

IBLA 85-911 Decided November 13, 1987

Appeals from a decision of the Alaska State Office, Bureau of Land Management, determining that funds held in an escrow account should be deposited in the general fund of the United States Treasury. A-067674.

Reversed and remanded.

1. Appeals: Jurisdiction--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Timely Filing

An administrative appeal must be filed within 30 days of receipt of the decision from which an appeal is taken. 43 CFR 4.411. The timely filing of an administrative appeal is jurisdictional and the failure to file timely mandates dismissal of the appeal.

2. Alaska: Native Allotments--Mineral Lands: Nonmineral Entries

Prior to passage of sec. 905(a)(3) of the Alaska National Interest Lands Conservation Act of 1980, 43 U.S.C. § 1634(a)(3) (1982), lands containing valuable deposits of gravel were considered to be mineral lands unavailable for Native allotment.

3. Alaska: Native Allotments--Alaska Native Claims Settlement Act: Administrative Procedure: Interim Administration

The Act of January 2, 1976, P.L. 94-204, 89 Stat. 1146, as amended, 43 U.S.C. § 1613 Note (1982), provides that "all proceeds derived from contracts, leases, permits, rights-of-way, or easements pertaining to lands or resources of lands withdrawn for Native selection" pursuant to the Alaska Native Claims Settlement Act (ANCSA) shall be deposited in an escrow account which shall be held until the lands have been conveyed to the "selecting corporation or individual entitled to receive benefits" under ANCSA. Where lands embracing a valuable deposit of gravel are withdrawn for Native village selection under ANCSA, the proceeds of a material sale contract with the State for the right to mine and remove the gravel are properly placed in the escrow account.

Where the land is also within the boundary of an Alaska Native allotment claim pending before the Department on December 18, 1971, which was expressly protected by sec. 18(a) of ANCSA, 43 U.S.C. § 1617(a) (1982), and the selection by the Native village corporation is subsequently relinquished in favor of the Native allotment applicant, the proceeds in the escrow account for such land, upon conveyance to the allottee, are properly paid to the allottee as an individual entitled to receive benefits under ANCSA.

APPEARANCES: Robert M. Goldberg, Esq., Anchorage, Alaska, for Ahtna, Inc.; Lloyd Burton Miller, Esq., and Mary V. Barney, Esq., Washington, D.C., and Anchorage, Alaska, for Mary J. Sanford; E. John Athens, Jr., Esq., and Linda L. Walton, Esq., Assistant Attorneys General, State of Alaska, for the Alaska Department of Transportation and Public facilities; Barry F. Morehead, Division Administrator, and Robert B. Rutledge, Esq., Regional Counsel, for the U.S. Department of Transportation, Federal Highway Administration; Bruce E. Schultheis, Esq., U.S. Department of the Interior, Office of the Regional Solicitor, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Ahtna, Inc.; the State of Alaska, Department of Transportation and Public Facilities (State); the United States Department of Transportation, Federal Highway Administration (FHWA); and Mary J. Sanford have appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated August 9, 1985. The BLM decision directed that \$112,426.20, presently held in an escrow account, be deposited in the General Fund of the United States Treasury. The escrowed funds were paid by the State in connection with the mining and removal of gravel for highway construction on a tract of land referred to as the Pit 18 extension, adjacent to material site right-of-way A-067674.

Each of the various appellants claims entitlement, directly or indirectly, to either all or a portion of the escrowed funds. An understanding of the basis of the claims and a resolution of the issues raised by these appeals requires some background knowledge of the history of competing claims to the tract of land involved.

The evolution of this case centers around a parcel of land located within secs. 9 and 10, T. 7 N., R. 2 E., Seward Meridian, near the Native village of Gakona, Alaska. On May 6, 1966, the State, pursuant to the terms of 23 U.S.C. § 317 (1982), 1/ filed an application (A-067674) for a material

1/ 23 U.S.C. § 317 (1982), provides:

"(a) If the Secretary [of Transportation] determines that any part of the lands or interest in lands owned by the United States is reasonably necessary for the right-of-way of any highway, or as a source of materials for the construction or maintenance of any such highway adjacent to such lands or interests in lands, the Secretary shall file with the Secretary of the Department supervising the administration of such lands or interests in

site right-of-way within secs. 9 and 10 to extract gravel for the building of the Tok highway. BLM granted the right-of-way on July 26, 1966. The State thereafter extracted gravel from the right-of-way for construction of the highway.

On December 31, 1970, Sanford applied to the Bureau of Indian Affairs (BIA) for an allotment under the Alaska Native Allotment Act of 1906, 34 Stat. 197, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed subject to pending applications, 43 U.S.C. § 1617 (1982)). On Sanford's behalf, BIA filed the application and evidence of occupancy with BLM on December 27, 1971. Sanford's Native allotment application claimed use and occupancy of the land from the end of May to the beginning of October each year commencing in 1965 and continuing through 1970 when the application was executed. Claimed uses included fishing, trapping, and berrypicking. Claimed improvements included a tent and camping equipment.

The bulk of the lands embraced in the material site right-of-way previously issued to the State were within the boundary of Sanford's Native allotment claim (See Exh. B to Sanford Brief). By notice dated December 15, 1975, counsel for Sanford was advised that a portion of her Native allotment claim had been determined to be mineral in character due to the presence of sand and gravel, noting that Native allotments are restricted to nonmineral land and citing the regulation at 43 CFR 2561.0-3. Sanford was given an opportunity to rebut the finding. Subsequently, by decision dated February 5, 1985, Sanford's Native allotment application was held to be approved by section 905 of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), 43 U.S.C. § 1634 (1982), 2/ subject to the State's material site

fn. 1 (continued)

lands a map showing the portion of such lands or interests in lands which it is desired to appropriate.

"(b) If within a period of four months after such filing, the Secretary of such Department shall not have certified to the Secretary that the proposed appropriation of such land or material is contrary to the public interest or inconsistent with the purposes for which such land or materials have been reserved, or shall have agreed to the appropriation and transfer under conditions which he deems necessary for the adequate protection and utilization of the reserve, then such land and materials may be appropriated and transferred to the State highway department, or its nominee, for such purposes and subject to the conditions so specified.

"(c) If at any time the need for any such lands or materials for such purposes shall no longer exist, notice of the fact shall be given by the State highway department to the Secretary and such lands or materials shall immediately revert to the control of the Secretary of the department from which they had been appropriated.

"(d) The provisions of this section shall apply only to projects constructed on a Federal-aid system or under the provisions of chapter 2 of this title."

2/ Section 905(a) of ANILCA provides:

"(a)(1) Subject to valid existing rights, all Alaska Native allotment applications made pursuant to the Act of May 17, 1906 (34 Stat. 197, as amended) which were pending before the Department of the Interior on or

right-of-way, A-067674. A copy of the decision was served on counsel for Sanford. It appears from the Native allotment case file that no appeal was filed from this decision.

On December 18, 1971, section 11(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1610(a) (1982), was enacted into law and withdrew secs. 9 and 10 subject to valid existing rights, for selection by Native corporations under ANCSA. Subsequently, on December 4, 1974, pursuant to section 12 of ANCSA, 43 U.S.C. § 1611 (1982), Gakona, the Native village corporation, 3/ selected the lands within secs. 9 and 10. The conflict between Gakona's selection and Sanford's allotment application was resolved on December 15, 1981, when Ahtna, Gakona's successor in interest, relinquished its selection of the portion of secs. 9 and 10 that conflicted with the Sanford allotment.

On June 5, 1975, the FHWA, on behalf of the State, filed an application with BLM pursuant to 23 U.S.C. § 317 (1982), seeking to amend the State's material site right-of-way A-067674 by enlarging the original site to add approximately 78 acres. A substantial part of the additional area, known as the Pit 18 extension, was located within Sanford's allotment claim. The remainder of the tract conflicted with the Gakona selection. This extension was in the process of being adjudicated by BLM when Ahtna objected to granting the extension without some guarantee it would be compensated for the gravel that would be taken from the lands it had selected. 4/

While the application was pending adjudication, BLM received on July 22, 1976, a copy of a letter from the president of Gakona, Inc., to the State expressing no objection to the proposed expansion of the material site on the condition that BLM sell the material to the State for a price of

fn 2. (continued)

before December 18, 1971, and which describe either land that was unreserved on December 13, 1968, or land within the National Petroleum Reserve -- Alaska (then identified as Naval Petroleum Reserve No. 4) are hereby approved on the one hundred and eightieth day following the effective date of this Act, except where provided otherwise by paragraph (3), (4), (5), or (6) of this subsection, or where the land description of the allotment must be adjusted pursuant to subsection (b) of this section, in which cases approval pursuant to the terms of this subsection shall be effective at the time the adjustment becomes final. The Secretary shall cause allotments approved pursuant to this section to be surveyed and shall issue trust certificates therefor."

The other paragraphs describe circumstances under which the application would remain subject to adjudication under the Native Allotment Act of 1906.

3/ Appellant Sanford has indicated that in 1980, the Gakona Village Corporation, Ahtna Regional Corporation, and several other Native village corporations merged to form Ahtna, Inc. (Brief of Mary Sanford at 5 note 1). Thus, Ahtna became the successor in interest to Gakona.

4/ Although Native allotments were limited by statute to nonmineral lands, the mineral rights in lands withdrawn for selection by Native village corporations under ANCSA were subject to selection by the relevant regional corporation. See 43 U.S.C. § 1613(f) (1982).

\$0.67 per cubic yard, the funds be placed in an escrow account pursuant to P.L. 94-204, 5/ and an accounting be provided to Ahtna of the amount of material extracted (Exh. F to Sanford Brief). The file also contains a copy of a letter from the president of Ahtna expressing "no objection for Bureau of Land Management to sell the material to the Department of Highways" on similar conditions. Thereafter, on August 10, 1976, BLM received a "Statement of NonObjection" by Sanford to extension of the material site conditioned on the terms set forth in the letters from Gakona and Ahtna (Exh. G to Sanford Brief). Commencing in August 1976 the gravel was removed by the State from the Pit 18 extension for roadbuilding purposes, although the amendment to the right-of-way was never approved by BLM. 6/

Apparently concerned that BLM had authorized (or was about to authorize) free use of the gravel by the State pursuant to 23 U.S.C. § 317 (1982), by letter dated August 19, 1976, counsel for Ahtna filed an "appeal" of the decision to approve the amendment of right-of-way A-067674. The "appeal" was premature in light of the fact no decision to approve the amended right-of-way had issued. However, on September 23, 1976, the Department of the Interior issued an interim management policy which specifically addressed the issue. Regarding applications made under 23 U.S.C. § 317 (1982), the policy directive provided:

Unless the Native Corporation involved gives its consent in writing, the Secretary of Transportation, or his designee, shall be advised that the appropriation of materials pursuant to 23 U.S.C. 317 from lands withdrawn for selection by the Native Corporation is inconsistent with the purposes for which the land has been withdrawn and reserved.

(Memorandum from Assistant Secretary to Director, BLM, dated Sept. 24, 1976, Exh. L to Sanford Brief). The policy directive acknowledged there may be situations where it is "necessary and in the public interest for the Department to dispose of gravel or similar mineral material" in lands withdrawn for selection by Native corporations. The directive further provided that, pursuant to sections 1 and 2 of the Materials Act of 1947, as amended, 30 U.S.C. §§ 601, 602 (1982), where the Native corporation involved gives its consent sales may be negotiated or offered for bids, but "in no case will less than the appraised value be accepted." The policy directive specifically referenced the escrow provisions of the Act of January 2, 1976, P.L. 94-204.

Section 2(a)(1) of the Act of January 2, 1976, P.L. 94-204, as amended, provides:

5/ Act of January 2, 1976, P.L. 94-204, § 2, 89 Stat. 1146, as amended by, Act of December 2, 1980, P.L. 96-487, § 1411, 94 Stat. 2497, 43 U.S.C. § 1613 Note (1982).

6/ The application for amendment of the right-of-way was eventually rejected by decision of BLM dated May 20, 1981. (Exh. S to Sanford Brief). The reason given was that processing of the application would delay issuance of the interim conveyance for the lands involved.

During the period of the appropriate withdrawal for selection pursuant to [ANCSA] any and all proceeds derived from contracts, leases, licenses, permits, rights-of-way, or easements, or from trespass occurring after the date of withdrawal of the lands for selection, pertaining to lands or resources of lands withdrawn for Native selection pursuant to [ANCSA] shall be deposited in an escrow account which shall be held by the Secretary until lands selected pursuant to that Act have been conveyed to the selecting Corporation or individual entitled to receive benefits under such Act.

43 U.S.C. § 1613 Note (1982).

In an October 19, 1976, letter to Ahtna's vice president of operations, the Director, BLM explained that this interim management policy would be applied to the present case and that "[m]onies received from the sale of mineral materials on land withdrawn for possible Native selection will be placed in an escrow account as provided by Section 2 of the Act of January 2, 1976 [P.L. 94-204]."

Thereafter, the State and Ahtna engaged in negotiations to arrive at a fair market value for the gravel removed from the Pit 18 extension. In an agreement executed by Ahtna (April 18, 1979), Gakona (April 18, 1979), and the State (May 11, 1979), the State acknowledged that Ahtna or Gakona was entitled to the fair market value of 237,623 cubic yards of material extracted from the Pit 18 extension during the construction season of 1976 (Exh. M to Sanford Brief). The parties agreed to submit the issue of fair market value to a specified appraiser and to be bound by his appraisal, provided the appraisal was not less than \$71,300 nor more the \$130,700, and the State agreed to pay the appraised amount into escrow. By a subsequent "Agreement for 'Pit 18 Extension' Settlement," executed by Gakona (June 4, 1980), Ahtna (June 6, 1980), and the State (November 13, 1980), the State agreed for purposes of settlement that 277,595 cubic yards of material were removed with a fair market value of \$0.45 per cubic yard for a total of \$124,918 which were to be deposited in escrow pursuant to section 2 of the Act of January 2, 1976, P.L. 94-204 (Exh. N to Sanford Brief).

Resolution of the amount to be paid for removal of the gravel by the State from lands selected by a Native corporation under ANCSA and the subsequent deposit of these funds in the escrow account did not resolve what would be done with escrowed amounts attributable to any portion of the selected lands not ultimately conveyed to a Native corporation. This issue became a critical one involving disposition of a substantial sum of money when Gakona relinquished its selection for those lands embraced in the Sanford Native allotment claim. The BLM decision under appeal states that on October 27, 1982, 10 percent of the lands in the Pit 18 extension were conveyed to Ahtna and thereafter payment of escrow funds to Ahtna in the amount of \$12,491.80 was authorized in 1984.

Section 2(a)(4) of the Act of January 2, 1976, P.L. 94-204, provides that any funds "which have been deposited in the escrow account pertaining to lands * * * selected [by a Native corporation] but not conveyed
due to

rejection or relinquishment of the selection, shall be paid, together with interest accrued, as would have been required by law were it not for the provisions of this Act [P.L. 94-204]." BLM concluded in its decision that the remaining funds in the escrow account (\$112,426.20) should be treated as proceeds of a Government material sale and deposited as earned income in the General Fund of the United States Treasury.

The various appellants in this case take issue, on different grounds, with the conclusion reached by the BLM decision. The State contends that if it were not for the withdrawal of the public lands for selection by Native corporations under ANCSA and the objection of Ahtna to free use of the material site resulting in the revised interim management policy, it would have received the requested extension of its material site free of charge under the authority of 23 U.S.C. § 317 (1982). In construing the language in section 2(a)(4) of P.L. 94-204, which states funds in escrow not paid to the Native corporation shall be paid "as would have been required by law were it not for the [escrow] provisions," the State asserts:

It is far more logical to construe the quoted section of Public Law 94-204 to mean that if the lands were not conveyed to the ANCSA corporations on whose behalf payment for materials was obtained, all parties would be returned to the position they would have occupied had ANCSA not applied, i.e., the funds returned to the state, which otherwise would not have deposited those funds.

(State of Alaska, Statement of Reasons (SOR) at 4).

The FHWA has filed a brief in support of the position argued by the State, pointing out that \$106,827.38 or 95.02 percent of the escrowed funds are Federal-aid highway funds "derived from the Highway Trust Fund and administered through the Federal-aid Highway Act (23 U.S.C. § 101 et seq.)." The FHWA argues that provisions of 23 U.S.C. § 317 (1982), authorize appropriation of material sites at no cost.

Appellant Sanford argues that her use and occupancy of the land commencing in 1965 followed by the filing of her application in 1970 defeats any subsequent claim to the gravel within her Native allotment. Sanford alleges her preference right to a Native allotment commences with the initiation of use and occupancy of the land and defeats claims to the land initiated after that date. Hence, appellant claims extraction of gravel in 1976 from the Pit 18 extension was an unauthorized trespass against appellant's Native allotment for which Sanford is entitled to compensation.

Appellant contends that under ANILCA, 43 U.S.C. § 1634(a)(3) (1982), the term "nonmineral" as used in the Alaska Native Allotment Act is expressly defined to include lands valuable for sand and gravel. Sanford also cites a passage from the legislative history of ANILCA in support of her contention this provision of ANILCA was intended to clarify, not alter, the meaning of the term "nonmineral" as used in the Native Allotment Act. Appellant further contends she is an individual entitled to receive benefits under ANCSA since her right to an allotment was protected when ANCSA repealed the Native

Allotment Act subject to pending applications, 43 U.S.C. § 1617 (1982), and hence, the Act of January 2, 1976, P.L. 94-204, provides authority for payment to her of the escrowed funds for gravel removed from her allotment.

Ahtna challenges the BLM decision below on the ground it is entitled to more than 10 percent of the proceeds of the sale of gravel from the Pit 18 extension because more than 10 percent of the gravel was removed from Ahtna land. Ahtna also argues it is entitled to compensation for its efforts to secure payment for removal of the gravel. Appellant asserts the extraction of the gravel in 1976 was a trespass and, hence, Ahtna is entitled to compensation on the basis of its proportionate share of the damages, *i.e.*, the share of the gravel removed from land later conveyed to it, under the trespass entitlement provisions added to the escrow law in 1980 by section 1411 of ANILCA. Section 2(a)(3) of the Act of January 2, 1976, as amended, 43 U.S.C. § 1613 Note (1982). Ahtna contends its share of the proceeds calculated under this method, rather than on the basis of the percentage of land conveyed, is greater than 10 percent. Ahtna argues its entry into the 1980 Agreement for Pit 18 Extension Settlement did not waive any right to assert a trespass. Ahtna requests an evidentiary hearing under 43 CFR 4.415 to determine the amount of gravel removed from land conveyed to Ahtna and the amount of interest the funds have earned since they were deposited.

Counsel for BLM has filed an answer in support of the decision under appeal. BLM argues the Letter of Intent Covering "Pit 18 Extension" Escrow entered into in 1980 by the State, FHWA, and BLM authorized the sale of the gravel pursuant to the Act of January 2, 1976, P.L. 94-204. BLM asserts that Gakona, Ahtna, and Sanford agreed to extraction of the gravel from the Pit 18 extension. Further, BLM contends that section 905(a)(3) of ANILCA, 43 U.S.C. § 1634(a)(3) (1982), enacted in 1980, allowed for the first time allotments on lands valuable for sand and gravel. BLM asserts Sanford's claim must fail because she could not have obtained an allotment of lands valuable for sand and gravel prior to passage of ANILCA on December 2, 1980. Further, BLM contends that Ahtna has already received its share of the escrow fund. Finally, BLM contends the State was not entitled to free use of material sites on Native-selected land after passage of the Act of January 2, 1976, and, hence, the funds should go to the United States Treasury.

Critical to the proper disposition of the escrow fund is an examination of the rights of the Native allotment claimant, Sanford. Her Native allotment application asserted commencement of use and occupancy in 1965. This was prior to the filing with BLM of the State's application for material site right-of-way (A-067674) under the provisions of 23 U.S.C. § 317 (1982), on May 6, 1966. The right-of-way was subsequently granted by decision of BLM dated July 26, 1966. However, Sanford's Native allotment application was not filed with BIA until December 31, 1970, and was not filed with BLM until December 27, 1971.

This Board has recently held that upon the vesting of the Native allotment applicant's statutory preference right after completion of the required five years of use and occupancy coupled with the timely filing of an application, the preference right relates back to the initiation of use and occupancy and takes preference over competing applications filed prior to the

Native allotment application. Golden Valley Electric Association (On Reconsideration), 98 IBLA 203, 205 (1987). The Board also held:

[T]hat to the extent prior use and occupancy by Natives afford any specific protections in the absence of an application to acquire title, it is "essential that acts of appropriation occur which would disclose to an observer on the ground that the land was under active development or use." United States v. Flynn, [53 IBLA 208, 236-37, 88 I.D. 373, 389 (1981).]

98 IBLA at 206. There is nothing in the record which shows such open and notorious use and occupancy of the land prior to the filing of the material site right-of-way application and its subsequent approval in 1966. Indeed, the supplemental Native allotment field report signed by the examiner on December 14, 1973, states that: "No actual physical evidence of use was found upon examination."

[1] Notwithstanding Sanford's assertion that material site right-of-way A-067674 was null and void ab initio as precluded by her statutory preference right, we find her challenge to the 1966 material site to be untenable for other reasons. As a threshold matter, no timely appeal was filed on behalf of Sanford from the February 5, 1985, decision of BLM declaring her Native allotment to be statutorily approved subject to the material site right-of-way granted in 1966. An appeal must be filed within 30 days of receipt of the decision under appeal. 43 CFR 4.411. The time limit is jurisdictional and the failure to file a timely appeal mandates dismissal of any attempted appeal of that decision at this time. See Ilean Landis, 49 IBLA 59 (1980).

[2] Further, we note that the Alaska Native Allotment Act limited Native allotments to "nonmineral" land. Act of May 17, 1906, ch. 2469, 34 Stat. 197. This statutory requirement is repeated in the relevant regulations promulgated under the Act. 43 CFR 2561.0-3. The question of whether valuable deposits of stone cause a tract of land to be mineral in character has been previously addressed in cases before the Department and the courts.

In an early case involving the question of whether lands embracing valuable deposits of stone are "mineral lands" excepted from a railroad grant statute, the Department held that lands chiefly valuable for the deposits of marble they contain may constitute mineral lands. Pacific Coast Marble Co. v. Northern Pacific Railroad Co., 25 L.D. 233 (1897). Thus, the Department held:

[L]ands containing valuable mineral deposits, whether of the metalliferous or fossiliferous class, of such quantity and quality as to render them subject to entry under the mining laws--that is, where they are more valuable on account of such mineral deposits than for agricultural purposes -- are "mineral lands" within the meaning of that term as used in the exception from the grants to the railroad company and to the State.

25 L.D. 247. Land containing a merchantable deposit of granite which was being mined and removed by a mining claimant was found by the Supreme Court to be mineral in character in Northern Pacific Railway Co. v. Soderberg, 188 U.S. 526 (1903). The Court held:

[M]ineral lands include not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture.

188 U.S. at 536-537.

Although neither of these cases dealt expressly with the issue of whether land chiefly valuable for a deposit of gravel is properly considered mineral land, the Department analyzed this question in Layman v. Ellis, 52 L.D. 714 (1929). ^{7/} Rejecting the contention that gravel is not a mineral because it does not have a "definite chemical composition," a characteristic true of locatable deposits of granite and limestone, the opinion quoted with approval the standard of mineral in character:

The mineral character of the land is established when it is shown to have upon or within it such a substance as--

(a) Is recognized as mineral according to its chemical composition, by the standard authorities on the subject; or--

(b) Is classified as a mineral product in trade or commerce; or--

(c) Such a substance (other than the mere surface which may be used for agriculture purposes) as possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts;--

And it is demonstrated that such substance exists therein or thereon in such quantities as render the land more valuable for the purpose of removing and marketing the substance than for any other purpose, and the removing and marketing of which will yield a profit; or, it is established that such substance exists in the lands in such quantities as would justify a prudent man in expending labor and capital in the effort to obtain it.

1 C. Lindley, American Law Relating To Mines and Mineral Lands, § 98 (1897). Applying this standard, the Department held gravel was properly classified as a mineral, found that gravel may have characteristics or properties "imparting to it utility and value in its natural state," and found it had not been shown the gravel deposit at issue derived its value "from the proximity between place of production and use." Layman v. Ellis, supra at 720. ^{8/}

^{7/} Overruling Zimmerman v. Brunson, 39 L.D. 310 (1910).

^{8/} It should be noted that certain materials useful for fill, grade, ballast, or base have never been regarded as locatable despite their marketability at a

Hence, the land embracing the gravel deposit was held to be mineral in character requiring cancellation of the homestead entry to the extent of the conflict.

In Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983), the Supreme Court examined the question of whether gravel was included in the scope of the reservation of "minerals" under the Stock-Raising Homestead Act of 1916, 43 U.S.C. §§ 291-302 (1982). The Court interpreted the "mineral reservation in the Act to include substances that are mineral in character (*i.e.*, that are inorganic), that can be removed from the soil, that can be used for commercial purposes, and that there is no reason to suppose were intended to be included in the surface estate." *Id.* at 53. Applying this standard, the Court found that the mineral reservation embraced gravel. *Id.* at 55 (citing Layman v. Ellis, *supra*).

Against this background, we must conclude that prior to passage of section 905(a)(3) of ANILCA in 1980, 43 U.S.C. § 1634(a)(3) (1982), lands valuable for gravel were considered to be mineral lands not available for disposition under the Alaska Native Allotment Act and the regulations promulgated pursuant thereto. A BLM mineral report dated July 5, 1973, prepared by H. L. Edwards, a mining engineer, appearing in the Native allotment case file, concluded that the southern portion of the Native allotment, including land embraced in the State's material site and the subsequent Pit 18 extension, was mineral in character. The report concluded that these lands "possess mineral materials in such quantity and quality as to be designated mineral in character" and, further, that a "market exists now for the material." Mineral Report at p. 4. This report was the basis for the December 15, 1975, notice to Sanford's counsel advising that a portion of her Native allotment claim had been determined to be mineral in character due to the presence of gravel.

Thus, prior to the passage of ANILCA in 1980, Sanford would not have been able to obtain an allotment for the land embracing the gravel deposit. Subsequent to passage of ANILCA, however, the presence of valuable deposits of gravel does not bar approval of a Native allotment. Agnes S. Samuelson, 56 IBLA 242, 244 (1981). The gravel deposit at issue in this case--the Pit 18 extension--was mined and removed during 1976. At that time the lands were classified as mineral in character and thus were unavailable for Native allotment although the lands and minerals were withdrawn under ANCSA and subject to selection by Native corporations thereunder. Sanford's Native allotment application was subject to rejection for the lands embraced in the gravel deposit as she was advised in the December 15, 1975, notice from BLM. If adjudication had proceeded in its proper sequence, Sanford's application would have been rejected as to the gravel lands prior to the material sale to

profit. United States v. Bienick, 14 IBLA 290, 298 (1974) (concurring opinion). However, specification grade material (meeting engineering specifications for the particular use) was regarded as locatable prior to the Act of July 23, 1955, § 3, 30 U.S.C. § 611 (1982). *Id.*

the State. However, before BLM had the opportunity to adjudicate her Native allotment application on this issue, the law was changed in 1980.

[3] Nonetheless, we conclude the legal authority for the material sale of the gravel from the Pit 18 extension to the State was provided by the Act of January 2, 1976, which states that thereafter "all proceeds derived from contracts, leases, permits, rights-of-way, or easements pertaining to lands or resources of lands withdrawn for Native selection pursuant to the Settlement Act shall be deposited in an escrow account which shall be held by the Secretary until lands selected pursuant to that Act have been conveyed to the selecting corporation or individual entitled to receive benefits under such Act." Act of January 2, 1976, P.L. 94-204, § 2(a), 89 Stat. 1146. Section 2(a) of the Act further provides that upon the expiration of the "selection or election rights of the corporation and individuals for whose benefit such lands were withdrawn, the proceeds derived from lands withdrawn but not selected or elected shall be paid as would otherwise have been required by law". *Id.* [Emphasis added.]

The land at issue in Sanford's Native allotment was clearly withdrawn for Native selection pursuant to the terms of ANCSA. When section 18(a) of ANCSA repealed the Alaska Native Allotment Act, it provided that any application for allotment pending before the Department on December 18, 1971, may, "at the option of the Native applicant," be approved under the Native Allotment Act. ANCSA, § 18(a), 43 U.S.C. § 1617(a) (1982). Section 18(a) further provided that a Native exercising the option to receive patent to a Native allotment "shall not be eligible for a patent" for a primary place of residence under section 14(h)(5) of ANCSA, 43 U.S.C. § 1613(h)(5) (1982). Thus, in pursuing her Native allotment application subsequent to enactment of ANCSA, Sanford has exercised her option under section 18(a) of ANCSA and elected not to pursue an application under the primary place of residence provisions of section 14(h)(5) of ANCSA. Hence, Sanford qualifies as an "individual entitled to receive benefits" under ANCSA. It follows that once the lands have finally been conveyed to Sanford, the balance of the escrow funds shall be paid to Sanford.

In light of our holding that Sanford, as an individual entitled to receive benefits under ANCSA, is entitled to receive the balance remaining in the escrow fund, we need not reach the claim of the State and FHWA as to the proper distribution of escrow funds for lands not conveyed.

Regarding the claim of Ahtna for a larger share of the escrow fund, we find that appellant's challenge is untimely. The record contains a copy of a memorandum dated February 16, 1984, from BLM to BIA advising of the interim conveyance to Ahtna of "a fraction (10%) of lands embraced in AA-44583 [the Pit 18 extension] (separated from A-067674 for escrow purposes), for which revenues were received and deposited to the escrow account * * * established by Sec. 2(a) of Public Law 94-204 (89 Stat. 1146)" (Exh. R to Sanford Brief). The memorandum further stated that "Release of these funds, with accrued interest, constitutes the total amount from AA-44583 due to Ahtna, Inc." The file copy of the memorandum reflects that a copy was provided to Ahtna. In light of this prior disbursement decision, we are simply unable to find the Ahtna appeal filed August 9, 1985, is a timely appeal. As noted

previously, an appeal must be filed within 30 days of receipt of the decision under appeal. 43 CFR 4.411. A timely appeal is jurisdictional and the failure to file within 30 days requires dismissal of the appeal. See Ilean Landis, supra.

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 reversed and the case is remanded to BLM for action consistent herewith.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Kathryn A. Lynn
Administrative Judge
Alternate Member

