

DANIEL JOHANSEN  
(ON RECONSIDERATION)

IBLA 75-603

Decided April 29, 1981

Petition for reconsideration of a Board decision affirming the rejection of Native allotment application AA 7759.

Petition for reconsideration granted; Daniel Johansen, 23 IBLA 292 (1976), and decision appealed from vacated; case remanded.

1. Alaska: Native Allotments

An Alaska Native allotment application is not approved under sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371, 2435 (1980), if the land is included in a State selection application but is not within a core township of a Native village. Under subsection (a)(4) of that section, such an application shall be adjudicated pursuant to the requirements of the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970).

2. Administrative Procedure: Adjudication--Administrative Procedure: Hearings--Alaska: Native Allotments--Alaska: Statehood Act--Hearings--Rules of Practice: Hearings

An application for a Native allotment must be rejected if the alleged use and occupancy commenced after the time that a state selection application was filed for the land. But where the Native allotment applicant alleges use and occupancy prior to the filing of a state selection application, it is improper

to reject his application without affording him notice and opportunity for a hearing, and BLM must initiate contest proceedings against the application. The State of Alaska must be given an opportunity to participate as a party to such contest.

3. Administrative Procedure: Adjudication--Administrative Procedure: Hearings--Alaska: Native Allotments--Alaska: Statehood Act--Rules of Practice: Hearings

If BLM determines that a Native allotment application that conflicts with a state selection application may be allowed without a Government contest against the Native allotment applicant, it must notify the State of Alaska of this determination. Upon such notification, the State, if dissatisfied, has an election of remedies. It may initiate a private contest within the time period prescribed in the notice, or it may appeal the decision of BLM, after it becomes final, to this Board. If the Board concludes that the Native's application is deficient, it will order the initiation of a Government contest. But if it finds the allotment application acceptable, it will order the issuance of a patent, if all else be regular.

APPEARANCES: James H. Holloway, Esq., Dillingham, Alaska, for appellant; James N. Reeves, Assistant Attorney General, for the State of Alaska.

#### OPINION BY ADMINISTRATIVE JUDGE LEWIS

Daniel Johansen has petitioned for reconsideration of our decision in Daniel Johansen, 23 IBLA 292 (1976), in which we affirmed the rejection of his Native allotment application, AA 7759. Appellant's application on its face stated that the applicant had not initiated qualifying use and occupancy of the three parcels applied for until 1964. As State selection applications covering these same lands had been filed in 1961, the land was segregated from entry at the time appellant alleged his initiation of use and occupancy. See 43 CFR 2627.4(b). Accordingly, BLM rejected Johansen's application by decision dated April 16, 1973.

Johansen appealed this decision to the Board, alleging, *inter alia*, that he used these lands in the traditional Native manner since 1950, first alongside his parents, then later on his own for hunting and fishing. He claimed that the 1964 date in the application was an error made in preparation of the application. Appellant furnished four witness statements, each of which was signed by a resident of Dillingham, Alaska, and in which each witness certified that he had known appellant all his lifetime, that he is acquainted with the land near Dillingham covered by his Native allotment, and that "by personal observation I know he has used and occupied said land for seasonal hunting and fishing in the traditional Native way prior to 1961 continuing up to the present time."

By order dated November 1, 1974, docket No. IBLA 73-382, this Board remanded the case record to afford appellant a reasonable further opportunity to submit additional evidence to establish entitlement. BLM wrote appellant that his application would have to be rejected because the lands were not unappropriated at the time he occupied them, and advised him that if he amended his application, he must give the reason for the error in the application and present convincing evidence of the actual use and occupancy which occurred at the earlier point in time. That letter also informed appellant that if he failed to respond, or if it is found that the evidence is still not satisfactory to meet the requirements of the law and regulations, adverse action would be taken on the application. He was allowed 60 days from receipt of the letter within which to submit the evidence.

No response was made by appellant. BLM again rejected the application because, after adequate notice, appellant had not presented clear and credible evidence of use and occupancy of the lands prior to the effective dates of the State selection applications. We affirmed. Shortly after issuance of our decision, the court in *Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976), held that a hearing was required where the Department proposed to reject a Native allotment application. Appellant petitioned for reconsideration of our decision because appellant felt that we had not given appropriate weight to his witnesses' statements and because he had not been given an opportunity for a hearing. The State of Alaska has entered an appearance, claiming its right to be heard in this matter.

While this petition was pending, Congress enacted the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371 (1980), which has a provision concerning Alaska Native allotments. It is therefore appropriate that we initially determine whether this provision affects the adjudication of this case.

[1] Section 905(a)(1) of that statute approved all Native allotment applications pending before the Department on or before December 18, 1971, which described either land that was unreserved on December 13, 1968, or land within the National Petroleum Reserve in

Alaska subject to valid existing rights, except where otherwise provided by other subsections of that section. Subsection 905(a)(4) concerns the adjudication of Native allotment applications which conflict with State selection applications. That subsection provides in pertinent part:

[W]here an allotment application describes land \* \* \* which on or before December 18, 1971, was validly selected by or tentatively approved or confirmed to the State of Alaska pursuant to the Alaska Statehood Act and was not withdrawn pursuant to section 11(a)(1)(A) of the Alaska Native Claims Settlement Act from those lands made available for selection by section 11(a)(2) of the Act by any Native Village certified as eligible pursuant to section 11(b) of such Act [i.e., a "core" township selection by an eligible Native village], paragraph (1) of this subsection and subsection (d) of this section shall not apply and the application shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended, the Alaska Native Claims Settlement Act, and other applicable law.

The three parcels for which appellant applied are not within the core township of a Native village, and because State selection applications have been filed for the land, the allotment is not approved by Congress and must be adjudicated pursuant to the provisions of the Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed, 43 U.S.C. § 1617 (1976). Roselyn Isaac (On Reconsideration), 53 IBLA 306 (1981).

[2] An application for a Native allotment must be rejected if the alleged use and occupancy commenced after the time that a state selection application was filed for the land. Roselyn Isaac (On Reconsideration), supra; Andrew Petla, 43 IBLA 186 (1979). But where the Native allotment applicant alleges use and occupancy prior to the filing of a state selection application, it is improper to reject his application without affording him notice and opportunity for a hearing, and BLM must initiate contest proceedings against the application. See Pence v. Kleppe, supra; Donald Peters, 26 IBLA 235, 83 I.D. 308 (1976); sustained on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976). The State of Alaska must be given an opportunity to participate as a party to such contest. See State of Alaska, 41 IBLA 315, 86 I.D. 361 (1979).

[3] If the BLM upon further review of this case determines that the allotment may be allowed without a Government contest against the Native allotment applicant, it must notify the State of Alaska of this determination. Upon such notification, the State, if dissatisfied, has an election of remedies. It may initiate a private contest within the time period prescribed in the notice, or it may appeal the decision of BLM, after it becomes final, to this Board. If the Board concludes

that the Native's application is deficient, it will order the initiation of a Government contest. But if it finds the allotment application acceptable, it will order the issuance of a patent, if all else be regular. State of Alaska, 42 IBLA 94 (1979).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is granted; our prior decision and the decision appealed from are vacated, and the case is remanded.

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Anne Poindexter Lewis  
Administrative Judge

We concur:

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James L. Burski  
Administrative Judge

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Edward W. Stuebing  
Administrative Judge

