

STATE OF ALASKA
v.
JOAN M. NEWHALL

IBLA 79-287

Decided April 21, 1980

Appeal from a decision of Alaska State Office, Bureau of Land Management, partially rejecting State selection application AA-2036 and A-060527.

Set aside and remanded.

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

When 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 BLM that the Native applicant has met the requirements for patent, BLM must notify the State that, if dissatisfied, it has an election of remedies. The State may not appeal from the "Notice," which is interlocutory, but it may initiate private contest proceedings to prove lack of qualifications on the part of the Native, or it may appeal the subsequent decision of BLM 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, but if it finds the allotment application acceptable, it will order the patent issued, if all else be regular.

APPEARANCES: Barbara J. Miracle, Assistant Attorney General, Anchorage, for the State of Alaska; Bruce C. Twomley, Alaska Legal Services Corporation, for Native allotment applicant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The State of Alaska appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated January 31, 1979, approving the allotment application of one Joan M. Newhall.

On February 10, 1966, the State of Alaska filed an application for the parcel in dispute under the Mental Health Enabling Act, 70 Stat. 711. The State again applied for the land under the Statehood Act, 72 Stat. 339, on August 17, 1967. On June 16, 1972, the State reapplied for the land under the Statehood Act.

On July 7, 1970, Joan Newhall applied for a Native allotment for 160 acres of land under the Native Allotment Act of May 17, 1906, 34 Stat. 197, stating that she had used the land since 1963. Appellee's husband informed BLM that he and appellee used the parcel for fishing along the river which runs through it. In 1965 appellee left Alaska for health reasons and did not return until 1969.

Simultaneous with appellee's use of the land, a homesteader occupied the land. He filed a homestead entry application for the parcel, which was allowed on January 20, 1966, and which expired on January 19, 1971, when he failed to file the final proof. When the homestead entry expired, the parcel became subject to Public Land Order (PLO) No. 4582 of January 17, 1969, which had withdrawn all of Alaska from most forms of appropriation. PLO 4582 was revoked on December 17, 1971, by the Alaska Native Claims Settlement Act, 85 Stat. 688, section 17(d)(1), which withdrew the land from additional appropriation for an additional 3 months.

Two BLM field examiners conducted separate examinations of the parcel in question. The first examination, conducted on September 5, 1973, concluded that appellee's use and occupancy was confined to an area of 40 acres, as opposed to the 160 acres that she had applied for. The first field examiner recommended that appellee's application for the remaining 120 acres be rejected. The second examination, conducted by a different field examiner on September 16, 1975, found appellee's use of the land in the early 1960's to have been intermittent and confined to the area along the Little Susitna River. For the period following 1970 he found appellee's use of the land to be extensive albeit other parties had used the land and built cabins on it in addition to appellee.

As a result of these field examinations, BLM informed appellee that her application did not support a grant of a Native allotment because she had not complied with the requirements of the Native

allotment statute and regulations concerning substantial use and occupancy of the land. Appellee was advised that she had 60 days to submit additional information or her application would be denied. Although appellee did not submit any additional information in support of her claim, her attorney sent BLM a letter stating that he thought their interpretation of the law was incorrect and generally arguing on behalf of his client. On January 31, 1979, BLM held appellee's Native allotment for acceptance and rejected that part of the State's selection which conflicted with the allotment application. ^{1/}

The BLM decision indicated that the State had "30 days from receipt of the decision in which to initiate a private contest against the Native Allotment Application pursuant to Departmental regulation 43 CFR 4.450." The BLM decision also stated that "[f]ailure of the State to initiate a private contest within the time indicated above will result in the Native allotment being approved and the State selection being rejected as to the lands in Mrs. Newhall's allotment application. This action will become final without further notice." The 30th day after the State's receipt of the BLM decision was March 4, 1979. The State's notice of appeal, however, was dated March 6, 1979.

[1] Subsequent to the decision of BLM, this Board has issued a number of decisions exploring the procedures to be followed respecting the treatment of conflicts between Native allotment applications and State selections. See, e.g., State of Alaska, 42 IBLA 94 (1979); State of Alaska, 41 IBLA 309 (1979). In those decisions, the Board stated that where such a conflict exists and it appears to BLM that the Native applicant has met the requirements for issuance of the allotment certificate, upon notice of this determination the State, if dissatisfied, has an election of remedies. The State may not appeal from the "Notice," which is interlocutory, but it may initiate private contest proceedings during the time prescribed to prove lack of qualifications on the part of the Native. If the State elects not to do so, it may inform BLM or simply allow the time to lapse, whereupon BLM will issue a decision concluding the adjudication. The State may appeal this decision to the Board in accordance with 43 CFR 4.400. If, on appeal, the Board concludes that the Native's application is deficient, it will order the institution of Government contest proceedings. If it finds the allotment application acceptable, it will order the allotment certificate issued if all else be regular.

Moreover, this Board has specifically held that where, in a decision holding a Native allotment for approval and a State selection for rejection to the extent of the conflict, BLM grants the State 30 days

^{1/} We have set out, at some length, the factual background of this appeal in order to provide a framework for consideration of this appeal. We do not now, however, express any opinion relating to the propriety of any or all of the actions described.

to initiate a private contest challenging the Native allotment, the 30-day appeal period commences upon the expiration of the 30 days accorded the State for initiation of a private contest and not with receipt of the decision. State of Alaska v. Patterson, 46 IBLA 56 (1980); State of Alaska, 42 IBLA 94 (1979). Thus, the appeal herein was timely.

Finally, we noted in State of Alaska, 41 IBLA 309 (1979), that while the State was required to make an election of remedies, it was apparent that the State was unaware that the election was mandatory. Accordingly, since the appeal was filed in this case prior to the issuance of our decision in State of Alaska, 41 IBLA 309 (1979), we will set aside the original decision and afford the State a period of 35 days from receipt of this decision in which to file a private contest complaint. Accord, State of Alaska v. Patterson, supra. At the expiration of 35 days, the decision of BLM will become final and the State may take a timely appeal to the Board directed solely to the question of whether a Government contest complaint should issue.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case files are remanded for further action consistent with this opinion.

James L. Burski
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Joan B. Thompson
Administrative Judge

