

**Editor's note: 86 I.D. 361; Clarification denied by order dated April 21, 1980.**

STATE OF ALASKA ET AL.

IBLA 76-639, etc.

Decided July 11, 1979

Appeals from decisions of the Alaska State Office, Bureau of Land Management, holding Native allotment applications for approval and rejecting State selections.

Decisions set aside and cases remanded.

1. Administrative Procedure: Standing -- State Selections

Where the State is a party to decisions by the Bureau of Land Management and the State's selection applications were rejected by those decisions, under 43 CFR 4.410, the State has standing to appeal those decisions to the Board of Land Appeals.

2. Alaska: Alaska Native Claims Settlement Act -- Alaska: Land Grants and Selections: Generally -- Alaska: Native Allotments -- Alaska Native Claims Settlement Act: Aboriginal Claims -- Indian Lands: Generally -- State Selections

The Alaska Native Claims Settlement Act extinguished aboriginal occupancy claims of Alaska Natives; such claims cannot

serve as a bar to a State selection, nor preclude the State from challenging Native allotment applications conflicting with its selection.

3. Administrative Procedure: Standing -- Alaska: Alaska Native Claims Settlement Act -- Alaska: Land Grants and Selections: Generally -- Alaska: Native Allotments -- Alaska Native Claims Settlement Act: Aboriginal Claims -- Indian Lands: Generally -- Rules of Practice: Private Contests -- State Selections

Under the "functional" standard to determine administrative standing set forth in Koniag, Inc. v. Andrus, 580 F.2d 601 (D.C. Cir. 1978), cert. denied, 99 S. Ct. 733 (1979), the State of Alaska has standing to challenge Native allotment applications conflicting with its selection applications even if the land is within a Native village selection area under the Alaska Native Claims Settlement Act. The State has standing under Departmental regulations to initiate private contests against such conflicting Native allotment applications.

4. Rules of Practice: Private Contests -- Words and Phrases

"Person." A state is a "person" within the meaning of the Department's private contest regulations.

5. Administrative Procedure: Adjudication -- Alaska: Land Grants and Selections: Generally -- Alaska: Native Allotments

State of Alaska selection applications should not be rejected because of conflicts with Native allotment applications which are to be approved without first affording the State notice of such action to be taken and an opportunity to contest the conflicting claims if it desires.

APPEARANCES: Thomas E. Meachum, Esq., Assistant Attorney General, State of Alaska, Anchorage, Alaska, for appellants; Alaska Legal Services Corporation, Anchorage, and Ketchikan, Alaska, for Native allotment applicants.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

The appeals which have been consolidated for this decision all involve State selection applications filed pursuant to the Alaska Statehood Act, P.L. 85-508, 72 Stat. 339 (1958), and Native allotment applications filed pursuant to the Act of May 17, 1906, 34 Stat. 192 as amended by the Act of August 2, 1956, 70 Stat. 954, 43 U.S.C. §§ 270-1 to 270-3 (1970) (now repealed subject to pending applications, section 18(a), Alaska Native Claims Settlement Act, (ANCSA), 43 U.S.C. § 1617 (1976)).

1/ The cases are identified in Appendix A attached hereto. The State selections in the subject cases were all partially rejected because of conflicting Native allotment applications which the Alaska State Office, Bureau of Land Management (BLM), found valid. 2/

---

1/ These 11 cases were consolidated with 7 others by order of July 30, 1976, under the rubric Mary Klein Zimin, 76-639. On further consideration of the matter we have decided that there are differences in the issues in the cases which necessitate the issuance of separate opinions.

2/ The decisions below issued in 1976. Our consideration of these appeals has been delayed pending decisions by the United States Court of Appeals in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), and Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

Alaska Legal Services Corporation (ALSC), representing some of the Native allotment applicants, 3/ filed a motion to dismiss the State's appeals for lack of standing. ALSC asserts that the lands applied for by the State are subject to valid village selections under section 12(a)(1) of ANCSA, and that section 11(a)(2) of ANCSA withdraws for village selection, "lands . . . that have been selected by or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act . . ." ALSC Memorandum In Support of Motion for Dismissal of State's Appeal, p. 1. Therefore, ALSC argues, even if the Native allotment applications are rejected, the village corporations would acquire the land; thus, the State has no direct interest in the land and lacks standing to appeal. ALSC further argues that the State had a duty to ascertain if the lands selected were occupied by Natives and failure to do so does not prevent the State being charged with notice of such occupancy. ALSC asserts that the cases, Donald Peters, 26 IBLA 235, 83 I.D. 308 (1976), and State of Alaska, John Nusunginya, 28 IBLA 83 (1976), are distinguishable on their facts. It argues that initiation of a Government contest by BLM would unfairly place the burden of proof on the Native allotment applicants who have already been found to satisfy the requirements of the Native Allotment Act.

---

3/ Native allotment applicants in the following cases are represented by ALSC: 76-639, 76-640, 76-687, 76-689, 76-692, 76-715, and 76-777. No appearances were entered for the Native allotment applicants in the remaining cases here concerned.

The State filed a statement of reasons which adopts the reasons for appeal submitted in the Nusunginya case, supra, and a statement of standing. The State filed these selection applications before any of the Native allotment applications were filed. Many of the State selections had been tentatively approved. Under 43 CFR 4.410, "any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management . . . shall have a right to appeal to the Board." The State argues that the decisions of the Alaska State Office rejecting the State selections because of conflicting Native allotment applications are decisions adversely affecting the State and are appealable. The State asserts that the selection applications segregated the lands from appropriation and precluded subsequent filing by an adverse claimant. This establishes an equitable interest in the lands "which cannot be summarily erased by a discretionary decision to approve a Native allotment application."

In response to ALSC's argument that ANCSA withdrew these lands for village selection, the State has withdrawn its appeals concerning parcels of lands withdrawn for compulsory core township selection by Native villages. The State contends that some of the lands still subject to this appeal are not withdrawn by sections 11 and 12 of ANCSA, and some of the lands were selected under the Mental Health Enabling Act, 70 Stat. 709, 711, and are not subject to the withdrawals in sections 11 and 12 of ANCSA. As to those lands which are subject to the withdrawal, the State points out that the villages are

not required to select the lands, that they have selected thousands of acres more than they are entitled to receive, and, therefore, it is not certain that the lands will not be available for conveyance to the State.

The State thus asserts it has a sufficient interest in the lands to support its appeal.

Substantively, the State argues that its applications segregated the land from any subsequent appropriation. It has urged, as summarized in Nusunginya, supra at 85:

. . . Moreover, because the allotment to a Native is within the discretion of the Secretary, the allotment cannot be the kind of "valid existing right" preserved by section 6(a) of the Statehood Act. The State urges that this Board overrule two of its earlier decisions which upheld the right of Natives to make application subsequent to the filing of a state selection application, where use and occupancy preceded the state selection: Archie Wheeler, 1 IBLA 139 (1970); Lucy Ahvakana, 3 IBLA 341 (1971). Third, the State argues that section 4(c) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1603(c) (Supp. IV, 1974), was a congressional confirmation of all previous tentative approvals which cannot be revoked by administrative decisions. Fourth, the State argues that the fact that a Native qualifies for an allotment does not necessarily remove the land from the category of "vacant, unappropriated, and unreserved." Finally, it should be noted that the State takes umbrage at not being informed of the Native's application until the decision rejecting its selection application. It contends that this omission denies it any opportunity to present an informed and effective protest and present its position.

The State asserts that BLM's rejection of the selections without notice and an opportunity to be heard violates due process and

requests that the Government initiate contest proceedings in which the State is allowed to intervene against the Native allotment applicants, or alternatively that it be allowed to contest the conflicting applications.

[1] Regulation 43 CFR 4.410, quoted above, gives a right of appeal to this Board to any party adversely affected by a BLM decision. The State is a party to the decisions below, and the State's selection applications were rejected by those decisions. These facts bring the State squarely within the language of the regulation which grants it standing to appeal.

The determinative issue involved in these appeals concerns the propriety of rejecting the State selection applications while approving the Native allotment applications without first affording the State notice of the conflicts, that BLM would approve the conflicting applications and reject the State's applications, and without affording the State the opportunity to contest the conflicting applications.

[2] ALSC argues that the State has no standing to challenge the allotment applications because lands occupied by Natives do not fall within the ambit of the provision of the Alaska Statehood Act allowing the State to select "public lands of the United States which are vacant, unappropriated and unreserved." A difficulty with this argument is that it is based upon a factual premise which the

State is challenging, namely, the occupancy of the Natives under the Allotment Act. The State's position is that if the use and occupancy of the individual Natives are not sufficient to warrant allowance of their allotment applications and the land is otherwise available, it is subject to their selection applications. Implicit in its contentions are issues concerning the type, extent, and adequacy of the Natives' use and occupancy.

A case cited to support ALSC's contentions concerning the effect of Native occupancy is State of Alaska v. Udall, 420 F.2d 938, 940 (9th Cir. 1969), wherein the court refused to rule as a matter of law "that under no circumstances could Indian trapping, hunting and camping . . . constitute a condition which would deprive the selected lands of the status of being 'vacant, unappropriated, and unreserved.'" There a Native village intervened as a party defendant in a suit by the State against the Secretary of the Interior. The Natives asserted that the village had possessory rights to lands sought by the State under selection applications. The Natives' alleged rights were based on present and aboriginal use and occupancy. The court held there were genuine issues of material fact requiring a trial. It refused to rule as a matter of law then on the aboriginal claims asserted by Natives and their affect upon the State. It specifically noted that pending legislation might resolve the question.

Thereafter, the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1601 (1976), was passed by Congress to resolve the

Native aboriginal claims asserted for much of the area of the State of Alaska. Discussions of the circumstances, statutes, cases, and other matters leading to the passage of ANCSA are in recent court decisions concerning the effect of the Act. See, e.g., Cape Fox Corp. v. United States, 456 F. Supp. 784 (D. Alaska 1978); United States v. Atlantic Richfield Co., 435 F. Supp. 1009 (D. Alaska 1977); Edwardsen v. Morton, 369 F. Supp. 1359 (D.D.C. 1973). From the rulings in the afore-cited cases, it appears that any Native claims based solely upon aboriginal occupancy can no longer serve as a bar to State selections, although State selections may ultimately be barred to specific lands granted to Native corporations or villages by provisions of ANCSA. Passage of ANCSA and these cases interpreting it have now superseded State of Alaska v. Udall, *supra*, and the implication raised there that aboriginal Native claims might bar State selections.

[3] The issue ALSC has raised concerning conflicts with Native village selections under ANCSA does not bar the State's standing here. Although under ANCSA final approval of village selections would require rejection of conflicting State selections, as the State has pointed out, the villages here have selected more acreage than allowed to them under ANCSA. Therefore, until there has been a final determination of the areas granted to the villages, the State retains its interest in the land by its selection application and the possibility that its interest may ultimately be defeated does not take

away its present interest and standing. Any doubt about the State's standing to challenge Native claims conflicting with its selection rights has been resolved by the United States Court of Appeals for the District of Columbia Circuit in Koniag, Inc. v. Andrus, 580 F.2d 601 (D.C. Cir 1978), cert. denied, 99 S. Ct. 733 (1979). In Koniag the State had not yet filed selection applications for land claimed by the villages. However, the mere possibility that it might later seek to select such land was held to be sufficient to confer standing on the State to challenge the eligibility of Native Alaskan villages under ANCSA pursuant to regulations of this Department applicable to the Alaska Native Claims Appeals Board. The State's position is stronger here than in Koniag as it has filed selection applications for the lands in conflict. It was noted in Koniag at 613-614 that there are conceptual differences between judicial and administrative standing; thus, a party might not have standing to obtain judicial review but could have administrative standing. The court then stated:

The fact that judicial and administrative standing are conceptually distinct does not, of course, mean that Congress could not require an administrative agency to apply judicial standing concepts in determining administrative standing. Nor does it mean that courts and agencies should never refer to judicial standing decisions, where helpful, by way of analogy. But absent a specific justification for invoking judicial standing decisions, I see no basis for interjecting the complex and restrictive law of judicial standing into the administrative process.

Id. To determine administrative standing, the court suggested that the

language of the statutes and the agency regulations should be the starting point. Where the language is general, such as speaking of persons "aggrieved," "affected," or having an "interest," there may be need for a functional approach to determine the issue. After analyzing court authorities, the court, at 616, concludes:

These authorities suggest a functional analysis composed of the following factors:

- (1) The nature of the interest asserted by the potential participant.
- (2) The relevance of this interest to the goals and purposes of the agency.
- (3) The qualifications of the potential participant to represent this interest.
- (4) Whether other persons could be expected to represent adequately this interest.
- (5) Whether special considerations indicate that an award of standing would not be in the public interest.

Such a standard would have to be flexible, of course, and the appropriate variables might well vary from one context to another. <sup>13/</sup> The important point is that administrative standing should be tailored to the functions of the agency, not to arcane doctrine from another area of the law.

---

<sup>13/</sup> One important distinction might be between a would-be participant seeking to institute a new administrative hearing or appeal, and one merely seeking to intervene in an on-going proceeding. An award of standing in the former circumstances is clearly more burdensome than in the latter. See 3 K. Davis, *Administrative Law Treatise* 241 (1958). Since intervention generally has no effect on what decisions are reached, or when they are rendered, it might be appropriate in considering requests for intervention

merely to focus on (1) whether the potential intervenor represents a point of view that would assist in illuminating the issues; (2) whether he is qualified to represent this point of view; (3) whether other parties to the proceeding could be expected to represent this perspective; and (4) whether there are special considerations that indicate intervention would not be in the public interest.

The court then applied this "functional" standard and found that the State was properly held to have standing to appeal the Native village eligibility determinations. We have previously ruled that the State had standing to appeal because it had an application which was rejected, and, thus, was adversely affected by the decision. The State's selection applications also give it an interest in the land sufficient to meet the requirements of the private contest regulation, 43 CFR 4.450-1, which provides in part:

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. Such a proceeding will constitute a private contest and will be governed by the regulations herein.

Where the State desires to present evidence concerning the sufficiency of a Native's use and occupancy, this would be information outside the records of BLM. Under the functional approach, this would be helpful to the agency. We recognize the special obligation and interest of the Secretary of the Interior with regard to Indians and Natives in Alaska; however, he also has a statutory duty to assure that there

has been compliance with the public land laws, including the Alaska Native Allotment Act and the Alaska Statehood Act, before land is conveyed pursuant to such laws. As a mere stakeholder here, this Department must be concerned with fairness to all parties. Therefore, we cannot accept the argument by ALSIC that because of Interior's special duty to Natives, the State should not be allowed to challenge the Native allotments. We must conclude that under the standard enunciated in Koniag the State has standing here, and also under the contest regulation quoted above. We have specifically held that the State has standing to bring a private contest against Native allotment applications conflicting with a State airport where the State had a selection application and an airport lease application and contended that the airport extension was needed for local community and public interest needs. State of Alaska, 40 IBLA 79 (1979). See also, State of Alaska, 40 IBLA 118 (1979).

[4] In State of Alaska, 40 IBLA 79 (1979), and many other cases, the Department has consistently recognized that states are included within the term "person" in the contest regulation. See e.g., Navajo Tribe of Indians v. State of Utah, 12 IBLA 1, 80 I.D. 441, 501 (1973); State of California v. Doria Mining and Engineering Corp., 17 IBLA 380 (1974), aff'd, Doria Mining and Engineering Corp. v. Morton, 420 F. Supp. 837 (C.D. Cal. 1976); State of California v. Rodeffer, 75 I.D. 176 (1968); State of Louisiana v. State Exploration Co., 73 I.D. 148 (1966).

In a private contest, as well as a Governmental contest, the Native must be given adequate notice and an opportunity for an oral hearing. In Donald Peters, 26 IBLA 235, 83 I.D. 308 (1976), reaffirmed, 28 IBLA 153, 83 I.D. 564 (1976), we held that the Departmental contest procedures would be applied when there is an issue of fact to be resolved in adjudicating Native allotment applications. In Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978), the Court of Appeals held that these procedures comply, at least facially, with the due process requirements set out in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). That case ruled that Native allotment applicants had a sufficient property interest in their allotment applications so as to be entitled under due process to adequate notice and an opportunity for an oral hearing before their applications can be rejected because of insufficient use and occupancy.

Under the Alaska Native Allotment Act there must be "substantial use and occupancy" by a Native. As mentioned before, State of Alaska v. Udall, supra, left to a fact-finding trial a determination whether Native aboriginal claims based on trapping, hunting, and camping could bar a State selection. However, aboriginal claims have now been abolished and that case has, in effect, been superseded by cases decided since ANCSA. We need not decide, in the present posture of this case, issues pertaining to the type of use and occupancy by a Native in his/her individual capacity seeking title under the Alaska Native Allotment Act which would be sufficient to bar the State, except to say

that, at a very minimum, the use and occupancy would have to be sufficient to meet the statutory and regulatory requirements for allowance of an allotment if there were no conflicting claim. <sup>4/</sup> We shall await future action and briefing by the parties before deciding whether there may be a more strict standard of use and occupancy, or at least, a more strict burden of proof necessary where there are third-party claims conflicting with an allotment application than where only the United States is involved and the Secretary is exercising his discretionary authority in making an allotment.

From the above, it is clear that the State has standing to contest a Native allotment application conflicting with its selection application regardless of whether the land is also within a Native village selection area. It also has standing to appeal an adverse decision affecting its selection application because of a conflict.

[5] Here, however, the State was not afforded an opportunity to contest the claims before its application was rejected. The action by BLM, therefore, afforded the State no choice but to appeal from the adverse decisions. This was not proper procedure in these

---

<sup>4/</sup> For examples of Indian or Native occupancy and third party claims, compare Cramer v. United States, 261 U.S. 219 (1923), with Herbert H. Hilscher, 67 I.D. 410 (1960). Also see Navajo Tribe of Indians v. State of Utah, *supra*.

circumstances. For this reason, we shall set aside the decisions to afford the State its opportunity to contest the conflicting claims if it desires.

The State's argument that the United States must contest all Native allotment claims where there is a conflicting State selection cannot be accepted. Only if BLM, or this Board on review, determines that there is a question as to a Native's compliance with the Act so as to warrant the initiation of a Government contest or a need for a hearing on facts prior to an exercise of discretion need such action be taken. Because the issues raised in these appeals primarily concern the procedural rights of the State, we are not ruling on merits of the Native allotment applications. When these case records are returned to BLM, it shall give notice of their return to the State and afford it time within which to bring private contest proceedings against the Natives' conflicting claims. If the State fails to do so within the time required, BLM may then reject the State selection applications. The State may then appeal to this Board for a review of the case on its merits pursuant to subpart 43 CFR 4.400. This review, however, will be limited to deciding whether the application was properly rejected because the Native allotment application is properly allowed, or whether there is doubt as to the adequacy of the allotment application so as to warrant a contest by the United States. See State of Alaska, 41 IBLA 309 (1979).

Notice of future proceedings should be given to the Native villages and any other conflicting parties.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are set aside and the cases remanded for further proceedings consistent with this opinion.

Joan B. Thompson  
Administrative Judge

We concur:

Edward W. Stuebing  
Administrative Judge

Newton Frishberg  
Chief Administrative Judge

APPENDIX A

<u>IBLA NO.</u>	<u>NATIVE ALLOTMENT NO. AND NAME</u>	<u>CONFLICTING</u>	<u>STATE SELECTION NO.</u>
*76-639	Mary K. Zimin	AA-6157	A-053268
76-640	Marsha Thorson	AA-7208	A-054308
76-641	Nicoli Tungiung	AA-7785 A-054590	A-054358
76-687	Wassillie Ilutsik	AA-7292 A-054373	A-054310
76-689	Bernice Brown	AA-7324	A-052985
76-690	Rose Wheeler	AA-067589	A-058734
76-691	Natalie Odegaard	AA-067640	A-053268
*76-692	Phyllis Westcoast	AA-7307	A-054332
76-715	Erma Lawrence	AA-6553	AA-208
76-716	John Estabrook	AA-6973	AA-4805
76-777	Vera Tschaepf	AA-6614	A-050580

\* The State has withdrawn its appeals in part as to parcels within the Native village compulsory core townships.

