

Editor's note: Appealed -- Court held Quiet Title Act barred challenge, Civ.No. A91-254 (D.Alaska Dec. 23, 1992); aff'd No. 93-35195 (9th Cir. Aug. 10, 1994), 33 F.3d 59 (table)

KOOTZNOOWOO, INC.

v.

HEIRS OF JIMMIE JOHNSON

IBLA 87-497

Decided June 8, 1989

Appeal from a decision by Administrative Law Judge Harvey C. Sweitzer dismissing a private contest complaint filed by Kootznoowoo, Inc., against Native Allotment Application AA-6588, filed by Jimmie Johnson.

Reversed in part and affirmed in part.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Valid Existing Rights--Alaska Native Claims Settlement Act: Generally--Conveyances: Generally

If a proper party lodged a timely protest of a Native allotment application filed pursuant to the Act of May 17, 1906, 34 Stat. 197, that application is removed from the automatic vesting provisions of ANILCA, and is adjudicated pursuant to the Act of May 17, 1906. If, after adjudication, BLM issues a decision holding the Native allotment application for approval, the adjudicatory process had been carried to the point of a BLM decision on the merits of the application. Having preserved his rights under section 905(a)(1) of ANILCA, the party is entitled to initiate a private contest upon receipt of notice of BLM's intent to grant the Native allotment.

When the decision holding the Native allotment application for approval also rejects a selection application filed pursuant to ANCSA, and affords the Native village corporation the opportunity to initiate a private contest, the Native village corporation has a choice regarding how to continue its objections to the approval of the Native allotment application. It may initiate a private contest or allow the decision to become final and appeal from that decision. If it elects to file a private contest, it is not required to pursue an appeal.

2. Administrative Authority: Generally--Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Valid Existing Rights--Patents of Public Lands: Suits to Cancel--Public Lands: Jurisdiction Over

An Alaska Native allotment which has not automatically vested pursuant to ANILCA is properly adjudicated under the Act of May 17, 1906. The question of the validity of the application is separate and apart from the issue of the ownership of the lands named in the application, and the Department has the jurisdiction to address this question, even though the lands described in the application may have been congressionally conveyed to another party. The Department had an ongoing trust obligation to Alaska Natives, and therefore retains jurisdiction to determine the validity of the Native allotment application. This action is necessary in order to determine whether it is necessary for the Department to take action to recover the land for the benefit of the Native applicant.

3. Alaska: Native Allotments--Contests and Protests: Generally--Rules of Practice: Private Contests

An Alaska Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of the land for a minimum period of 5 years. Such use and occupancy contemplates substantial actual possession or use of the land, at least potentially exclusive of others. In a private contest initiated by a Native corporation following a BLM decision holding the Native allotment for approval, the Native corporation carries the burden of showing by a preponderance of the evidence that the Native allotment application is not valid.

4. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Valid Existing Rights--Alaska Native Claims Settlement Act: Generally--Conveyances: Generally

A conveyance to a Native corporation under ANCSA is subject to valid existing rights. A conflicting application based on settlement and occupancy maintained under laws leading to acquisition of title is properly excluded from an ANCSA conveyance.

APPEARANCES: Ray D. Gardner, Esq., Anchorage, Alaska, for appellant, Kootznoowoo, Inc.; Mark Butterfield, Esq., Anchorage, Alaska, for appellees, Heirs of Jimmie Johnson.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Kootznoowoo, Inc. (Kootznoowoo), has appealed from an April 17, 1987, decision of Administrative Law Judge Harvey C. Sweitzer, Hearings Division, Office of Hearings and Appeals, dismissing Kootznoowoo's private contest complaint against Native allotment application AA-6588, filed by Jimmie Johnson (Johnson).

The starting point for setting out the pertinent facts leading to this appeal is the Act of May 17, 1906, 34 Stat. 197, commonly called the Alaska Native Allotment Act. The Native Allotment Act was enacted by Congress to provide a means for Alaska Natives to obtain title to lands they had used and occupied for a period of 5 years.

President Roosevelt had previously issued a proclamation withdrawing certain lands in Alaska for National Forests, and Admiralty Island was subsequently included among the lands in the Tongass National Forest. Proclamation of February 16, 1909, 35 Stat. 2226.

In 1959, Johnson filed Native Allotment Application Jun 01 1491 for lands totalling approximately 160 acres (Exh. K; see also Exh. 6). In 1961, that application was rejected (Exh. M).

In November 1971, Johnson submitted Native Allotment Application AA-6588. The lands described in Johnson's application are contained in two separate parcels located on Admiralty Island. Parcel A consists of approximately 10 acres ^{1/} located on the south shore of Favorite Bay, one-half mile southeast of Angoon, Alaska, and more particularly described as the SE[^] NW[^] sec. 31, T. 50 S., R. 68 E., Copper River Meridian, Alaska. Parcel B contains approximately 104 acres located on the east shore of Favorite Bay, 3 miles southeast of Angoon, more particularly described as the E\ sec. 9, T. 51 S., R. 68 E., Copper River Meridian, Alaska (Exhs. 3, 6, 7; Tr. 10). For purposes discussed below, Parcel B may be further divided into two tracts. Tract B1 is a 660-foot-wide strip of land along the west boundary of parcel B, which is the shore of Favorite Bay; tract B2 is the balance of parcel B. See Contestant's Supplemental Exh. 1; cf. Contestees' Supplemental Exh. 2.

In his application, Johnson stated that he was born June 16, 1879 (Exh. 3), but his exact age at the time he filed the application is

^{1/} Kootznoowoo claims the parcel is 2.9 acres (Contestant's Opening Brief at 2). In his affidavit, Edward J. Gamble, Sr., Mayor of Angoon, suggests it is 4.9 acres (Exh. H to Contestant's Complaint). Johnson's heirs claim the parcel is 10 acres (Contestees' Opening Brief at 1). Kootznoowoo withdrew its contest against parcel A at the commencement of the hearing, and no further evidence was introduced concerning its size. See Contestant's Opening Brief at 4; Tr. 10. A review of BLM materials suggests that the parcel is closer in size to 10 acres. See BLM's Decision of June 1, 1984, attached to Contestant's Complaint as Exh. G. The issue may be determined later by survey, if necessary.

uncertain. ^{2/} In any event, there is no question that he had reached adulthood by 1900. Johnson lived on parcel B year-round as a boy, then he moved to Angoon where he resided permanently (Exhs. 3, K, L). From 1900 to 1965 he used parcels A and B for seasonal subsistence (Exhs. 3, K, L).

In December 1971, the Alaska Native Claims Settlement Act (ANCSA), P.L. 92-203, 85 Stat. 70, 43 U.S.C. | 1601 (1982), was enacted. ANCSA repealed the Alaska Native Allotment Act, but kept alive those applications which were pending before the Department on December 18, 1971. 43 U.S.C. | 1617(a) (1982).

The Native village of Angoon then incorporated Kootznoowoo. On December 17, 1974, Kootznoowoo filed Native Village Selection Applications AA-6978-B and AA-6978-C, pursuant to ANCSA which overlapped and included a portion of the lands subject to Johnson's Native allotment application.

On December 2, 1980, the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96-487, 94 Stat. 2435, took effect. Section 506 of ANILCA provided for the conveyance of certain lands to Kootznoowoo in lieu of its prior selections. In addition ANILCA automatically approved Native allotment applications, if the lands sought were not within a withdrawal made prior to December 18, 1968, and if no protest was filed within 180 days. ANILCA, P.L. 96-487, | 905(a)(1) and 905(a)(5)(A).

Kootznoowoo took no action to reject the pending congressional conveyance in the manner provided in section 506(a)(8)(A) of ANILCA, and on June 1, 1981, Kootznoowoo's Native village applications AA-6978-B and AA-6978-C became null and void. See ANILCA, | 506(a)(8)(B); see also Contestant's Supplemental Brief at 3. That same day Kootznoowoo filed a protest against Johnson's Native allotment application (Exh. 9). ^{3/} In its protest, Kootznoowoo alleged that Johnson's use and occupancy was not potentially exclusive of others because he was acting as caretaker for the people of Angoon, that Johnson's occupancy of the lands was not substantially continuous, and that Johnson's Native allotment conflicted with prior Native community use. Johnson's allotment application was held for adjudication pursuant to the Act of May 17, 1906 (rather than receiving automatic approval pursuant to ANILCA), because the protest had been lodged and lands had been withdrawn as a part of the Tongass National Forest.

On January 28, 1983, Kootznoowoo filed a printed copy of ANILCA, section 506 with the Juneau Recording District for recordation (Contestees' Supplemental Exh. 1; Contestant's Supplemental Exh. 2; Contestant's Supplemental Brief at 5).

^{2/} In a proceeding to determine his heirs, it was found that Johnson "was born June 16, 1869, and died intestate at Juneau, Alaska, On February 15, 1975" (Order Determining Heirs, dated June 28, 1985, Probate IP SA 271N 84 (emphasis added)).

^{3/} The protest was actually filed on the 181st day. However, the 180th day was a Sunday, and thus the protest was filed in a timely manner. See State of Alaska, 95 IBLA 196, 198 n.2 (1987).

On June 1, 1984, BLM issued its decision holding Johnson's allotment claim for approval and rejecting Kootznoowoo's selection application for the lands described as tract B1 (Exh. G of Contestant's Complaint). The June 1, 1984, BLM decision contained the following provisions:

Kootznoowoo, Incorporated has 60 days from receipt of this decision in which to initiate a private contest against the Native allotment application pursuant to Departmental regulation 43 CFR 4.450 (copy enclosed).

Failure of the Native corporation to initiate a private contest within the time indicated above will result in the Native allotment being approved and the village selection being rejected as to the lands in Native allotment application AA-6588. This action will become final without further notice. The Native corporation has a 30 day appeal period which commences upon expiration of the 60 day period allowed for initiation of a private contest. (48 IBLA 229).

On August 2, 1984, Kootznoowoo filed its complaint initiating a private contest (Contestant's Complaint). On September 18, 19, and 20, 1985, the contest hearing was held before Judge Sweitzer at Angoon, Alaska. The parties submitted posthearing briefs, and a decision was rendered on April 17, 1987.

Judge Sweitzer found that the contest was untimely pursuant to the provisions of section 905(a)(5) of ANILCA, 43 U.S.C. | 1634(a)(5) (1982); that Kootznoowoo had the ultimate burden of proof by a preponderance of evidence in its private contest against Johnson's Native allotment; that Kootznoowoo failed to show that Johnson's allotment claim was invalid; that Johnson's heirs had shown by a preponderance of the evidence that Johnson's allotment claim was valid; that if the lands had been conveyed to Kootznoowoo, the matter should be referred to the Solicitor for appropriate action; and finally that the lands described in Johnson's Native allotment had not been legislatively conveyed to Kootznoowoo.

Kootznoowoo lodged a timely appeal of Judge Sweitzer's decision, contending that the decision is fundamentally flawed in several material respects. Kootznoowoo asserts that the contest was timely, and that Judge Sweitzer erred when finding that the Department had jurisdiction over the subject matter, misapplied the statutory procedure for adjudicating Native allotments, did not name the appropriate party to bear the burden of proof in the contest proceeding, and ignored the established standards of "exclusivity" relating to conflicting community use and occupancy.

[1] In his April 17, 1987, decision Judge Sweitzer found two reasons for finding appellant's private contest, which was filed on August 2, 1984, to be untimely and subject to dismissal. First, Judge Sweitzer stated that the enactment of ANILCA restricted the application of 43 CFR 4.450 for private contests of Native allotment claims because ANILCA limited the time within which a private contest could be brought to the 180-day period following ANILCA's enactment. On this point Judge Sweitzer is in error.

Section 905(a)(1) of ANILCA provides:

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 are pending before the Department of the Interior on or before December 18, 1971, and which describe * * * land that was unreserved on December 13, 1968, * * * 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 * * *.

* * * * *

(5) Paragraph (1) of this subsection and subsection (d) shall not apply and the Native allotment application shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended, if on or before the one hundred and eightieth day following the effective date of this Act--(A) A Native corporation files a protest with the Secretary stating that the applicant is not entitled to the land described in the allotment application, and said land is withdrawn for selection by the Corporation pursuant to the Alaska Native Claims Settlement Act; * * *.

Judge Sweitzer correctly noted that Kootznoowoo had lodged a timely protest of Johnson's Native allotment application. As a result, Johnson's Native allotment application was removed from the automatic vesting provisions of ANILCA and was properly adjudicated pursuant to the Act of May 17, 1906. On June 1, 1984, when BLM issued its decision holding Johnson's Native allotment application for approval, the adjudicatory process had been carried to the point of a BLM decision on the merits of the application. Having preserved its rights under section 905(a)(1) of ANILCA, Kootznoowoo was entitled to initiate a private contest upon receipt of notice of BLM's intent to grant the Native allotment. See State of Alaska v. Jimmie, 48 IBLA 370 (1980); State of Alaska v. David, 46 IBLA 177 (1980).

The second basis for Judge Sweitzer's dismissal of the contest was Kootznoowoo's failure to appeal the June 1, 1984, BLM decision. He reasoned that, by this decision, BLM had rejected Kootznoowoo's Native village selection application to the extent that the application conflicted with Johnson's claim. Finding that Kootznoowoo had failed to take a timely appeal from the June 1, 1984, decision, he then held that the decision effectively disposed of Kootznoowoo's protest. Judge Sweitzer also erred in this finding.

A careful reading of the June 1, 1984, decision reveals that when BLM issued its decision, Kootznoowoo had a choice regarding how it would continue its objections to the approval of Johnson's Native allotment. It could have initiated a private contest, as it did, or it could have elected to let the 60-day period run, allowing the decision to become final, and appealed from that decision. See State of Alaska v. Johnson, 42 IBLA 370, 376, 86 I.D. 441, 444 (1979). Having elected to file a private contest,

Kootznoowoo was not required to pursue an appeal. In fact, had Kootznoowoo filed an appeal after having filed the private contest, its appeal would have been dismissed as premature. The private contest initiated by Kootznoowoo was not subject to dismissal.

[2] After finding the case subject to dismissal Judge Sweitzer noted that one of the issues presented by Kootznoowoo made it necessary for him to deliberate and rule on the other issues before him. Kootznoowoo had challenged the jurisdiction of the Department to make a finding regarding the validity of Johnson's Native allotment application because, according to Kootznoowoo, the Department was deprived of the authority to issue a finding after the lands had passed to Kootznoowoo.

The issue of the Department's jurisdiction was again raised on appeal. Kootznoowoo argues that the Department lacks jurisdiction to grant Johnson's Native allotment application. According to Kootznoowoo, Congress directly conveyed the lands described in section 506(a)(3)(C) of ANILCA to Kootznoowoo, and as such the Department lacks jurisdiction over those lands.

Johnson's Native allotment application was properly adjudicated pursuant to the Act of May 17, 1906. The authority to conduct this adjudication is lodged with the Department. The question of the validity of the application is separate and apart from the issue of the ability to transfer the lands named in the application, and the Department has the jurisdiction to address this question, even though the lands described in the application may have been congressionally conveyed to Kootznoowoo. Judge Sweitzer recognized that if the Native allotment was valid, and the land had passed to Kootznoowoo, the Department had an ongoing trust obligation to determine the validity of the application. See Heirs of Doreen Itta, 97 IBLA 261 (1987); Matilda Titus, 90 IBLA 340 (1986); Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979). Therefore, the Department retained jurisdiction to determine the validity of Native allotment application AA-6588 regardless of any conveyance of the lands to Kootznoowoo. ^{4/} This action is necessary in order to determine whether it is necessary for the Department to take action to recover the land for the benefit of the applicant. Heirs of Doreen Itta, *supra* at 265.

Having determined that the Department retained jurisdiction to determine the validity of Johnson's Native allotment application, we will defer the question of whether the lands had been congressionally conveyed to

^{4/} If Kootznoowoo had elected not to file a protest and appealed the decision to this Board, Kootznoowoo would have been required to show, by a preponderance of the evidence, that the decision was in error. If sufficient error were shown, this Board would have ordered a hearing on the facts in accordance with the requirements of Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). In addition, if sufficient evidence were presented to raise a question of material fact, a hearing would be ordered, even though the evidence may be insufficient to support a reversal of the decision. See Heirs of Doreen Itta, *supra*.

Kootznoowoo. If Johnson's Native allotment claim is not valid, there is no reason to address this issue.

[3] We now turn to the validity of Johnson's Native allotment. Kootznoowoo also argues that appellees have not fulfilled the regulatory requirements for the grant of a Native allotment. On appeal, Kootznoowoo contends that Judge Sweitzer disregarded evidence which established that Johnson did not assert exclusive ownership of the land in his allotment. Appellant asserts that there is no evidence of record which would distinguish the allotment applicant's use of the area from any other Native resident. Relying upon the Board's decision in Andrew Petla, 43 IBLA 186, 199-201 (1979), Kootznoowoo argues that use of land in common with the entire community or familial relations is not "potentially exclusive" use which should qualify an applicant for a Native allotment.

Judge Sweitzer set forth a detailed summary of the testimony and evidence adduced at the hearing regarding Johnson's use and occupancy of the land (Decision at 15-16). We find no fault with his statement of these pertinent facts and find no reason to reiterate that statement. On pages 18 and 19 of his decision he set an accurate summary of the evidence pertaining to the question of whether Johnson's possession was potentially exclusive of others. Again we find no fault with the statement made by Judge Sweitzer in this respect and find no reason to set it out in this decision.

Kootznoowoo contends that the use of the land by other Natives constitutes a conflicting Native community use that invalidates Johnson's Native allotment claim, citing the provisions of 43 CFR 2561.1(d) in support of this contention. Evidence was submitted that members of the community used Tract B for hunting, fishing, and other subsistence (Tr. 56-57, 68, 126, 128, 182, 188, 227, 234, 418). However, we agree with Judge Sweitzer that the evidence submitted does not establish that Native community use predated Johnson's use, that it was more extensive than his use, or that it conflicted with his use or wishes. No evidence suggesting conflicting Native community use was found during the course of BLM's field investigation (Exh. 5). Although Kootznoowoo filed a protest alleging such conflicting use (Exh. 9), it did not then avail itself of the opportunity to submit evidence in support of this contention prior to the hearing (Tr. 320), nor has it submitted any substantial evidence on the issue on appeal.

The applicable regulation, 43 CFR 2561.0-5 provides:

(a) The term "substantially continuous use and occupancy" contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

BLM decisions issued pursuant to its delegated authority are presumed to be valid. It is the contestant in this proceeding who is the proponent of the rule or order in this case, viz., that BLM's decision was erroneous

and that Jimmie Johnson's Native allotment claim is, in fact, not valid. The burden of proof thus falls to contestant. See Seldovia Native Association, 95 IBLA 177, 180 (1987). The Native applicant has already shown to BLM's satisfaction that he is entitled to the allotment and BLM has determined that issue in his favor. Therefore, in order to prevail in this proceeding, contestant Kootznoowoo must establish by a preponderance of the evidence that BLM's decision was wrong. Id.; see also In re Pacific Coast Molybdenum Co., 75 IBLA 16, 22 (1983), and cases cited therein.

Our review of the record leads to the conclusion that Judge Sweitzer correctly found that Johnson's heirs have proven by a preponderance of the evidence that the Johnson Native allotment application No. AA-6588, was valid. We also agree with Judge Sweitzer that Kootznoowoo failed to pro-vide a preponderance of evidence to establish that appellee Johnson was not entitled to an allotment on the basis of substantially continuous use and occupancy. 5/

[4] Having ruled on the validity of the Johnson Native allotment application, we will determine whether it is necessary for the Department to take action to set aside the conveyance to Kootznoowoo in order to protect Johnson's rights, which are now vested in his heirs. On appeal Kootznoowoo argues that the grant language in section 506(a)(3) of ANILCA contains no reservation or delays that would support the Judge's conclusion that an immediate conveyance was not intended by Congress. Kootznoowoo asserts that the conveyance to Kootznoowoo was similar to the conveyances to the State of Alaska contemplated in subsection 906(c)(1) of ANILCA. This section of ANILCA provided for an immediate legislative conveyance of legal title to lands which had been tentatively approved for conveyance to the State of Alaska pursuant to the Alaska Statehood Act. Kootznoowoo argues that the decision in State of Alaska v. Thorson (On Reconsideration), 83 IBLA 237, 91 I.D. 331 (1984), supports its position that it also received an immediate congressional conveyance.

The Thorson decision, which concerned Native allotment applications in conflict with previously filed State selections, rejected the argument that the phrase "subject only to valid existing rights" in subsection 906(c)(1) of ANILCA permitted the Department to retain jurisdiction over the land for the purpose of resolving the conflicting claims. Finding that Congress intended an immediate conveyance of those lands which had been tentatively approved for conveyance to the State, even though those lands might be subject to "valid existing rights," the decision observes that "[a]s to the interests (i.e., valid existing rights) * * * embraced by a tentative approval, Congress clearly intended to transfer all of the underlying right, title, and interest of the United States to the State." Id., 83 IBLA at 246, 91 I.D. at 336.

5/ We agree with Judge Sweitzer's holding that the ultimate burden of proof in a private contest rests with the party initiating the private contest. See In re Pacific Coast Molybdenum Co., supra at 22; State of California v. Doria Mining & Engineering Corp., 17 IBLA 380, 389 (1974); Marvel Mining Co. v. Sinclair Oil & Gas Co., 75 I.D. 407, 423 (1968).

Kootznoowoo argues that Judge Sweitzer erred by attempting to distinguish the facts underlying the Thorson decision from the instant situation based on his conclusion that section 506(a)(3) of ANILCA excludes pending Native allotment applications from the legislative conveyance to Kootznoowoo, and that the reference to ANCSA in section 506(a)(8)(B) of ANILCA was intended to limit the legislative conveyances to Kootznoowoo.

Kootznoowoo contends that the legislative conveyances pursuant to section 506(a)(3) of ANILCA were unequivocal and Judge Sweitzer's determination that the Kootznoowoo conveyances were to be made pursuant to the regulations promulgated under ANCSA constitutes a nonsequitur because none of the ANCSA procedures were followed by Congress. Appellant contends:

The application procedures set forth in 43 C.F.R. | 2650.2 for general Native selections were not incorporated in the legislative conveyance. The regulations regarding public easements set forth in 43 C.F.R. | 2650.4-7 also were not included in the legislative conveyances. The selections were not published in the federal register as required by 43 C.F.R. | 2650.7. Nor were the restrictions on selections set forth in 43 C.F.R. | 2650.6 considered by Congress. The selection limitations imposed on village corporations pursuant to 43 C.F.R. | 2651.3 & 4 are not applicable to the legislative conveyance. In fact, none of the statutes or regulations involving the normal ANCSA selection and conveyance procedures were involved in the legislative conveyances to Kootznoowoo under Section 506 of ANILCA.

Section 506(a) of ANILCA, states in relevant part:

(3) Subject to valid existing rights, there is hereby granted to Kootznoowoo, Incorporated--

* * * * *

(C) All rights, title, and interest in and to * * * all the land from the mean high tide mark to a point six hundred and sixty feet inland of all shorelands * * * in and adjacent to the inland water from Kootznoowoo Inlet to the rangeline separating range 68 east and range 69 east, Copper River Base and Meridian, and including those parts of Mitchell, Kanalku, and Favorite Bay west of that line

* * * * *

(8)(A) The provisions of this section shall take effect upon ratification by appropriate resolution of all its terms by Kootznoowoo, Incorporated, or by its failure to take any action, within one hundred and eighty days of enactment of this Act.

* * * * *

(B) In the event that the provisions of this section are fully ratified by Kootznoowoo, Incorporated, the lands, interests therein, and rights conveyed by this section shall constitute full satisfaction of the land entitlement rights of Kootznoowoo, Incorporated, and Sealaska, Incorporated, and be deemed to have been conveyed pursuant to the Alaska Native Claims Settlement Act, and shall supersede and void all previous land selections of Kootznoowoo, Incorporated, pursuant to section 16 of that Act, * * *. [Emphasis added.]

We agree with Judge Sweitzer's finding that the conveyance to Kootznoowoo was subject to Johnson's Native allotment application. On a number of occasions the Board has held that conveyances to Native corporations pursuant to ANCSA are subject to valid existing rights. Kenai Natives Association, 87 IBLA 58, 62 (1985); Appeal of Raymond A. Kreig, 3 ANCAB 168, 86 I.D. 189 (1979); see sections 14(g) and 22(b) of ANCSA, 43 U.S.C. || 1613(g), 1621(b) (1982); 43 CFR 2650.3-1(a). Conveyances to Native corporations exclude any lawful entries which are maintained in compliance with laws leading to the acquisition of title. 43 CFR 2650.3-1(a); Kenai Natives Association, supra; Appeal of Raymond A. Kreig, supra. A right to a Native allotment requires a combination of qualifying use, occupancy, and the application describing the land. See United States v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981).

Kootznoowoo urges us to ignore the plain language of section 506(a)(8)(B) of ANILCA (according to Kootznoowoo, it has no direct applicability to its legislative conveyance) and find that section 14(g) of ANCSA is inapplicable to the question of whether Johnson's Native allotment constituted a valid existing right. Section 14(g) of ANCSA states in relevant part:

All conveyances made pursuant to this Act shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him.

In a memorandum to the Secretary, dated October 24, 1978, Solicitor Krulitz addressed the scope of the term valid existing rights under ANCSA. ^{6/} He stated, in part:

A fundamental principle of ANCSA is that "[a]ll conveyances made pursuant to this Act shall be subject to valid existing

^{6/} Secretarial Order No. 3029, 43 FR 55287 (Nov. 27, 1978) adopted Solicitor Krulitz' opinion "as the position of the Department on the subject of valid existing rights under ANCSA."

rights." In addition, the sections withdrawing land from Native selection (Sections 11(a), 16(a)) expressly provide that the withdrawal is "subject to valid existing rights." The revocation of prior reserves created for Natives is also "subject to valid existing rights." (Section 19(a)).

Although the phrase "valid existing rights" is not specifically defined in Section 3 "Definitions", both the statute and the legislative history offer guidance as to its meaning.

Section 14(g) provides in pertinent part: "Where prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement * * * has been issued * * * the patent shall contain provisions making it subject to the lease, contract (etc.) * * *."

Section 22(b) directs the Secretary "to promptly issue patents to all persons who have made a lawful entry on the public lands in compliance with the public land laws for the purpose of gaining title to homesteads, headquarters sites, trade and manufacturing sites or small tract sites, and who have fulfilled all the requirements of law prerequisite to obtaining a patent."

By regulation the Department has construed Sections 14(g) and 22(b) and provided the mechanism for implementing them. 43 CFR 2650.3-1(a) provides:

"Pursuant to sections 14(g) and 22(b) of the act, all conveyances issued under the act shall exclude any lawful entry or entries which have been perfected under, or are being maintained in compliance with, laws leading to the acquisition of title, but shall include land subject to valid existing rights of a temporary or limited nature such as those created by leases (including leases issued under section 6(g) of the Alaska Statehood Act), contracts, permits right-or-way [sic], or easements."

* * * * *

* * * I do not believe the listing of the rights to be protected was intended to be limiting, but rather was ejusdem generis. The regulation already quoted (43 CFR 2650.3-1(a)) precedes its list with "such as those created by * * *," indicating clearly that the list is not exhaustive. Furthermore, there is not longical [sic] reasons by Congress would have intended to protect rights of municipalities or individuals which lead to the acquisition of title under such Federal laws as the Townsite Act or the Homestead Act, but did not intend to protect the same municipality or individual when the law under which the rights are being perfected is a State law.

It is my conclusion, therefore, that the Department's regulations have construed "valid existing rights" under ANCSA to

include rights perfected or maintained under State as well as Federal laws leading to the acquisition of title. [Emphasis in original.]

Based on the foregoing it was concluded in the Appeal of Raymond A. Kreig, supra, that:

[V]alid existing rights are not limited to leases, contracts, permits, rights-of-way or easements mentioned in | 14(g) of ANCSA, but include other interests whether or not they are specifically set forth in ANCSA. Included within the meaning of the term valid existing rights are interests which are of a temporary or limited nature and interests which lead to the acquisition of title. Furthermore, if such interests were created prior to ANCSA they are to be considered valid existing rights if they have been perfected or if they are being maintained in conformance with the law under which they were created.

The congressional conveyance of the lands described in section 506(a)(3)(A) of ANILCA was subject to valid existing rights. This conveyance became effective pursuant to the provisions of section 506(a)(8) of that Act. Under section 506(a)(8)(B), the land was "deemed to have been conveyed pursuant to [ANCSA]." See sections 14(g) and 22(b) of ANCSA, and the regulations promulgated thereunder.

We have determined that on June 1, 1981, Johnson's Native allotment application was pending before the Department. Because of the protest and the lands being within a National Forest, the lands subject to Johnson's application did not automatically vest pursuant to ANILCA, and his application was adjudicated pursuant to the Act of May 17, 1906, 34 Stat. 197. ^{7/} Following adjudication the Department found the application to be valid and held the application for approval. Kootznoowoo initiated a private contest, and the application was again found to be valid. On appeal we find nothing to cause us to overturn Judge Sweitzer's determination regarding the validity of Johnson's application. Johnson's application created a valid existing right as to the land described in his application. This right was in existence on June 2, 1981, and the land did not pass to Kootznoowoo on that date.

We do not deem it necessary to belabor this decision with additional references to other errors of fact and law alleged by Kootznoowoo, except to the extent they have been expressly or impliedly addressed in this decision, they are rejected on the ground they are, in whole or in part, contrary to the facts and law or are immaterial. National Labor Relations Board v. Sharples Chemicals, Inc., 209 F.2d 645, 652 (6th Cir. 1954).

^{7/} The underlying purpose of this adjudication is to determine if the applicant has met the requirements of the Act, thus obtaining a valid existing right. This right vests when the statutory requirements are met, rather than when adjudication had been completed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the dismissal of Kootznoowoo's contest is reversed and Judge Sweitzer's decision is affirmed in all other respects.

R. W. Mullen
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge