

STATE OF ALASKA
v.
CORA JOHN SMITH

IBLA 79-432

Decided September 5, 1980

Appeal from decision of Alaska State Office, Bureau of Land Management, holding Native allotment application F-027073 for approval and rejecting, in part, State selection applications F-026789 and F-026809.

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 BLM 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 not appeal from an interlocutory decision which authorizes the State to initiate private contest proceedings to prove lack of qualification on the part of the Native. Rather, it may initiate the private contest within the time period prescribed, or it may appeal the decision of BLM, after it becomes final, 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 allotment issued, all else being regular.

APPEARANCES: Barbara J. Miracle, Esq., Assistant Attorney General, for the State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

The State of Alaska has appealed from a decision dated April 12, 1979, of the Alaska State Office, Bureau of Land Management (BLM), holding for approval Native allotment application F-027073, made pursuant to the Act of May 17, 1906, 34 Stat. 197, as amended (hereinafter the Alaska Native Allotment Act), and holding for rejection State selections F-026789 and F-026809 made pursuant to section 6(b) of the Alaska Statehood Act, 72 Stat. 339, as amended, 73 Stat. 141, 48 U.S.C.A. Chap. 2 (West Supp. 1979), to the extent of any conflict with the allotment application. 1/

BLM gave the State 30 days from receipt of the decision to initiate a private contest, 2/ pursuant to 43 CFR 4.450, challenging the applicant's compliance with the use and occupancy provisions of the Alaska Native Allotment Act. Under the decision, 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. The decision noted that "this action will become final without further notice."

The BLM decision also contained a standard appeals paragraph which provides that in accordance with the regulations in 43 CFR 4.400, the State of Alaska has the right of appeal to the Board of Land Appeals.

[1] The State of Alaska appealed to this Board within the 30 days in which it could initiate a private contest. However, the decisions appealed from were interlocutory in nature and not subject

1/ The State of Alaska has filed no statement of reasons for appeal. Under the applicable regulation, 43 CFR 4.402, the appeal of the State in such a case would be subject to summary dismissal. State of Alaska, 42 IBLA 94 (1979). The State of Alaska apparently relied on the relaxed procedural standards applicable to Native allotment appeals arising in Alaska. As we noted in State of Alaska, supra, those procedures, while expressly revoked for future appeals, would nevertheless be followed for all appeals then pending. This appeal was pending prior to that decision.

2/ The Board has recently held in State of Alaska v. Jimmie, 48 IBLA 370 (1980) that BLM in such a situation should give the State 60 days from receipt of the decision to initiate a private contest.

to appeal at that time. State of Alaska v. Jimmie, 48 IBLA 370 (1980); State of Alaska v. John, 46 IBLA 137 (1980); State of Alaska, 42 IBLA 94 (1979); State of Alaska, 41 IBLA 309 (1979). Upon notification by the BLM State Office that it intends to grant the Native allotment and reject the State selection to the extent of any conflict, the State of Alaska is required to make an election of remedies. It may initiate a private contest within the terms of the decisions; or it may permit the decisions to become final, waiving its right to bring a private contest, and then appeal to this Board for a determination whether a Government contest complaint should issue against the allotment claim. If, on appeal, the Board concludes that 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 allotment issued, all else being regular. See State of Alaska v. Jimmie, *supra*; State of Alaska v. David, 46 IBLA 177 (1980); State of Alaska v. John, *supra*; State of Alaska, 42 IBLA 94 (1979); State of Alaska, 41 IBLA 309 (1979).

The appeal in this case was filed prior to the issuance of the decision in State of Alaska, 41 IBLA 309 (1979), wherein the Board delineated the election of remedies which the State must make and, therefore, the State was unaware that an election was mandatory. Accordingly, we will set aside the original decision in order to afford the State time in which to file a private contest complaint. Upon receipt of this case file, the BLM Office will issue notice to the State of its return. The State will have 60 days from then within which to bring a contest. If the State does not do so within that time, the decision of BLM will become final and 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 remanded for further action consistent herewith.

Anne Poindexter Lewis
Administrative Judge

We concur:

Joan B. Thompson
Administrative Judge

Frederick Fishman
Administrative Judge

