

STATE OF ALASKA

v.

DANIEL JOHNSON

IBLA 77-523

Decided September 11, 1979

Appeal from decision of the Alaska State Office, Bureau of Land Management, partially rejecting state selection applications A-050580 and A-060527.

Remanded.

1. Alaska: Land Grants and Selections: Generally – Alaska: Native Allotments – Appeals – Contests and Protests: Generally – Rules and Practice: Government Contests – Rules of Practice: Private Contests

Where there is a conflict between an application by the State of Alaska to select land under the Alaska Mental Health Enabling Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to the Bureau of Land Management that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may initiate private contest proceedings to prove lack of qualification

on the part of the Native, or it may appeal the determination to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient, it will order the institution of Government contest proceedings. If, however, the Board affirms the finding that the requirements of patent have been met, the State will have no further administrative recourse. Where the State had not prior to its appeal been afforded notice of the election, it should be afforded an opportunity to make such election.

2. Alaska: Land Grants and Selections: Generally – Alaska: Land Grants and Selections: Mental Health Lands – Alaska: Native Allotments

A selection filed by the State of Alaska is subject to prior valid existing rights of Natives, irrespective of whether the State selection was filed pursuant to the Alaska Mental Health Enabling Act or the Statehood Act.

APPEARANCES: Thomas E. Meacham, Esq., Assistant Attorney General, Anchorage, Alaska, for the State of Alaska;
Frederick Torrisi, Esq., Alaska Legal Services Corporation, Dillingham, Alaska, for Daniel Johnson.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

The State of Alaska has appealed from a July 6, 1977, decision of the Alaska State Office, Bureau of Land Management (BLM), giving tentative approval to the allotment application of Daniel Johnson and withdrawing prior tentative approval of the State of Alaska's selection application for the same land.

The State of Alaska's selection application A-050580 (filed on November 11, 1959) was amended on August 16, 1962, to include the land here in issue, lot 8, NE 1/4 SE 1/4 sec. 6, and lots 1 and 6 sec. 7, T. 7 N., R. 11 W., Seward meridian. These lands were also included in a homestead entry, A-52822, filed on August 15, 1960. The homestead entry failed and was closed on August 12, 1966.

On April 13, 1972, the Bureau of Indian Affairs filed Native allotment application AA-7597 for 79.18 acres for lot 8, NE 1/4 SE 1/4 sec. 6, T. 7 N., R. 11 W., Seward meridian, on behalf of Daniel Johnson. Johnson claimed use and occupancy from May 1957 for fishing, hunting, trapping, and berry picking.

On June 16, 1972, the State of Alaska further selected the land (A-060527) pursuant to the Alaska Statehood Act, 72 Stat. 339, as amended, 48 U.S.C. Chap. 2, note (1976).

A BLM field report, filed in January 1973, states that a cabin was found on the land but that there was no verification of use. The report also contains the following findings:

Based on the evidence on the ground the applicant has been using the land in the recent past.

The applicant's use prior to the homestead entry was not adequate to qualify for an allotment, and the applicant's use during the time the homestead was of record could not qualify as legal use and occupancy since the use

was not potentially exclusive. However, since the applicant lives near the tract, it is assumed that the applicant has made legal use of the land since the time the homestead failed.

* * * * *

The examiner assumes that the land was open and recommends that the applicant be granted the tract

In response to BLM's request for further information bearing on applicant's use of the land, five witnesses, including the allotment applicant, submitted statements. The witnesses indicated that they had seen the applicant use the land, that the applicant had a family when using the land, that the land was used for berrypicking, wood gathering, and food gathering, and that a cabin was on the land.

Based on this information, BLM held application AA-7597 for approval, reserving coal, oil, and gas to the United States. The decision appealed from also held for rejection State selection A-050580 allowing the State of Alaska 30 days to initiate a private contest against the allotment applicant pursuant to 43 CFR 4.450. The decision further stated:

Failure of the State to initiate a private contest within the time indicated above will result in the Native allotment being approved, the tentative approval being modified in part, and the State selection being rejected as to the lands in Mr. Johnson's allotment application. This action will become final without further notice.

The decision also advised the State of its right to appeal to this Board.

The State of Alaska appeals on several grounds. First, it asserts, citing State of Alaska, John Nusunginya, 28 IBLA 83 (1976), that the burden is on BLM to initiate its own contest proceedings against the later-filed Native allotment applicant in which the State may appear as an interested party. The State contends that a BLM-initiated contest with a full evidentiary hearing is required for a determination as to whether the applicant established a valid claim. The State maintains that unless and until the Native allotment applicant's claim is sustained in a BLM contest proceeding "the State's Mental Health [Alaska Mental Health Enabling Act, 70 Stat. 709 (July 28, 1956)] grant selection applications stand as prior-filed applications, thus segregating the land from later appropriation by [the allotment applicant]."

The State further argues that since selection application A-050580 was made pursuant to the Alaska Mental Health Enabling Act, supra, and regulations thereunder, there could be nothing "tentative" about BLM's approval of such selection and the State's equitable title to the land vested absolutely. Therefore, it is argued, BLM was without power to subsequently modify the approval granted the State on December 1, 1966.

The State's final argument is directed to the weakness of evidence upon which BLM held for approval applicant Johnson's allotment application.

We shall treat each of these arguments in turn.

[1] John Nusunginya, supra, does not support the proposition for which appellant has cited that case, namely that the Department must initiate a contest even though BLM may be fully satisfied that the Native applicant has fulfilled his obligations under the Allotment Act.

The Board in State of Alaska, 41 IBLA 309, 312, 313 (1979), stated that:

In Nusunginya, supra [28 IBLA 83], the Board held that the evidence of the allotment applicant's compliance was not 'satisfactory to the Secretary of the Interior,' although it was deemed satisfactory to BLM. Therefore, the Board reversed the BLM decision, and because of the requirement that a Native allotment cannot be summarily rejected without notice and opportunity for an oral hearing, the Board directed that BLM initiate a Government contest proceeding against the allotment claim. . . . This result flowed exclusively from the Board's conclusion that BLM had erred in finding that Nusunginya's evidence was ultimately sufficient to prove his qualification to the satisfaction of the Secretary. It did not hold, and may not be construed as holding, that BLM must bring a Government contest in every case where an allotment application was filed later than the State's application for the same land. [Footnote omitted.]

The question ultimately raised by the State's first argument is whether it was afforded a proper opportunity to participate in the BLM determination. In Natalia Wassilliey, 17 IBLA 348 (1974), we held that the State's interest in its selection application was adverse to that of a Native allotment applicant and that the State should be served with copies of documents relating to the allotment application and be "afforded an opportunity to set forth its position on whether the occupancy of the Native would be sufficient to prevent the State's selection rights from attaching to the land." Id. at 352.

The decision in the instant case was adverse to the State in that it advised that the allotment application was held for approval, that the selection application was held for rejection in part, and that if the State failed to initiate a contest within the time allotted, the "action will become final without further notice."

As we observed in State of Alaska, supra, the State has an election of remedies. It may either initiate a private contest (43 CFR 4.450-1), or appeal to this Board. The consequence of the latter action, with an ensuing decision by the Board, is that no further appeal will lie in this Department, the administrative remedy is exhausted, and the State will have no further administrative recourse if the Board affirms the BLM decision. But in the case at bar, the State was not apprised of the necessity of making a binding election between (1) initiating a contest, or (2) allowing the decision to become final by the expiration of 30 days and then appealing, agreeing

sub silentio to be bound by the Board's determination. In other words, if, in the circumstances, the Board should find that the Native allotment is proper for allowance, the State would have no further recourse before the Department.

[2] The State's second argument attempts to draw a distinction between the effect of approvals of State selections made under the Alaska Mental Health Enabling Act and those made under the Statehood Act. Section 202(a) of the Mental Health Enabling Act provides:

Sec. 202. (a) The Territory of Alaska is hereby granted and shall be entitled to select, within ten years from the effective date of this Act, not to exceed one million acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection: Provided, That nothing herein contained shall affect any valid existing rights. All lands duly selected by the Territory of Alaska pursuant to this section shall be patented to the Territory by the Secretary of the Interior.

The regulation to which the State adverts is 43 CFR 2222.9-4(d) (1966) which provides:

(d) Effect of approval of selections. Following the selection of lands by the State and the tentative approval of such selection by the authorized officer of the Bureau of Land Management, the State is authorized to execute conditional leases and to make conditional sales of such selected lands, pending survey of the exterior boundaries of the selected area, if necessary, and issuance of patent. Said officer will notify the appropriate State official in writing of his tentative approval of a selection after determining that there is no bar to passing legal title to

the lands to the State other than the need for the survey of the lands or for the issuance of patent or both. [Emphasis added.]

The text of the later regulation, 43 CFR 2627.3(d), is identical; both regulations provide for tentative approval of lands selected by the State. The distinction contended for simply does not exist, and the effect of a State selection irrespective of the Act under which it was made is subject to prior valid existing rights of Natives. These rights have been preserved by a chain of legislation beginning with the Organic Act of May 17, 1884, 23 Stat. 24, 26. Even the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601-1628 (1976), which extinguished all claims of title based on use or occupancy of the lands, provides at 43 U.S.C. § 1617 (1976) (section 18) that Native allotments, pending on the date of enactment, could be processed to conclusion. Thus, if Johnson used and occupied the land according to the prerequisites of the Native Allotment Act, 43 U.S.C. §§ 270-1 to 270-3 (1970), prior to the State selection application, the land was not vacant, unappropriated, or unreserved under the statute.

Since the State has not as yet been afforded an opportunity to make an informed election as stated above, it is appropriate that it be afforded such an opportunity at this time.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we remand

the case to the Alaska State Office, BLM, for appropriate action consistent herewith.

Administrative Judge

Frederick Fishman

We concur.

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

