

OUZINKIE NATIVE CORP.
v.
EDWARD OPHEIM, SR.

IBLA 77-459

Decided January 30, 1980

Appeal from decision of the Alaska State Office, Bureau of Land Management, granting Native allotment application AA 2911.

Set aside as remanded.

1. Alaska: Alaska Native Claims Settlement Act -- Alaska: Native Allotments -- Alaska Native Claims Settlement Act: Generally

The Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 (1976), extinguished aboriginal occupancy claims of Alaska Natives effective Dec. 18, 1971, and a Native allotment application then pending in the Bureau of Land Management and purportedly "amended" after that date to include an additional 100 acres cannot be granted for the additional acreage unless it be shown that the amendment was pending in the Department prior to the repeal of the Act.

2. Administrative Procedure: Generally -- Alaska: Generally -- Alaska: Native Allotments -- Rules of Practice: Appeals: Standing to Appeal.

Where a Native corporation has pending an application to acquire land, which land was awarded to an Alaska Native by BLM pursuant to a Native allotment application, the Native corporation is a party adversely affected by the decision of BLM and therefore has a right to appeal pursuant to

43 CFR 4.410, from the BLM decision holding the Native allotment application for allowance and will be afforded the opportunity to contest the Native allotment application.

APPEARANCES: David Wolf, Esq., Keane, Harper, Pearlman, & Copeland, Anchorage, Alaska, for Ouzinkie Native Corp.; Matthew D. Jamin, Esq., Alaska Legal Services Corporation, Kodiak, Alaska, for Edward Opheim, Sr.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Ouzinkie Native Corp. (Ouzinkie) has appealed a decision dated June 24, 1977, by the Alaska State Office, Bureau of Land Management (BLM), holding for approval the Native allotment application of Edward Opheim, Sr. (Opheim), and partially rejecting the State of Alaska's selection application for the same land. BLM invited the State of Alaska to initiate a private contest against the allotment applicant or to appeal to this Board, but the State refrained from both actions.

On May 31, 1968, the Bureau of Indian Affairs filed Native allotment application AA-2911 on behalf of Edward Opheim, Sr., for approximately 40 acres (Parcel A) in T. 26 S., R. 19 W., Seward meridian. On April 10, 1972, an application was filed for an additional 100 acres (Parcel B), also in T. 26 S., R. 19 W., Seward meridian. Opheim claimed use and occupancy of the land from 1938.

The Native village of Ouzinkie (appellant) filed an application (AA-6688-A) for all available land in T. 26 S., R. 19 W., Seward meridian. The file does not disclose the date of this filing.

The decision appealed from approved Edward Opheim, Sr.'s (appellee's), allotment application as follows:

Based on the witness statements submitted, it has been determined that Mr. Opheim used the land applied for. It has further been determined that Mr. Opheim began the use of his parcels at least 5 years prior to Executive Order 8344 (February 10, 1940). Therefore, Native allotment application AA-2911, covering approximately 140 acres, is held for approval for allotment to the applicant. Parcel A has recently been surveyed and is now described as U.S. Survey No. 5689, containing 38.03 acres. The allotment certificate will issue, after the lands in Parcel B are officially surveyed. The survey will be done in the regular order of business, but may require 3 or 4 years due to the large number of allotments already scheduled.

Appellant challenges BLM's approval of the allotment as to Parcel B only, contending that

Parcel B is an area utilized not only by Mr. Opheim but by the entire village of Ouzinkie for cattle grazing, recreational opportunities, and subsistence activities. Upon closer evaluation by your staff you will find that Parcel A and Parcel B are not compact and contiguous. They are separated by 2 or more miles and are not interrelated in any way to use and occupancy. [1/]

Appellant argues that appellee's evidence as to Parcel B is insufficiently clear and credible to establish entitlement. Appellant asserts that there is no evidence of use of Parcel B by appellee prior to the 1940 segregation of the land by Exec. Order No. 8344, and that there is a marked conflict as to when his use and occupancy of this parcel actually began. Appellant further points out that the field examiner's report concluded that no substantially continuous use and occupancy for a period of 5 years was demonstrated for Parcel B.

Appellant states that it filed a selection application for Parcel B under the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976). Appellant asserts that it was not afforded due process in that BLM failed to provide it with notice and an opportunity to be heard prior to its decision.

[1] Although neither the decision appealed from nor the parties have alluded to the issue, it appears that the date of filing conceivably could be dispositive as to Parcel B. Appellee Opheim's application for this parcel was filed on April 10, 1972, over 4 months after the revocation of the Native Allotment Act on December 18, 1971, by section 18 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 (1976). The decision below apparently regarded the filing as Parcel B as an amendment of appellee's original application AA-2911, filed on May 31, 1968. However, the 1972 application describes lands which, as appellant points out, are neither contiguous with, nor related in any way to, the use and occupancy claimed for the lands claimed in the 1968 application. Thus, unless it was pending in the Department on or before December 18, 1971, the 1972 application could in no way be considered an "amendment" of the earlier one. It might be considered a new application filed on an additional parcel of land. If the 1972 application were untimely filed, appellee Opheim could have no individual allotment claim to Parcel B and his application for that parcel would have to be rejected.

This issue was considered recently in Andrew Petla, 43 IBLA 186, 193 (1979), decided October 5, 1979. We stated:

1/ Letter dated July 5, 1977, from President of Ouzinkie Native Corporation to BLM.

Appellant's attempt to amend his application to change the land applied for in sections 14 and 23 to a subdivision in section 19 cannot be considered. Section 18 of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. § 1617 (1976), repealed the 1906 Native Allotment Act, subject to the proviso that applications then pending before the Department might be approved. An effort by an applicant to acquire different or additional lands after that date must be regarded as the filing of a new application which is barred by the statute. This Board has repeatedly held that where an Alaska Native allotment application pending in the Department on December 18, 1971, is later amended to include new or additional lands, the amendment will not be considered as timely filed and will be rejected. Annie Sopl, 22 IBLA 38 (1975); Raymond Paneak, 19 IBLA 68 (1975); George Ondola, 17 IBLA 363 (1974). The Secretarial Instruction of October 18, 1973, directs, "Amendments which result in the relocation of the allotment will not be accepted unless it appears that the original description arose from the inability to properly identify the site on protraction diagrams." (Emphasis added.) The land in Petla's application was platted on a topographic map of the area which clearly showed how the land claimed was situated with reference to the river on which it fronted and its relationship to other terrain features. No protraction diagram was used.

On October 18, 1973, the Assistant Secretary, Land and Water Resources, issued a memorandum which, in part, dealt with this issue. The Assistant Secretary examine section 18 of the Alaska Native Claims Settlement Act, 85 Stat. 688, 710, 43 U.S.C. § 1617 (1976), which provided for the continued processing of pending Native allotment applications, with specific reference to the phrase "pending before the Department of the Interior on December 18, 1971." He declared:

This phrase is interpreted as meaning that an application for a Native allotment must have been on file in any bureau, division, or agency of the Department of the Interior on or before December 18, 1971. The Department has no authority to consider any application not filed with any bureau, division, or agency of the Department of the Interior on or before said date. Evidence of pendency before the Department of the Interior on or before December 18, 1971, shall be satisfied by any bureau, agency or division time stamp, the affidavit of any bureau, division or agency officer that he received said application on or before December 18, 1971, and may also include an affidavit executed by the area director of BIA

stating that all applications transferred to BLM from BIA were filed with BIA on or before December 18, 1971.

In Julius F. Pleasant, 5 IBLA 171 (1972), the Board noted that in one of the three cases involved in that appeal, the BLM State Director recommended against acceptance of an application because of the period of time which had elapsed from the filing of the application with BIA and its transmittal to BLM. The Board rejected this argument, noting: "We are of the opinion that having recognized that the documents were held by the BIA past their respective due dates, the several applicants are equally absolved of blame, regardless of how long their individual submissions were delayed in the Anchorage agency." 5 IBLA 177. It is interesting to note that this decision issued prior to the Assistant Secretary's memorandum.

Similarly, in Schwalbe Nukwak, 18 IBLA 418 (1975), the application was signed on October 28, 1971, but was not filed by BIA with BLM until April 3, 1972. While the Board affirmed the rejection of the Native allotment application, the basis was not that it had been untimely filed but rather that appellant had not initiated use until after the repeal of the allotment act. In Raymond Paneak, 19 IBLA 68 (1975), this Board permitted the allotment applicant to partially amend his application since the Board found that the misdescription in the original application had been occasioned by the difficulty in identifying the desired land on a protraction diagram. In Paneak the original application had not been filed with BLM until March 24, 1972.

There are situations in which this Board has rejected Native allotment applications as untimely. Thus, in Jessie Jim, 22 IBLA 54 (1975), rejection of an application which was signed after the repeal of the Native allotment act was affirmed. In George Ondola, 17 IBLA 363 (1974), a subsequent application was treated as an amendment, because the second application had been received by BIA after repeal of the allotment act. In Nora L. Sanford, 43 IBLA 74 (1979), an application filed with BLM after December 18, 1971, was rejected because the statement of BIA did not contend that an application embracing the parcel in question had actually been on file with BIA. Rather, BIA simply stated that the parcel should have been included in the original application.

While the record is something less than crystal clear that the amendment including Tract B was pending in the Department on the crucial date, we will assume for the purpose of this decision that it was in the Department on or before December 18, 1971, and therefore was a viable application.

[2] Counsel for Opheim has challenged the appeal of the Ouzinkie Native Corp. on the basis that (a) Ouzinkie has no standing to appeal because it is not a "party" to the proceeding below, and (b) even if Ouzinkie had such standing, "its appeal should be summarily dismissed

as not in accord with departmental regulations." Opheim asserts directly that Ouzinkie is not a "party to a case" within the ambit of 43 CFR 4.410 since it did not participate in the case below.

Opheim's challenge to Ouzinkie's standing to appeal should be placed in the context of whether Ouzinkie has standing to contest a Native allotment application. In State of Alaska, 41 IBLA 315, 86 I.D. 361 (1979), we found that the State of Alaska has standing to appeal BLM decisions to the Board of Land Appeals where State selection applications were rejected by these decisions. The State also has standing under Departmental regulations to initiate private contests against such conflicting Native allotment applications. BLM in its decision dated June 24, 1977, recognized the State's standing to initiate a private contest or to appeal to this Board.

In State of Alaska, 40 IBLA 79, 84 (1979), we said in the context of contest proceedings:

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.

Ouzinkie has a claim to an interest in the land equal to the State's claim of interest. Ouzinkie's application (AA-6688-A) for the lands in T. 26 S., R. 19 W., Seward meridian will not be deemed to include the lands awarded to Opheim by BLM's decision, if that decision were to become final. As such Ouzinkie is a party to a case who has been adversely affected by a decision of the BLM and as such has standing to appeal pursuant to 43 CFR 4.410. Contrary to Opheim's assertion, standing to appeal is not determined by whether a party is mentioned in a BLM decision, instead the determination is whether a party is adversely affected by a BLM decision.

Opheim also suggests that Ouzinkie's appeal should be summarily dismissed as not in accord with Departmental regulations. Specifically, Opheim attacks the notice of appeal filed by Ouzinkie as not complying with 43 CFR 4.413 which provides in pertinent part:

The appellant must serve a copy of the notice of appeal and of any statement of reasons, written arguments,

or briefs on each adverse party named in the decision appealed from, in the manner prescribed in §4.401(c), not later than 15 days after filing the document. Failure to serve within the time required will subject the appeal to summary dismissal as provided in § 4.402.

Ouzinkie's notice of appeal was filed July 11, 1977. Opheim was first made aware of the appeal on August 24, 1977, when he received a copy from BLM. Ouzinkie served Opheim with the notice of appeal on September 2, 1977. Although the service did not comply with section 4.413, we note that the clear language of section 4.413 provides that, "Failure to serve within the time required will subject the appeal to summary dismissal." Dismissal under section 4.413 is not mandatory. Opheim does not allege nor do we perceive any prejudice from the delay of service. The failure to timely serve is not a fatal defect nor is dismissal of the appeal a necessary penalty. As a result, we decline Opheim's invitation to dismiss the appeal for noncompliance.

Opheim also alleges that the statement of reasons is inadequate. A statement of reasons in support of an appeal which does not point out affirmatively in what respect the decision appealed from is in error does not meet the requirements of the Department's rules of practice and may be dismissed. Duncan Miller, 41 IBLA 129 (1979). Ouzinkie's statement of reasons, although brief, was sufficient to notify the Board of the error below and avoid dismissal.

In the context of this case, it is appropriate to remand the case to BLM with instructions to permit appellant 60 days, from service of notice to be given by BLM to appellant, in which to file a contest against appellee's Native allotment application for Parcel B. Appellant is at liberty to set forth all grounds it deems appropriate and relevant. If appellant fails to initiate such a contest timely, the allotment will be approved, all else being regular. If the contest is timely initiated, action on the Native allotment application will be held in abeyance, pending termination of the contest proceedings. See State of Alaska, supra.

Therefore, pursuant to the authority delegated to Board of Land Appeals by the Secretary of Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for appropriate action consistent herewith.

Frederick Fishman
Administrative Judge

I concur:

James L. Burski
Administrative Judge

ADMINISTRATIVE JUDGE GOSS CONCURRING:

I concur in the remand to BLM. Prior to issuance of any Native allotment, BLM should refer the application to the Bureau of Indian Affairs for review of its certification that the 1972 application "does not infringe on other Native claims or area of Native community use." 43 CFR 2561.1(d). 1/ Under section 2561.1(d), initial reevaluation should be by BIA. If BIA should withdraw its certification, then under the regulation the allotment application must be rejected.

Joseph W. Goss
Administrative Judge

1/ Section 2561.1(d) provides:

"An application for allotment shall be rejected unless the authorized officer of the Bureau of Indian Affairs certifies that the applicant is a native qualified to make application under the Allotment Act, that the applicant has occupied and posted the lands as stated in the application, and that the claim of the applicant does not infringe on other native claims or area of native community use."

