

KATHERINE C. (ZIMIN) ATKINS  
v.  
BUREAU OF LAND MANAGEMENT  
BRISTOL BAY HOUSING AUTHORITY, INTERVENOR

IBLA 89-176

Decided October 29, 1990

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., reinstating Native allotment application A-059281.

Affirmed; case remanded for adjudication.

1. Alaska: Native Allotments--Applications and Entries: Relinquishment

The Administrative Law Judge properly determined that relinquishment of a Native allotment application was not knowing and voluntary. The language of a letter accompanying relinquishment, the request for BLM advice, and testimony at a subsequent hearing demonstrated that the relinquishing applicant did not grasp the full legal consequences of executing a relinquishment.

2. Alaska: Native Allotments

A reinstated Native allotment application will not be legislatively approved if legislative approval would effect a taking of an asserted valid existing right without providing the holder notice and the opportunity for a hearing.

APPEARANCES: Mark Butterfield, Esq., Anchorage, Alaska, for Katherine C. (Zimin) Atkins; Bruce E. Schultheis, Esq., Anchorage, Alaska, for the Bureau of Land Management; and James F. Vollintine, Esq., Anchorage Alaska, for Bristol Bay Housing Authority.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Bristol Bay Housing Authority (BBHA) has appealed from a November 30, 1988, decision by Administrative Law Judge John R. Rampton, Jr., that Katherine C. (Zimin) Atkins' relinquishment of Native allotment application A-059281 was unknowing and involuntary, and reinstating the application.

On December 23, 1964, Katherine C. (Zimin) Atkins 1/ filed Alaska Native allotment application No. A-059281 and evidence of occupancy, seeking 2.23 acres of land located in sec. 11, T. 17 S., R. 47 W., Seward Meridian, South Naknek, Alaska. In her application she claimed occupancy of the identified lands since August 1949.

On July 30, 1958, the land subsequently embraced by Atkins' Native allotment application was included within a townsite application filed by the South Naknek Village Counsel. The townsite was surveyed in the summer of 1967, and the land described in Atkins' application was identified on the ground and designated as lot 2, block 16, and lot 8, block 17 in U.S. Survey No. 4879, which was accepted on August 31, 1972. At the time of the survey, and its approval, a portable Quonset hut owned by Atkins was located on lot 8, block 17, and there were no improvements on lot 2, block 16.

On November 9, 1967, Atkins filed a printed form letter and transmittal letter with the Alaska State Office, Bureau of Land Management (BLM). The form letter was a relinquishment of her Native allotment application. The transmittal letter stated in part, "I have signed the enclosed Entry Number relinquishment form in good faith, trusting it will not in any way hamper my claim for the described land or portion of same at South Naknek." The form letter relinquishment was apparently filed in response to a BLM request that she relinquish her application to expedite issuance of the townsite patent. 2/

After Atkins filed the relinquishment of her Native allotment application, the lands described in the application were deemed a part of the townsite. The process ultimately led to the Atkins parcel being occupied by persons other than Atkins. In 1973 BLM's townsite trustee applied for patent, but no patent and no deeds to the townsite lots have been issued.

Nevertheless, BLM's townsite trustee and local housing officials proceeded on the presumption that the lands would be conveyed under the townsite procedures. On February 25, 1976, BBHA entered into a cooperation agreement with the South Naknek Village Council to build an unspecified number of "units of low-rent housing" within the townsite (BBHA Exh. L). No specific parcel of land was either identified in or dedicated to the cooperation agreement. On July 18, 1977, BBHA wrote to BLM notifying BLM that BBHA had "selected and programmed [certain lands in South Naknek] for low income housing units this construction season" and requested that "the

1/ The Alaska Native allotment application was filed by Katherine C. Zimin, a widow at the time of filing, who subsequently remarried. For convenience we will use the name Atkins when referring to her.

2/ On Nov. 1, 1967, the Bristol Bay Resource Area Manager, BLM wrote Atkins asking her to relinquish her Native allotment claim so that BLM could "proceed as fast as possible with the processing of the survey and the passing of title to the lands [Atkins was] claiming as part of the townsite."

lands identified be examined to determine conflict with any other entry or claim, with result of examination provided in written form to Housing and Urban Development, Anchorage Insuring Office, 334 W. 5th Avenue, Anchorage, Alaska 99501" (BBHA Exh. E). BBHA's July 18, 1977, letter identified (among other lands) lot 2, block 16, one of the two lots claimed by Atkins in her Native allotment application (BBHA Exh. E).

On September 6, 1977, the townsite trustee, George E. M. Gustafson, responded to BBHA's July 18, 1977, letter to BLM stating that "the Trustee will issue deeds to the occupants of the lots listed in your letter when he receives patent. If there are no occupants on the lot, the trustee will issue the deed to whatever agency or corporation of which the village council of So. Naknek approves" (BBHA Exh. F).

On September 28, 1977, Ron Zimin, Atkins' son, who was then president of the Village Council, signed a letter expressing "intent to sign an agreement with Bristol Bay Housing Authority to contribute my land described as Parcel No. 13, lot 5A, Block 17, USS 4879 to the Authority for the purpose of obtaining housing through the Mutual Help Indian Housing Program (Atkins Exh. Q)." On August 6, 1978, BBHA and Ron Zimin entered into a Mutual Help and Occupancy Agreement (BBHA Exh. M at 2).

BBHA did not build Ron Zimin's house on lot 5A. It was built on lot 8, block 17 and was ready for occupancy on November 30, 1979. In a November 6, 1979, letter to the townsite trustee Ron Zimin stated that he and his family had occupied lot 8, block 17. Ron Zimin stated further: "On Lot 8 in Block 17, I had a HUD [Housing and Urban Development] home built on the lot and expect to move in within the month. I am not sure, but I gather the lot will be used as collateral by the Bristol Bay Housing Authority for the Home" (BBHA Exh. H). Thus Ron Zimin occupied a house built on land covered by the Atkins Native allotment application.

On October 7, 1977, BBHA entered into a Mutual Help and Occupancy Agreement with Anisha Elbie (Elbie). BBHA completed Elbie's house on lot 2, block 16, in 1979, which was also within the area described in Atkins' application.

On October 26, 1982, the Village Council adopted a resolution authorizing the trustee to convey certain lots to BBHA. The lots identified in this resolution included lot 2, block 16, but did not include lot 8 of block 17 (BBHA Exh. I). On November 4, 1982, the townsite trustee advised counsel for BBHA that, although he had applied for a patent to the South Naknek Townsite on September 10, 1973, he had not received the patent, and absent the patent he could not convey any lots. He also noted that a moratorium had been placed on patents to the trustee during litigation regarding the status of Alaskan townsites. <sup>3/</sup> Nonetheless, the trustee agreed to issue the deeds to BBHA upon receipt of the patent (BBHA Exh. S).

<sup>3/</sup> A discussion of this litigation is found in Aleknagik Natives Ltd. v. United States, 806 F.2d 924 (9th Cir. 1986).

In 1983, BBHA entered into a written agreement with the South Naknek Village Council and the Alaskan Peninsula Corporation calling for conveyance of title to BBHA in the event that either of those entities obtained title to the lands upon which the houses had been built.

On December 5, 1983, the Bureau of Indian Affairs (BIA) requested reinstatement of Atkins' application, stating that reinstatement was being sought to ensure that Atkins would lose no land because she had opted to receive lands under the townsite laws. On February 8, 1984, BLM advised BIA that Atkins' application would be reinstated.

On June 14 and on August 21, 1984, Ron Zimin wrote to BBHA and demanded that it remove the house and septic tank from lot 2, block 16, because the lot belonged to his mother (BBHA Exhs. Q and R). These letters, BBHA states, were its first notice that Atkins claimed an interest in the lands (Tr. 448-50). On November 9, 1984, BBHA filed a formal protest of the proposed reinstatement of Atkins' application, advising BLM that another party was residing in a house BBHA had constructed on lot 2, block 16, and that reinstatement would cause an injustice against both the occupant and BBHA. It argued that BLM had no authority to reinstate the application because Atkins had knowingly and voluntarily relinquished her claim.

In a decision dated February 4, 1985, BLM responded to BBHA's protest and issued a decision rejecting Atkins' application, Atkins appealed to this Board, and on February 24, 1987, we issued Katherine C. Atkins, 95 IBLA 391 (1987), referring the case to the Hearings Division, Office of Hearings and Appeals, for a hearing on the factual issue of whether Atkins' relinquishment had been knowing and voluntary. "In order to finally resolve this matter," we instructed the Administrative Law Judge to "decide all other relevant questions of fact and law raised by the parties." Katherine C. Atkins, *supra* at 396.

A hearing was held in South Naknek, Alaska, on June 15 and 16, 1988. On November 30, 1988, Judge Rampton issued his decision. After quoting extensively from Katherine C. Atkins, *supra*, Judge Rampton noted testimony and evidence concerning the specific circumstances of Atkins' relinquishment, the conduct of BBHA, and Government contacts with the Native community in South Naknek.

Judge Rampton specifically noted the testimony of Stan Curtis, who was in charge of the BLM section responsible for the lands sought by Atkins. Curtis stated his opinion that it is more efficient and expeditious to process an entire townsite. He stated that he had reviewed appropriate files and gave testimony regarding notes in the case file outlining discussions BLM held in the community to explain that the community would be better off if the Native allotment applicants relinquished their applications. Curtis testified that the form letter relinquishment was in direct response to BLM's request, and noted Atkins' request for advice regarding BLM's request that she relinquish her application (Tr. 65). He also testified that he found nothing in the file indicating that BLM had responded to her request

(Tr. 66) or to support a conclusion that she had been advised that she might receive less after relinquishment than she would receive under her Native allotment application (Tr. 71). Curtis explained that prior to 1977 BLM did not require BIA approval of Native allotment application relinquishments (Tr. 41).

Judge Rampton also noted the testimony of Paul O. Johnson, who held many Government positions dealing with Native allotments. Johnson testified that it was a common practice for BLM to seek relinquishments in order to create a townsite or airport, and that few of the BLM field personnel had sufficient knowledge of Indian law or the relationship between the Government and the Indian people. He also testified that he had been involved with between 7,000 and 9,000 applications, and described his personal involvement with the deliberation regarding reinstatement of Atkins' application. Johnson stated that during the initial deliberation he concluded that Atkins did not have full knowledge of the impact of signing the relinquishment on her claim to the land (Tr. 119-20); that the Solicitor's Office had overruled his initial decision; and that, in his personal opinion, Atkins' application should be reinstated because her relinquishment was conditional (Tr. 119).

Testimony by Freeman Roberts, Director of BBHA between 1978 and 1981, was also noted in Judge Rampton's decision. Roberts testified that South Naknek Village Council had authorized BBHA construction of homes in formal agreements with BBHA (Tr. 183, 185). Roberts noted that BBHA had built a house for Ron Zimin on lot 8, block 17, and built a house for Elbie on lot 2, block 16. He stated his understanding that these lots were vacant and available, and that between 1978 and 1981 he had no knowledge of the conflict with Atkins' claim. Roberts also testified that during his conversations with Ron Zimin, Zimin had never mentioned or advised him of any conflict with his mother's application. Roberts testified that Government regulations required BBHA to have title before a house could legally be built on the land, but admitted that no one did a title search or contacted BIA, BLM, or HUD (Tr. 196-97).

Carvel Zimin, Jr., who is Atkins' nephew and Ron Zimin's cousin, testified that Ron Zimin <sup>4/</sup> had verbally objected to the BBHA houses being built on land within his mother's allotment claim and had told him that he had spoken to Roberts about the conflict. Carvel Zimin, Jr., who was on the village council at the time of the hearing, also stated that he was surprised when BBHA requested a title agreement with the village council, stating that he had believed the matter had been settled because houses had been constructed on the lots and occupied (Tr. 228-29). He testified that the village council had authorized trustee conveyance to BBHA in 1983, but that a village council resolution passed in 1984 rescinded this action (Atkins Exh. L; Tr. 234-38). The determination to rescind the earlier

<sup>4/</sup> Ron Zimin was killed in 1986 in the line of duty as a Village public safety Officer. His wife continues to occupy the home on lot 8, block 17.

resolution was apparently based on advice received from BIA representative Stanton Williams that the Native allotment application relinquishments were invalid because BIA was not involved.

Elizabeth Dexter, who worked for the realty department of the Bristol Bay Native Association, testified that she had accompanied the townsite trustee when the trustee was taking applications for townsite lots in 1987, and that it was her opinion that the trustee knew of Atkins' Native allotment claim (Tr. 259-60).

Joan Zimin Gilliland, Ron Zimin's widow, testified that Ron Zimin had always referred to the land on which the Elbie house sat as his mother's allotment, particularly after the house had been built (Tr. 266, 277). She also stated that Ron Zimin had advised BBHA not to erect the Elbie house (Tr. 276).

Judge Rampton found Charles Bunch to have extensive involvement and training concerning Native claims while holding many positions with BIA. Bunch testified that under a 1979 agreement between the BIA and BLM, BIA must counsel individual natives about relinquishments, but the agreement was not in effect when Atkins signed and submitted her relinquishment. He also found no evidence that she was ever counseled regarding the effect of relinquishing her claim. He noted that as a general rule, the older people in the village are not highly attuned to land matters, and generally accept whatever BLM or BIA recommends.

Ralph E. Zimin, Atkins' son and Ron Zimin's brother, testified that he was aware of his mother's claim and that his mother had never expressed either a desire or intent to abandon the land (Tr. 352, 369). He testified that his brother had always acknowledged their mother's claim, had spoken to him about the allotment, and had told him that he had advised BBHA not to put the Elbie house on his mother's land (Tr. 340, 355, 380-81).

Atkins also testified, and portions of her testimony were quoted in Judge Rampton's opinion. Atkins explained that a man with "the land outfit" said that they were going to change the land over to a townsite (Tr. 390). She stated that he had reassured her that doing so would not change the land in any way, and that she was to have the same land. *Id.* She stated that she wanted the land for her children as a part of their heritage because it had belonged to her father (Tr. 391-93). Atkins specifically stated that she did not understand that by writing the relinquishment letter and signing the townsite application she would lose some of the land subject to her Native allotment application (Tr. 396). She recalled writing the letter expressing her hope that the townsite applications would not affect the land going to her children (Tr. 395). She stated that she was not in the area when the Elbie house was built, but was made aware of that by her son Ron. She stated that Ron had initiated reinstatement of her application while working for Alaska Legal Services.

Kimberly Phillips, BBHA housing manager, also testified. She stated that she had reviewed the files pertaining to Ron Zimin, Atkins, and Elbie,

noting that BBHA and the village council had executed a standard cooperative agreement in 1976 (Tr. 433). Phillips testified that these agreements evidenced the council's consent to BBHA's building houses. She stated that HUD is required to have title to the land upon which its houses are built (Tr. 437), that Ron Zimin and Elbie had entered into mutual help and occupancy agreements with BBHA, and that BBHA had applied for the necessary townsite lots (Tr. 445-46). Phillips stated her opinion that BBHA had some problems with site control, as there were three other title problems in South Naknek at the time of the hearing. She stated that the August 21 and September 1, 1984, letters were the first documents notifying BBHA of Atkins' claim that BBHA had taken lot 2, block 16 in trespass (Tr. 448-50).

Anisha Elbie testified that she lived in a BBHA/HUD house on land claimed by Atkins. She stated that she had learned through her husband that another party was claiming the land, but that Ron Zimin had never approached her about the problem (Tr. 497-98). Jeffery Elbie testified that he first learned of the problem in 1984 (Tr. 503).

Extensive posthearing briefs were filed by the parties. Based upon the evidence presented at the hearing Judge Rampton found that Atkins did not knowingly and voluntarily relinquish her Native allotment application. He noted his finding that she executed the document at the request of BLM and in the belief that, by doing so, she would obtain the identical land through another act. He accepted as true her testimony that she did not understand that she might lose some of the land subject to her application and did not express a desire to claim only a portion of the land described in her Native allotment application. He specifically noted that she had sought help from BLM, but no one had explained the consequences of executing the relinquishment. He found her testimony believable and supported by testimony given by other witnesses.

Judge Rampton found that the fact that the efforts to reinstate her allotment claim coincided with Ron Zimin's employment by Alaska Legal Services had no bearing on her knowledge and intent when she executed the relinquishment document. He further found that a determination that her relinquishment was involuntary and unknowing was supported by her family's subsequent actions to obtain the land for her (Decision at 14).

Noting that BBHA claims to be the rightful owner of the land in question, Judge Rampton found the validity of Atkins' Native allotment application to be a question which was not before him and declined to address the effect of the townsite application on the Native allotment application filed by Atkins. He then directed the reinstatement of her application. BBHA has appealed from that decision.

On appeal BBHA presents a number of arguments, and Atkins has filed a motion to dismiss BBHA's appeal for lack of standing. We deem it appropriate to first address BBHA's argument that Judge Rampton erred when finding Atkins' relinquishment to be other than knowing and voluntary. As noted

in the BBHA statement of reasons, a relinquishment of a Native allotment application must be made voluntarily and with knowledge of the applicant's allotment rights and the consequences of the relinquishment. Peter Andrews, Sr., 93 IBLA 355, 365-66 (1986); Matilda Titus, 92 IBLA 340, 343 (1986).

BBHA argues that this case is like the Andrews case (in which the relinquishment was upheld) because Atkins understood the consequences of her relinquishment. It also argues that the record supports a finding that her relinquishment was knowing and voluntary, citing the contents of her relinquishment letter as evidence of her acceptance of the fact that she might receive a much smaller tract when she relinquished her allotment application. Upon examining the language cited by BBHA, we find it to be vague at best. The phrase BBHA relies upon in support of its argument that she intended that the relinquishment would not "hamper [her] claim for the described land or portion of same" (emphasis added) is clearly subject to more than one interpretation. It can be construed to mean "any portion" just as easily as it can be construed to mean "some portion," the meaning urged by BBHA.

[1] Judge Rampton based his decision on a finding that Atkins did not sign the relinquishment with full understanding of the legal consequences of her action. The record adequately supports this conclusion.

Atkins signed the relinquishment after BLM advised her that doing so would expedite receipt of title to the land she sought under her Native allotment application. In Peter Andrews, Sr., supra, neither the relinquishment nor the other contemporaneous writings or circumstances surrounding execution of the relinquishment suggested that Andrews did not understand the legal consequences of relinquishment. In the instant case the transmittal letter accompanying the relinquishment (which states, "I have signed the enclosed Entry Number relinquishment form in good faith, trusting it will not in any way hamper my claim for the described land or portion of same at South Naknek") and Atkins' unanswered request for BLM advice (Tr. 67-68) are probative evidence that Atkins did not grasp the full legal consequences of executing a relinquishment. Testimony at the subsequent hearing corroborates the conclusion that Atkins' relinquishment of her Native allotment application was unknowing.

The impact of a relinquishment is to extinguish all rights, and Johnson appropriately noted that a relinquishment cannot be "knowingly and voluntarily" made if it is conditional. Under the Alaska Native Claims Settlement Act (ANCSA), when a Native allotment application is relinquished, the Native must do so "knowingly and voluntarily." (Emphasis supplied.) We find Atkins' relinquishment was unknowing and affirm Judge Rampton's decision reinstating Atkins' December 23, 1964, Native allotment application. The application is therefore deemed to have been pending before the Department on or before December 18, 1971.

[2] Having determined that the application should be reinstated, the question becomes -- was the application legislatively approved pursuant to section 905(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a) (1988). Section 905(a)(1) of ANILCA approved

"on the one hundred and eightieth day following December 2, 1980," subject to valid existing rights and certain exceptions, all Native allotment applications pending before the Department on or before December 18, 1971. Exceptions to legislative approval are found in paragraphs (3), (4), (5), and (6) of subsection (a).

None of the rights asserted by BBHA are covered by the exceptions set out in paragraphs (3) and (4). Paragraph 5 provides:

(5) Paragraph (1) of this subsection and subsection (d) of this section 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 December 2, 1980--

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(C) A person or entity files a protest with the Secretary stating that the applicant is not entitled to the land described in the allotment application and that said land is the situs of improvements claimed by the person or entity.

Subparagraphs (A) and (B) cover protests filed by a Native Corporation and the State of Alaska and do not extend to any rights asserted by BBHA. BBHA constructed houses on lands described in Atkins' Native allotment application in 1978 and 1979 and presumably would have been in a position to file a protest under subparagraph (C) of paragraph (a)(5) on or before 180 days after December 2, 1980, to protect any alleged valid existing right in the land. The record does not reflect that a protest asserting that the land described in the allotment application was the situs of BBHA improvements had been filed by BBHA within the 180-day period. Nonetheless, it cannot be said that BBHA had an obligation to file a protest during the 180-day period when the record of the Native allotment contained a relinquishment filed before December 2, 1980, and the relinquishment remained unchallenged until December 5, 1983.

Section 905(a) of ANCSA is not applicable to Atkins' Native allotment application and it was not legislatively approved. BBHA had no reason to believe that it needed to file a protest within the time specified in section 905(a)(5)(C), as Atkins' application was not of record at the time. When it enacted section 905(a) Congress expressed an intention to protect valid existing rights. Due process prohibits Congress from legislatively depriving an individual of a property right without compensation, and an individual must be given notice and an opportunity to demonstrate the alleged valid existing right. Thus, before a Native allotment application can be legislatively approved under ANILCA, due process requires that those asserting valid existing rights (in this case a property interest in the land embraced by the allotment application) be afforded notice and an opportunity to challenge the claim to the land under the Native allotment

application. This requirement is firmly embedded in the Constitution, and ANILCA should not be construed to thwart constitutional protections.

Further evidence that Congress did not intend to have section 905(a) of ANILCA become applicable in cases such as this can be found in the language in paragraph (c) of the same section. In section 905(c) Congress recognized that an amendment of a Native allotment application might result in a surprise to another party claiming an interest in the same land included in the amended application and expressly provided a means for the surprised party to prevent legislative approval by filing a protest. 43 U.S.C. § 1634(c) (1988). Although section 905(c) is not applicable to a reinstatement without amendment, when that section is read in pari materia with section 905(a)(5), it manifests the congressional intent to protect due process rights of parties asserting rights superior to those held by Native allotment applicants when, through no fault of their own, the parties were unaware of the conflicting applications during the 180-day protest period under ANILCA.

The 180-day period set out in section 905(a)(5) does not satisfy the due process requirement if, on the date of enactment of ANILCA, the record shows the Native allotment application to be relinquished and the application is not reinstated until after the expiration of the 180-day period. In such case the record would not be sufficient to give notice of the requirement to file a protest within the 180-day period. 5/ A reinstated (involuntarily relinquished) Native allotment application cannot be deemed to be legislatively approved if legislative approval thwarts both due process by denying the holders of alleged valid existing rights notice and the opportunity for a hearing and the express intent of Congress that they be given an opportunity to protest.

Adjudication of the Native allotment application pursuant to the Act of May 17, 1906, 34 Stat. 179, as amended (Native Allotment Act) provides an opportunity for those asserting valid existing rights to be heard and the opportunity to have those rights determined relative to the application, thus affording due process protection. Moreover, we find support for requiring adjudication under the Native Allotment Act to protect asserted valid existing rights under the circumstances of this case in section 905(e) of ANILCA, 43 U.S.C. § 1634(e) (1988). Under this section the Secretary must adjudicate any record or application for title made under any Act other than the ANCSA, the Alaska Statehood Act, or the Native Allotment Act, prior to issuing a certificate for allotment. The Secretary is duty bound to determine whether such entry or application represents a valid existing right to which the application is subject. Under certain circumstances an entrant under the Townsite Act may appear to be entitled to adjudication. See State of Alaska v. Heirs of Albert, 90 IBLA 14, 20 (1985), as modified

5/ A "timely" protest filed under section 905(a)(5) of ANILCA objecting to a Native allotment application which had been relinquished would be properly rejected as moot unless and until the application is reinstated.

by Golden Valley Electric Association (On Reconsideration), 98 IBLA 203 (1987).

If Atkins can establish that she has met the requirements of the Native Allotment Act, her statutory preference right to the allotment "relates back to the initiation of occupancy" and takes preference over and preempts interests created or initiated after the commencement of her use and occupancy. Golden Valley Electric Association (On Reconsideration), *supra* at 205-08. If upon adjudication under the Native Allotment Act Atkins is found to have met the requirements of the Native Allotment Act, the property interests asserted by BBHA would not be entitled to protection under section 905, because, as a matter of law, the asserted rights or interests now claimed by BBHA could not be initiated after the commencement of her use and occupancy. *Id.*

We need not address whether, in light of Aleknagik Natives Ltd. v. United States, 806 F.2d 924 (9th Cir. 1986), BBHA possesses any valid existing rights to the lands on which it constructed the houses. The existence of BBHA's valid existing right to the land hinges on whether Atkins has satisfied the requirements of the Native Allotment Act. <sup>6/</sup> If BLM determines that a contest action must be initiated because Atkins failed to satisfy the requirements of the Native Allotment Act, and the ultimate result is a rejection of Atkins' reinstated Native Allotment application, BBHA's asserted right or interest in the land would not be affected by any interest claimed by Atkins under the Native Allotment Act. That is, if her allotment claim is rejected, it would no longer stand as an impediment to BBHA's claimed interest in the land. Therefore, an adjudication of her Native allotment application need not be complicated by an adjudication of the validity of the right, title, or interest claimed by BBHA or the authority of the townsite trustee to convey the lots to BBHA.

It is, therefore, appropriate to remand Atkins' reinstated Native allotment application to BLM to permit BLM adjudication pursuant to the Native Allotment Act. <sup>7/</sup> If BLM finds that Atkins satisfies the requirements of the Native Allotment Act, an allotment should be issued. On the other hand, if BLM concludes that Atkins has failed to satisfy the requirements of the Native Allotment Act, Atkins will be entitled to notice and opportunity for a hearing before an Administrative Law Judge as mandated in Pence v. Kleppe, 529 F.2d 135, 141-42 (9th Cir. 1976), and BLM should initiate this action by filing a contest complaint. If a complaint is filed, BBHA and other interested parties may petition to intervene in such proceedings.

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<sup>6/</sup> We decline to rule on Atkins' motion to dismiss BBHA's appeal for lack of standing.

<sup>7/</sup> In adjudicating whether Atkins satisfied the use and occupancy requirements of the Native Allotment Act BLM should determine whether Atkins demonstrated a "subjective intent to abandon the land." Fred J. Schikora, 89 IBLA 251, 255 n.2 (1985); United States v. Flynn, 53 IBLA 208, 235-36, 88 I.D. 373, 387-88 (1981).

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 affirmed and remanded to BLM consistent with this decision.

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R. W. Mullen  
Administrative Judge

I concur:

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David L. Hughes  
Administrative Judge