

STATE OF ALASKA
v.
DORA DAVID AND
CATHY DICK

IBLA 79-483, 79-486

Decided March 21, 1980

Appeal from decisions of the Alaska State Office, Bureau of Land Management, partially rejecting State selection application. F-905.

Set aside and remanded.

1. Alaska: Land Grants and Selections: Generally -- Alaska: Native Allotments -- Appeals -- Contests and Protests: Generally -- Rules of 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 Statehood 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 notification to the State, it has an election. The State may initiate a private contest proceeding during the time prescribed to prove lack of qualification of the Native, or the State may await final decision from BLM and then appeal to this Board.

APPEARANCES: Barbara J. Miracle, Esq., Assistant Attorney General, State of Alaska, for State of Alaska; Tred Eyerly, Esq., Alaska Legal Services Corporation, Bethel, Alaska, for Dora David and Cathy Dick.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

The State of Alaska (State) appeals from two decisions of the Alaska State Office, Bureau of Land Management (BLM), holding the

Native allotment applications of Dora David, F-16950, and Cathy Dick, F-17896, for approval and rejecting in part the State of Alaska's selection application F-905 (Anch.), to the extent that it conflicted with the Native allotments. ^{1/} In each decision BLM allowed the State 30 days from receipt of the decision to initiate a private contest against the Native applicants pursuant to 43 CFR 4.450. The decisions stated that failure to initiate a private contest would "result in the Native allotment being approved and the State selection being rejected" to the extent of any conflict and that "[t]his action will become final without further notice." The BLM decision also indicated that the State had the right to appeal to the Board of Land Appeals pursuant to 43 CFR 4.400. The State was allowed 30 days from receipt of the decisions to file a notice of appeal. The State appealed within that time.

The State challenges the factual adequacy underlying the BLM determination that the allotment applicants had complied with the provisions of the Alaska Native Allotment Act of May 17, 1906. ^{2/} The State further alleges that it was not apprised of the allotment applications conflicting with its selection until the State received the decisions currently under review. The State contends that John Nusunginya, 28 IBLA 83, 87-90 (1976), and Natalia Wassilliey, 17 IBLA 348 (1974), require service of copies of all documents and proof filed in the Native allotment case. The State also maintains that Nusunginya, supra, requires BLM to initiate a Government contest where a State application conflicts with a Native allotment application. Finally, the State contends that the allotment application should not have been approved since the State filed its selection prior to the filing of the Native allotment applications.

[1] In recent decisions of the Board, subsequent to the issuance of the BLM opinions, we have examined the BLM procedures for resolution of conflicts between Native allotment applications and State selection applications. In State of Alaska, 41 IBLA 309 (1979), we held that where such a conflict exists and it appears to BLM that the Native applicant has met the requirements for patent, upon notification to the State, it has an election. The State may initiate private contest proceedings during the time prescribed to prove lack of qualification of the Native or the State may await a final decision from BLM and appeal to this Board pursuant to 43 CFR 4.400.

^{1/} The decision regarding Dora David was issued May 15, 1979. The BLM decision regarding Cathy Dick was issued May 21, 1979. Upon appeal they were assigned IBLA docket Nos. 79-483 and 79-486 respectively. We have sua sponte consolidated the appeals.

^{2/} Native Allotment Act of May 17, 1906, 34 Stat. 197, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed by the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976), with a proviso for approval of any allotment application pending before the Department on December 18, 1971.

At the time of the appeal, neither the State nor BLM was aware that an election was mandatory. Consequently, we will set aside the original decisions of BLM and afford the State a period of 30 days from receipt of notification by BLM that the case file has been received in the State office, to elect to file private contests or to allow the decisions to become final and timely appeal to this Board.

The State complains that it is not receiving copies of documents regarding the allotment application until the initial decision of BLM issues. The State contends it is entitled to service at an earlier date relying upon the language in Wassilliey, supra at 352, quoted in Nusunginya, supra at 88-89. The State misinterprets the cited language. The decisions require service upon the State once an initial determination of validity of the allotment application has been made. The State is not entitled to notification at an earlier time. This holding does not preclude the State from reviewing the BLM records to determine if conflicts exist between land selected by the State and land applied for under the Native Allotment Act. We also note that any difficulty the State may experience will be short lived, as only allotment applications pending before the Department on December 18, 1971, are subject to approval. See n.2, supra.

The third contention of the State has also been addressed in State of Alaska, supra, where we reaffirmed our holding in Nusunginya that BLM need not initiate a Government contest where a State selection application conflicts with a Native allotment application. BLM is to bring a contest against the Native applicant only where the evidence presented is insufficient to prove the Native's entitlement to the land.

The State's final argument is that, having filed its selection prior to the filing of the Native allotment, the State's selection should be given priority. The State further contends that the Alaska Native Allotment Act is a discretionary allocation of public lands, but the language of the Alaska Statehood Act is nondiscretionary, therefore the State selection should be given priority. The State cites Mountaineering Club of Alaska, Inc., 19 IBLA 198 (1975), as authority. The crucial distinction between the instant case and Mountaineering Club is that if the Natives used and occupied the land according to the prerequisites of the Allotment Act prior to the State selection application, the land was not vacant, unappropriated or unreserved under the statute and as such not available for State selection. State of Alaska v. Daniel Johnson, 42 IBLA 370 (1979), 86 I.D. 441 (1979); State of Alaska v. Mattie B. Bartos, 42 IBLA 269 (1979). The appellant in Mountaineering Club had no prior right or superior interest when it filed its petition application pursuant to the Recreation and Public Purposes Act of June 14, 1926, as amended, 43 U.S.C. § 869 (1976).

Since, as noted above, the State has not been afforded an opportunity to make an informed election, it is appropriate that it be afforded an opportunity at this time. 3/

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

James L. Burski
Administrative Judge

3/ The State has made arguments concerning the adequacy of the type of occupancy alleged by the Natives. We reserve ruling on this issue in view of the procedural resolution of this appeal.

