

STATE OF ALASKA

IBLA 77-70      Decided March 22, 1979

Appeal from decision of the Alaska State Office, Bureau of Land Management, denying request for reinstatement of airport lease application F-1309.

Decision suspended pending further proceedings.

1.      Administrative Procedure: Generally--Contests and Protests: Generally--Rules of Practice: Private Contests

Regulation 43 CFR 4.450-1 gives a person with an adverse interest in land a right to contest an adverse claim. The Department of the Interior has consistently recognized States as included within the term "person" within the meaning of the regulation, allowing them to initiate private contests.

2.      Administrative Procedure: Generally--Alaska: Generally--Alaska: Native Allotments--Contests and Protests: Generally--Rules of Practice: Private Contests

Where the State of Alaska has shown an interest in land in its existing airport, it may bring a private contest to challenge native allotment applications for land in conflict with the airport.

APPEARANCES: Martha Mills, Esq., Assistant Attorney General, State of Alaska, for appellant.

## OPINION BY ADMINISTRATIVE JUDGE THOMPSON

The State of Alaska, Department of Public Works, Division of Aviation (ADA), appeals from the November 2, 1976, decision of the Alaska State Office, Bureau of Land Management (BLM), denying its request for reinstatement of its former application, F 1309, for a 20-year airport lease of land designated as Tract II in Bethel, Alaska. Consideration of this appeal has been delayed pending decisions by the Ninth Circuit Court of Appeals in Pence v. Kleppe, 529 F.2d 135 (1976), and Pence v. Andrus, 586 F.2d 733 (1978).

The lease application was originally submitted July 12, 1968. Because the same land was included in State selection F 905 filed March 29, 1968, the lease application was withdrawn May 4, 1971. By letter dated December 17, 1975, the ADA requested reinstatement of the lease application stating that the land was selected by the Bethel Native Corporation under the Alaska Native Claims Settlement Act (ANCSA), 85 Stat. 688, 43 U.S.C.A. § 1601 et seq. (West Supp. 1978), thereby precluding the granting of the State selection.

The BLM denied reinstatement on the basis of 43 CFR 2091.6-3 which provides: "Lands occupied by Indians, Aleuts and Eskimos in good faith are not subject to entry or appropriation by others," and because there are four Native allotment applications pending for the lands in question whose claimed use predates both the State selection and the original lease application. 1/ BLM stated that in most of the allotment cases there are sufficient witness statements verifying occupancy and use of the lands by the applicants, but noted adjudication of the applications has not yet been completed. Nevertheless, BLM concluded the ADA's request must be denied.

The major argument put forth by the State in its statement of reasons for appeal is that the conflicting Native allotments are not yet adjudicated and may be denied. According to the State, all four were rejected in 1975, three for failure to establish use and occupancy, and one because the land had been patented to the State. Three requested hearings in 1976. The fourth, Kasayuli, indicated by letter that she has abandoned her claim. The case records of the allotment applicants are not before us. Therefore, the current status of those cases has not been verified.

1/ The four Native allotment applicants are:

<u>Serial Number</u>	<u>Applicant</u>	<u>Occupancy Date Claimed</u>
F-16147 (Anch.)	Anna Kasayuli	1967
F-15737 (Anch.)	Paul Charles, Sr.	1964
F-15714 (Anch.)	Mary Charles	1964
F-15069 (Anch.)	Tommy Maxile	1945

The State points out that all four Native allotment applications were filed in 1972 after the deadline set by ANCSA. The State asserts that there has been no evidence submitted to substantiate use and occupancy. Furthermore, they argue that Evan Chiskak, 22 IBLA 153 (1975), holds "that lands required for airport approach and aviation purposes and most used in common by the general community will not be conveyed pursuant to an application filed under the Alaska Native Allotment Act." Statement of Reasons at 4.

The State asserts that the airport was in use before the claimed occupation dates of the Native allotment applicants, and that the State application was filed first. 43 CFR 2561.0-3 requires that Native allotments be on "vacant, unappropriated, and unreserved" land. The State argues that the airport was in existence long before the claimed occupancy dates and, therefore, the land was not available for Native allotments.

Regulation 43 CFR 2561.1(e) states:

The filing of an acceptable application for a Native allotment will segregate the lands. Thereafter, subsequent conflicting applications for such lands shall be rejected, except when the conflicting application is made for the conveyance of lands pursuant to any provision of the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq. )

Since the State application was filed first, arguably it was not a subsequent conflicting application and "should not be rejected on the basis of § 2561.1(e) until the Native allotment applications are finally adjudicated." The State also relies on 43 CFR 2561.1(d) which provides: "An application for allotment shall be rejected unless the Bureau of Indian Affairs certifies \* \* \* the claim of the applicant does not infringe on other native claims or area of Native community use." They urge that the airport could be considered an area of native community use which would compel rejection of conflicting Native allotment applications.

The State next argues that "[s]ince Tract II is necessary to protect the approach to the airport, the lease application could be considered as a request for the conveyance of land pursuant to § 14(c)(4) of ANCSA." Statement of Reasons at 6. Furthermore, under section 22(i) of ANCSA, the Secretary is authorized to grant a lease to the State if the Native allotment applications are rejected. Therefore, the State asserts, the lease application should be held in abeyance until the Native allotment applications are finally adjudicated.

The State's next ground for appeal is the failure of BLM to provide the State with any notice concerning the status of the Native

allotment applications. The State believes the due process rights recognized in Pence v. Kleppe, *supra*, should apply to the State in this case, and cites State of Alaska, 28 IBLA 83 (1976), for the proposition that the State is entitled to a hearing on Native allotment applications when they conflict with State selections.

According to the State, after BLM notified ADA that its lease application conflicted with the State selection, the lease application was withdrawn "because the title interest through selection would be superior to a twenty-year lease." Statement of Reasons at 8. The State goes on to explain that the conflict could easily be resolved between the two State agencies. It was reasonable, the State believes, to expect the State selection to be tentatively approved when the lease application was withdrawn, but the passage of ANCSA halted all tentative approvals. Assuming the Native allotment applications are rejected, the State asserts that granting the lease would not affect any other party's interest. Therefore, the application should be reinstated pending final adjudication of the Native allotment applications.

Because of our disposition of this case, we need not, at this point, reach the merits of the arguments of the State concerning the validity of the Native allotment applications nor of the denial of its request for reinstatement of its lease application. The basic thrust of the State's position is procedural, namely, that BLM should make no determination affecting the land without first affording the State an opportunity to challenge the allotment applications and have a hearing. With this point we agree. The decision of the BLM will be suspended for 30 days from the date of receipt of this decision to allow the State to file a private contest against the Native allotment applicants in accordance with the regulations at 43 CFR 4.450 *et seq.*

[1] Regulation 43 CFR 4.450-1 provides:

Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land \* \* \* may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management.

The Department has consistently recognized States as included in the term "person" within the meaning of the regulation, allowing them to initiate private contests. See State of California v. Doria Mining and Engineering Corp., 17 IBLA 380 (1970), *aff'd*, Doria Mining and Engineering Corp. v. Morton, 420 F. Supp. 837 (1976); State of California v. E. O. Rodeffer, 75 I.D. 176 (1968); State of Louisiana v. State Exploration Co., 73 I.D. 148 (1966). Therefore, under the

regulation, if a State claims an adverse title or interest in land it may institute a contest against the adverse claimant.

Under the Alaska Statehood Act, P.L. 85-508, 72 Stat. 339 (1958), the State is entitled to select land from "public lands of the United States which are vacant, unappropriated and unreserved." The land involved in this appeal is part of a State selection filed prior to the filing of the Native allotment applications. The lease application was filed pursuant to the Act of May 24, 1928, as amended, 49 U.S.C. §§ 211-214 (1970), and 43 CFR Subpart 2911, which authorize the Secretary to lease unreserved and unappropriated lands for use as a public airport. Section 14(c) of ANCSA 43 U.S.C.A. § 1613(c)(4) (West Supp. 1978), requires a village corporation which receives a patent to convey title to the surface estate for existing airport sites to the State, with such additional acreage and easements as are necessary to provide related services and to insure safe approaches to airport runways. If, as the State asserts, the land has been selected by the village corporation, the State has a sufficient interest under ANCSA in a future conveyance to warrant it to challenge the allotment applications. On the other hand, if the land has not been so selected and remains subject to the State's selection application, the State has an interest in the land by virtue of that application.

Furthermore, the State has raised the issue of whether the allotment applications should be rejected on discretionary grounds because of the public interest inherent in maintenance and completion of the airport to serve the local community. A hearing would afford the allotment applicants an opportunity to be heard on all aspects of their entitlement, namely, their compliance with the requirements for an allotment under the Native Allotment Act and, if so established, facts relative to an exercise of discretion by the Department to allow or deny the application in the public interest.

[2] In Pence v. Kleppe, supra, the Ninth Circuit Court of Appeals held Native allotment applicants have a property interest in their claims sufficient to entitle them to notice and an opportunity to be heard before their applications can be denied. The Department decided to apply the regulations governing Government contests, 43 CFR 4.451 et seq., to the adjudication of Native allotment applications. Donald Peters, 26 IBLA 235 (1976); Donald Peters (On Reconsideration), 28 IBLA 153, 83 I.D. 564 (1976). In Pence v. Andrus, supra, the court held that the Government contest regulations "facially comply" with Pence v. Kleppe, supra. It would be inconsistent with the spirit of those decisions to deny the State a similar opportunity to be heard where it claims an adverse interest in lands covered by Native allotment applications. Since private contest procedures are basically similar to Government contest procedures, the rights of the allotment applicants under Pence will be satisfied. 2/

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2/ There is a doctrine applicable to regulatory proceedings involving mutually exclusive conflicting applications which is analogous here and

The State will be given 30 days from receipt of notice of the return of the case files to the BLM State Office to institute contest proceedings against the conflicting Native allotment applicants. The State must comply fully with the regulations at 43 CFR 4.450 *et seq.*, and must serve the complaint on the Native allotment applicants, and should give notice of the proceeding to any village or Native corporations which may claim an interest in the land. Such entities would have a sufficient interest to intervene in the contest if they so desire. Nothing in this decision should be interpreted as precluding BLM from intervening in the proceedings should it desire.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is suspended pending further proceedings consistent with this opinion.

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Joan B. Thompson  
Administrative Judge

We concur.

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Douglas E. Henriques  
Administrative Judge

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Anne Poindexter Lewis  
Administrative Judge

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fn. 2 (continued)

lends support to the conclusion that the State is entitled to a hearing. In Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1946), the Federal Communications Commission had before it two applications for the same operating frequency. By statute, both were entitled to a hearing. The Supreme Court ruled that under the applicable statute when two or more mutually exclusive applications are before an agency, each applicant must be given notice and an opportunity to be heard before a decision is reached to grant either application. See also Delta Airlines v. CAB, 228 F.2d 17 (D.C. Cir. 1955), holding that the applicants are entitled to cross-examine witnesses, rebut other applicants' evidence, raise objections, file briefs and make arguments as contesting parties; and Northwest Airlines v. CAB, 194 F.2d 339 (D.C. Cir. 1952). While there are differences in the circumstances and underlying rationale in the Ashbacker line of cases with many of the adjudications made in this Department where there are conflicting parties, the thrust of the doctrine should be followed where it is feasible so as to afford every interested party a full and timely opportunity to be heard.

