

STATE OF ALASKA

IBLA 76-776

Decided March 27, 1979

Appeal from decision of the Alaska State Office, Bureau of Land Management, denying airport lease application F-971 (Anch).

Decision suspended pending further proceedings.

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

The State of Alaska will be afforded time within which to bring private contests against Native allotment applications conflicting with an existing airport runway built by the State and to show it has standing to contest. If it does so timely, the Bureau of Land Management will adjudicate its standing as a contestant and the contests will proceed if it finds affirmatively. If not, the State's timely objections will be taken as a protest and a fact-finding hearing will be held. If the State fails to take timely action, a decision rejecting its application to reinstate a conflicting airport lease application will stand.

APPEARANCES: Martha Mills, Esq., Assistant Attorney General, State of Alaska, for appellant; Norman A. Cohen, Esq., Alaska Legal Services Corporation, for Native allotment applicants Carrie Lomack and Edward Peter (deceased).

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

The State of Alaska, Department of Public Works, Division of Aviation (ADA), appeals from the decision of the Alaska State Office,

Bureau of Land Management (BLM), dated July 29, 1976, denying reinstatement of, and rejecting an amendment to, airport lease application F-971 (Anch.). Consideration of this appeal has been delayed to await 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).

On April 29, 1968, ADA applied to lease approximately 61 acres, designated as Tract 1, for development of an airport at Akiachak, Alaska, under the Act of May 24, 1928, 45 Stat. 728, as amended, 49 U.S.C. §§ 211-214 (1970). The application was rejected on November 4, 1970, because it conflicted with three Native allotment applications. 1/ On December 8, 1970, ADA amended the application to exclude the lands in conflict with previously filed Native allotment applications, and requested reconsideration. Airport lease F-971 (Anch.), consisting of approximately 13.5 acres, in Tract 1, Parcel A, was issued to the State on October 21, 1974, for a 20-year period.

On June 6, 1975, ADA requested their original application covering lands in conflict with Native allotment applications be reinstated. They further asked that the existing lease be amended to include Tract 1, Parcel C (17.62 acres), since the Stevens Native allotment application was no longer in conflict 2/ and that the application as to Tract 1, Parcel B (29.13 acres) be permitted to stand as an application until the conflict with Native allotment application F-932 (Anch.) is resolved.

The decision appealed from rejected the amendment and denied reinstatement of the original lease application. The State office said: "Parcel B, Tract 1, is entirely within Native allotment application F-932, filed by Carrie Lomack. Parcel C, Tract 1, is entirely within Native allotment application F-976, filed by Edward Peter (deceased)." It is indicated that reports by field examiners for both parcels show compliance with the Native allotment law and regulations, and, therefore, appellant's requests for amendment and reinstatement were denied.

In the Statement of Reasons, appellant's first argument relies on 43 U.S.C. § 270-1 (repealed 1976), which provides for Native allotments on "vacant, unappropriated, and unreserved nonmineral land in

1/ The Native allotment applicants were: Carrie Lomack, F-932 (Anch.); David Stevens, F-029184 (Anch.); Edward Peter, F-976 (Anch.). BLM originally stated that Peter's application was for a portion of the lands included in Stevens' application. It was later determined that the written description for Stevens' claim was in error, the claim actually being located in another area and not conflicting with either Peter's or ADA's applications.

2/ Appellant did not discuss the Peter application, which also covered these same lands.

Alaska * * *." Because the airport runway was built on these lands in 1966 and 1967, and Lomack's application was not filed until April 1, 1968, appellant argues the land was not vacant and unappropriated and the Native allotment must be rejected. The same reasoning is applied to the Peter application.

Appellant points out that the State application was filed April 29, 1968; Peter's was filed 2 days later, May 1, 1968. Appellant states that if the reason for BLM's decision was "conflict with previously filed Native allotment application," the State's application for Parcel C, Tract 1, should not be denied because Peter's application was not "previously filed."

Finally, the State relies on 43 CFR 2561.1(d) which provides: "An application for allotment shall be rejected unless the authorized officer of the Bureau of Indian Affairs certifies that * * * the claim of the applicant does not infringe on other native claims or area of native community use." Appellant states that the airport is an area of native community use, and, therefore, the Native allotment applications must be rejected.

Native allotment applicants Lomack and Peter, through counsel, filed an answer to the statement of reasons urging that the State's appeal be denied and patents granted to Lomack and the heirs of Peter. Counsel claims Lomack used and occupied the land from 1960, and filed her application prior to the time the State application was filed. Under 43 CFR 2561.1(e), counsel argues the land was segregated from subsequent conflicting applications. Counsel further asserts that as the BLM field report found substantial use and occupancy of Lomack's claim, the lands were not vacant and unappropriated either at the time the airport was built or the State application was filed. Lucy Ahvankana, 3 IBLA 341 (1971). Under 43 CFR 2911.0-8 only unreserved and unappropriated lands may be leased for airports. Counsel also disputes the State's claim that the airport is a Native community use. Therefore, he asserts that the State's application must be rejected.

Use and occupancy by Peter is alleged from 1962, and the field report found he satisfied the requirements for an allotment. The only difference between Lomack's and Peter's cases, counsel states, is that Peter's application was filed 2 days after, rather than before, the State's application. However, he contends that as use and occupancy predated the construction of the airport, the lands were not available to the State. Counsel also contends that the State built the existing runway in trespass over the land used by the Native applicants for food and wood gathering, whereas the State contends, in effect, there was no use of the land at the time the runway was built.

[1] There are factual issues raised in this case relative to the Natives' entitlement to their allotment. These go to the extent and time of use and occupancy by the Natives of the land improved by the

State for the airport runway. There are legal issues involved as to what type of Native occupancy is sufficient to preclude the inception of use and possession by the State or others which could bar the initiation of rights by the Natives. There is a dispute as to the community interest in the State's use of the airport. We note there is some indication of community interest expressed by the village of Akiachak in use of the land by the State in the continued maintenance and operation of the airport. Even assuming the Natives satisfactorily show that the statutory preconditions for allotment have been satisfied, allowance of their applications under the 1906 Act remains in the discretion of the Secretary of the Interior. Among considerations to be made in determining whether that discretion should be exercised to allow or to reject the applications is the impact upon the Natives. This would include what use they had made in the past, how deprivation of that use would affect them, the extent of use and occupancy, including whether they had improvements on the land or adjoining lands which would be affected, and other matters reflecting upon their equities. On the other hand, factors relating to the public interest must be weighed. These go to the community's need and use for the airport and the interests of the State representing the larger State-wide community.

Some of the facts and issues raised in this case are similar to those raised in State of Alaska, 40 IBLA 79 (1979). In that case we ruled that the State of Alaska had a sufficient interest to bring a private contest against Native allotment applications conflicting with a State airport where it had filed a State selection application for the lands (as well as a relinquished airport lease application for which the State requested reinstatement) and there was a possibility of a conveyance to the State for the airport if a Native village acquired title. We also pointed to the need for factual background in the event the Secretary needed to exercise his discretionary authority concerning the allotment application, and in view of the rulings by the Court of Appeals for the Ninth Circuit in the two Pence cases.

It is not clear from the record in the present case whether the State may have some of the interests in the land asserted in our prior-decided case, nor do we deem it appropriate at this time to decide the issue of its standing as a private contestant. However, we do decide, and so direct, that BLM afford the State 60 days within which to file contest complaints against the allotment applicants, together with a showing of its status as a proper contestant. See 43 CFR 4.450-1. If the State fails to do so, the decision below will stand as the final decision of the Department on the State's application, and the suspension of that decision will terminate. This would not preclude BLM from further examining the allotment applications and adjudicating them on their merits.

If the State comes in timely, BLM will adjudicate the State's standing as a contestant. If it finds affirmatively, the contests

will proceed. If BLM finds in the negative, the State's complaints shall be treated as protests pursuant to 43 CFR 4.450-2 and the appropriate action to be taken thereon will be a fact-finding hearing to resolve the factual issues implicit in the case. BLM would then forward the cases to the Hearings Division, Office of Hearings and Appeals, for assignment of an administrative law judge to hear this case as we so order pursuant to 43 CFR 4.415. In such an event, the administrative law judge should serve copies of his recommended decision upon the parties for objections or comments before this Board acts upon the matter.

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

Joan B. Thompson
Administrative Judge

We concur.

Frederick Fishman
Administrative Judge

Douglas E. Henriques
Administrative Judge

