeer grazing permits may be issued.

Thus, under the analysis in Alaska Pacific Fisheries, it appears that Congress should be deemed to have reserved the entire reindeer industry to

the Natives--in other words, to have precluded non-Natives from engaging in the industry.

[7] The rule of statutory construction invoked in Winters and Alaska Pacific Fisheries is still vital today. In employing the principle recently, the Supreme court stated: "When we are faced with these two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" County of Yakima v. Confederated Bands & Tribes of the Yakima Indian Nation, 112 S. Ct. 683, 693 (1992). Where a choice lies between two inferences, one of which would support the purpose of the statute and the other impair or defeat it, Winters teaches that the rule must be applied. There seems to be no doubt that an interpretation which would allow non-Natives to re-enter the reindeer industry in Alaska would impair or defeat the purpose of the Reindeer Act. 24/

24/ Williams states that he has only 300 reindeer and maintains them on his own land. He contends that his operation could never be a threat to the Native industry, in part because, according to him, the Natives have "exclusive, free access to millions of acres of Native, Federal and State lands" (Williams' Motion to Intervene at 5). It is apparent, however, that Williams' herd has increased markedly since 1987. Moreover, the arguments he makes before this Board suggest that he will seek to lease State-owned lands for reindeer grazing. And, apparently, the State would not deny him a permit on the grounds that he is a non-Native. See note 7.

It clearly appears to have been recognized by Congress that herds of a size to threaten the Native industry could well evolve from an initially small number of reindeer. Thus, for instance, Congress accepted the amendment proposed by the Secretary of the Interior which would allow the Department to purchase escaped and stray reindeer, the absence of which authority the Secretary stated would lead to a situation where "we would in a space of a few years be faced with the same situation we now seek to eliminate entirely and avoid forever." H.R. Rep. No. 1188 at 5.

The Board cannot agree with the Regional Solicitor's statement that "there is no particular ambiguity on the face of the [Reindeer Act]" (Regional Solicitor's May 11, 1989, memorandum at 3, quoted supra). There is neither a specific prohibition of, nor a specific allowance of, importation of foreign reindeer for commercial purposes. The lack of any explicit provision concerning this matter, in the face of the overall purpose expressed in the Act, creates a significant ambiguity. To resolve this ambiguity, it is both appropriate and necessary to employ the principle discussed. While, as noted above, the Area Director's interpretation of the statute is a reasonable one, it is also reasonable to conclude, especially in light of the strong support for such a conclusion in the legislative history, that Congress intended to preclude the re-entry of non-Natives into the reindeer industry. Accordingly, this ambiguity in the Reindeer Act must be resolved in the Natives' favor.

[8] Another principle of statutory construction, if applied here, would produce the same result as the rule just discussed. It is described in 2B N. Singer, Sutherland on Statutory Construction, § 54.05 (5th ed. 1992):

Broadly speaking, the language of a statute will be extended to include situations which would reasonably have been contemplated by the legislature in light of the circumstances giving rise to the legislation. If the language of a statute reasonably covers a situation, the statute applies irrespective of whether the legislature ever contemplated that specific application. In the words of the First Circuit Court of Appeals [in Johnson v. United States, 163 F. 30 (1st Cir. 1908)] "it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before."

See also United States v. Ron Pair Enterprises Inc., 498 U.S. 235, 242 (1989): “The plain meaning of legislation should be conclusive, except in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.’ * * * In such cases, the intention of the drafters, rather than the strict language, controls.” On at least two recent occasions, the Ninth Circuit Court of Appeals has employed this exception to enforce a statute beyond its literal terms. See Commodity Futures Trading Comm’n v. P.I.E., Inc., 853 F.2d 721, 725 (9th Cir. 1988); Trailer Train Co. v. State Board of Equalization, 697 F.2d 860, 866 (9th Cir.), cert. denied, 464 U.S. 846 (1983) (“A court may look beyond the express language of a statute where a literal interpretation thwarts the purpose of the overall statutory scheme or leads to an absurd result”).

There is no doubt that a literal interpretation of the Reindeer Act, to the extent it would allow the reentry of non-Natives into the reindeer industry, conflicts with the intention of its drafters and thwarts the purpose of the overall statutory scheme. Further, insofar as the Act is interpreted to be unenforceable except by the Federal purchase of reindeer, it produces the potentially absurd result of guaranteeing a market to non-Natives who import reindeer.

It is apparent that this rule of statutory construction is appropriately applied only in rare circumstances. Here, however, the rule serves to reinforce the result reached under the previously discussed

rule concerning construction of Indian statutes. Thus, it has added force in this case.

The Board holds that, given the overall statutory scheme, the strong legislative history, and the rules of statutory construction discussed, the Reindeer Act must be construed to prohibit non-Native entry into the reindeer industry in Alaska, regardless of the source of the reindeer involved.

Describing the prohibition and enforcing it, however, are two different things. It appears from the Regional Solicitor's May 11, 1989, memorandum, that a perceived difficulty of enforcement helped him to reach the conclusion he did. Appellant and the Area Director agree that a "remedy" is available through Federal purchase of non-Native-owned reindeer. Thereafter, however, they part company.

Appellant contends that 25 U.S.C. § 500i is applicable to Williams' reindeer and requests that Williams be ordered to slaughter them or ship them out of Alaska in accordance with that section. The Board cannot agree that this section can be construed to authorize such an order. As discussed above, section 500i by its terms is applicable only to reindeer owned or sold by the United States, Natives, or Native organizations.

Further, Williams cannot be deemed to have forfeited title to his reindeer under 25 U.S.C. § 500b, because he has filed declarations of ownership, as required by that section, on a regular basis.

In his May 11, 1989, memorandum, the Regional Solicitor noted that civil remedies are available but doubts that they would be likely to succeed or that they would be of any great benefit to the Native reindeer herders. See Regional Solicitor's Memorandum, May 11, 1989, at 5, quoted supra.

In this case, in light of Williams' reliance on advice given by BIA, it appears that BIA should purchase or condemn the reindeer presently owned by him rather than attempt to pursue a more drastic remedy. Clearly, however, Federal acquisition of reindeer cannot be viewed as a satisfactory long-term enforcement mechanism if Williams and/or others continue to import reindeer for the purpose of engaging in commercial reindeer operations. Accordingly, BIA should begin to consider other means of enforcing the Act. 25/

25 U.S.C. § 500a authorizes the Secretary to acquire reindeer, "the acquisition of which he determines to be necessary to the effectuation of the purposes of [the Reindeer Act]." The Area Director contends that this authority gives him the discretion to determine when "the circumstances indicate the necessity to acquire non-Native-owned reindeer in order to accomplish the statutory purpose" (Area Director's Brief at 15). The Regional Solicitor's May 11, 1989, memorandum suggests, at pages 4-5,

25/ In addition to the litigation possibilities mentioned by the Regional Solicitor, diplomatic or legislative options might be considered. The Board assumes that BIA's efforts to promulgate regulations are ongoing. Published regulations would, of course, aid in future enforcement of the Act.

that such circumstances would be present when importation of reindeer by non-Natives "seriously threatens" the Act's purposes of "establishing and maintaining a self-sustaining economy and preserving the Native character of the reindeer industry or business." The memorandum does not further describe how or at what point the Area Director would determine that a serious threat to the Native industry was present.

Section 500a clearly vests discretion in the Secretary with respect to the acquisition of reindeer. However, to the extent the Area Director contends that this discretion is unfettered, the Board disagrees. The Area Director's discretion is limited by the requirement that he carry out the intent of the statute. As discussed above, the Board has held that Congress intended to reserve the reindeer industry exclusively to the Natives and to exclude non-Natives from the industry.

The Board concludes that the discretion vested in the Secretary by section 500a is the discretion to determine how the intent of the statute should be implemented. That is, section 500a allows him to take other actions, such as initiating litigation, to accomplish the intent of the statute and, if such action proves adequate, relieves him of any obligation to purchase the reindeer because acquisition would no longer be "necessary to the effectuation of the purposes of [the] Act." 26/ The section presumably allows him to disregard small numbers of imported

26/ The Secretary's determination, through BLM, to restrict reindeer grazing on public lands to Native herders can also be viewed as an exercise of this discretion.

reindeer kept as pets or for subsistence purposes by the non-Native individuals who imported them. 27/ It does not, however, permit him to allow the development of non-Native commercial herds to the point where they "seriously threaten" the Native industry, when to do so is likely to lead to the need for another major Federal buy-out of non-Native reindeer. 28/ This is an eventuality Congress sought to avoid, as is abundantly evident from the legislative history of the Act.

The Board holds that, where BIA learns that non-Native-owned reindeer are kept for commercial purposes, it is required to take some action to eliminate the threat or potential threat to the Native industry. The Board further holds that the manner in which action is to be taken is within BIA's discretion to determine.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Juneau Area

27/ Non-Natives are required under 25 U.S.C. § 500b to file declarations of ownership for their imported reindeer, even under these circumstances. Under section 500b, a non-Native who fails to do so is "barred thereafter from asserting his claim of title." It may be that the Secretary would bear some responsibility to seize unreported reindeer or otherwise enforce this section. Because this case does not involve unreported reindeer, the Board reaches no conclusion in this regard.

28/ As noted, the point at which a serious threat would be perceived is not specified by the Area Director. Presumably, the seriousness of a threat would be determined, in part at least, by the number of reindeer in non-Native ownership. It is entirely possible that a threat would not be deemed serious until Williams' and/or other non-Native-owned herds had increased to the point where the acquisition costs to the Federal Government would be considerable. See also note 24.

Director's May 27, 1992, decision is reversed, and this matter is remanded to him for further action.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge