

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting in part Native allotment application AA 7179.

Set aside and 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 sec. (a)(4), 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, as a general matter, to reject the application without affording the applicant notice and opportunity for a hearing.

3. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Generally -- Alaska Native Claims Settlement Act: Native Land Selections: State-Selected Lands

The Department of the Interior does not retain jurisdiction to hear a contest brought by the State of Alaska against an applicant for a Native allotment where the lands sought by the Native were tentatively approved to the State following commencement of the Native's use and occupancy. Section 906(c)(1) of the

Alaska National Interest Lands Conservation Act, confirming all tentative approvals of State land selections subject to valid existing rights, conveyed the lands in dispute out of Federal ownership so as to remove the contest from the Department's jurisdiction.

4. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Duty of Department of the Interior to Native Allotment Applicants

Where title to lands tentatively approved to the State of Alaska is conveyed to the State pursuant to the Alaska National Interest Lands Conservation Act, the Department of the Interior, although it loses jurisdiction over said lands, has a duty to Native allotment applicants whose claims lie within such tentatively approved lands to make a preliminary validity determination as to such applications and to pursue recovery of such lands where appropriate.

APPEARANCES: Bruce Balter, Esq., Alaska Legal Services Corporation, for appellant; and John M. Allen, Esq., Office of the Regional Solicitor, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Oleanna Hansen appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated July 16, 1982, which rejected, in part, her Native allotment application AA 7179. The application was filed pursuant to the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed, 43 U.S.C. § 1617 (1976).

Appellant's allotment application described three parcels. Parcel A is described as the NE 1/4 SW 1/4 sec. 23, T. 2 S., R. 53 W., Seward Meridian; parcel B consists of the SE 1/4 NW 1/4 NE 1/4 SW 1/4 NE 1/4 NE 1/4 sec. 4, T. 15 S., R. 51 W., Seward Meridian; parcel C encompasses the W 1/2 NW 1/4 sec. 19, T. 1 N., R. 54 W., and the E 1/2 NE 1/4 sec. 24, T. 1 N., R. 55 W., Seward Meridian.

Appellant's application stated, in response to question 8a, that she initiated use and occupancy of the three parcels applied for in January 1964. BLM's decision noted:

Under the provisions of the Act of July 7, 1958 (72 Stat. 339), Alaska Statehood Act, the State of Alaska filed general purpose grant selections in 1961 and received tentative approvals in 1963 for the land claimed in Parcels A and C of Native allotment AA-7179.

State selection A-054362, filed May 19, 1961, and tentatively approved September 3, 1963, covers lands within T. 2 S., R. 53 W., Seward Meridian (including Parcel A of Native allotment AA-7179); State selection A-054342, filed May 3, 1961, and tentatively approved September 6, 1963, covers T. 1 N., R. 55 W.,

Seward Meridian (including approximately 42 acres of Parcel C, AA-7179); State selection A-054343, filed May 3, 1961, and tentatively approved September 6, 1963, lies in T. 1 N., R. 54 W., Seward Meridian (including 60 acres of Parcel C, AA-7179).

As State selection applications covering the same lands had been filed in 1961, prior to the alleged date of use or occupancy, BLM held that the land was segregated from entry at the time appellant initiated her use and occupancy. See 43 CFR 2627.4(b). As a result, BLM rejected Hansen's application as to parcels A and C.

In her statement of reasons for appeal, appellant asserts that her use and occupancy of the subject parcels began in her childhood. She notes that she was born on November 15, 1932, and was, therefore, 28 years of age when the State of Alaska made its selection. Appellant states that she speaks English only as a second language and neither reads nor writes well. Appellant also avers that her application was prepared by an employee of the Bureau of Indian Affairs, and that she does not know why January 1964 was used as the date of her initial use and occupancy of the allotment. Appellant contends that neither she nor her counsel received notice of the deficiency of her application nor information regarding the conflict with the State selection until the BLM decision.

[1] Initially, we note that section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), 94 Stat. 2371, 43 U.S.C. § 1634(a)(1) (1982), 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, effective 180 days after the Act's passage. Subsection 905(a)(4), 43 U.S.C. § 1634(a)(4) (1982), 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 parcels for which appellant applied are not within the core township of a Native village and, since a State selection application has been filed for the and, the allotment was not automatically approved by the statute, but rather 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 (1982). Mary A. A. Aspinwall (On Reconsideration), 66 IBLA 367 (1982); Victor A. Anahonak (On Reconsideration), 64 IBLA 289 (1982); Daniel Johansen (On Reconsideration), 54 IBLA 295 (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. Mary A. A. Aspinwall (On Reconsideration), supra; Victor A. Anahonak (On Reconsideration), supra; Daniel Johansen (On Reconsideration), supra. But, where the Native allotment applicant alleges use and occupancy prior to the filing of a State selection application, the Board has held that it was improper to reject her application without affording her notice and opportunity for a hearing. See Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976); Donald Peters, 26 IBLA 235, 83 I.D. 308 (1976); sustained on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976).

[3] The problem in the instant case arises from the fact that the lands embraced within Parcels A and C of appellant's application were included in a State selection application which had been tentatively approved (TA'd) for conveyance to the State. Section 906(c)(1) of ANILCA provided, in relevant part, that:

All tentative approvals of State of Alaska land selections pursuant to the Alaska Statehood Act are hereby confirmed, subject only to valid existing rights under the Alaska Native Claims Settlement Act, and the United States hereby confirms that all right, title, and interest of the United States in and to such lands is deemed to have vested in the State of Alaska as of the date of tentative approval.

Subsequent to the adoption of ANILCA, questions arose as to the relationship of section 906(c)(1) confirming State title to TA'd lands and section 905(a)(4) which provided for adjudication of Native allotment applications on lands selected by or TA'd to the State of Alaska. The problem centered on the question of the authority of the Department to conduct contest proceedings concerning allotment applications embracing TA'd lands. Since section 906(c)(1) of ANILCA had confirmed title to TA'd lands in the State, subject only to valid existing rights, if the lands embraced by a pending Native allotment application were conveyed to the State by the Act, the Department would lack jurisdiction sufficient to adjudicate title under principles established by the Supreme Court in Germania Iron Co. v. United States, 165 U.S. 379 (1897), and recognized as recently as Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979).

This issue was first analyzed by the Board in a decision styled Alaska v. Thorson, 76 IBLA 264 (1983). In that decision, the Board held that lands embraced by pending Native allotment applications were not conveyed from United States ownership by the operation of section 906(c)(1) to the extent that the United States retained jurisdiction to adjudicate the allotment application.

Following rendition of this decision, however, BLM and the State petitioned the Director, Office of Hearings and Appeals (OHA), to assume jurisdiction of the case pursuant to 43 CFR 4.5(b), and reconsider the Board's

determination. By order of April 2, 1984, the Director, OHA, assumed jurisdiction. In a decision dated October 22, 1984, styled State of Alaska v. Thorson (On Reconsideration), 83 IBLA 237, 91 I.D. 331, the Director reversed the decision of the Board, holding that the operation of section 906(c)(1) of ANILCA did, in fact, deprive the Department of jurisdiction to determine the status of Native allotment applications embracing lands TA'd to the State.

[4] The Director noted, however, that:

This does not mean that Native allotment claimants are without a remedy or that the Department has no duty toward them. The Department does have a duty based on its special relationship to Alaska Natives and its responsibility under the 1906 Act to make a preliminary determination as to the validity of Native allotment applications and to pursue recovery of land where appropriate through negotiation with the State or litigation. This duty is recognized in subsection 905(a)(4) of ANILCA, 43 U.S.C. § 1634(a)(4) (1982), which provides that allotment applications to TA'd lands "shall be adjudicated pursuant to the requirements of the Act of May 17, 1906."

The situation here is in many respects similar to that which existed in Aguilar v. United States, supra, and the procedures which were stipulated in that case might be appropriate in this type of case as well. [Footnote omitted.]

Id. at 254, 91 I.D. at 341.

In light of the Director's ruling, it is clear that the proper avenue to follow is to set aside rejection of the allotment application and remand the case to BLM for a preliminary determination consistent with Aguilar v. United States, supra, as to whether the United States should institute proceedings for the recovery of the lands embraced within parcels A and C.

Accordingly, 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 remanded for further action consistent with this opinion.

James L. Burski
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Franklin D. Arness
Administrative Judge

