

JULIUS F. PLEASANT
JOHN MOORE
ELIA WASSILLIE

IBLA 70-524
70-526
70-527

060257

Anchorage 060258

059278

Decided March 14, 1972

Separate appeals from the several decisions by the Anchorage state office rejecting appellant's respective evidence of occupancy of Alaska Native Allotments.

Set aside and remanded.

Alaska: Native Allotments--Applications and Entries:
Filing--Equitable Adjudication: Generally

Where applicants for Alaska Native allotments delivered their evidence of occupancy to the agency office of the Bureau of Indian Affairs which held them past the time when they were required to be filed with the Bureau of Land Management, absent any evidence that the delays were occasioned through the fault of the respective applicants, the rejection of those documents will be set aside, the documents received and the entries reinstated in accordance with the principles of equitable adjudication.

Alaska: Native Allotments

Where Native allotment applications under the Act of May 17, 1906 (34 Stat. 197) were filed and pending before the Department upon enactment of the Alaska Native Claims Settlement Act of December 18, 1971 (85 Stat. 688), further processing of the applications will be deferred pending a declaration by each applicant of his election to waive his rights under section 14 (h)(5) of the 1971 act or to withdraw his pending application under the 1906 act.

Attorneys--Practice before the Department: Persons Qualified to Practice

A field official of the Bureau of Indian Affairs, not otherwise shown to be qualified, is not eligible to practice before the Department by representing individual Indians, Aleuts and Eskimos in appeals to the Board of Land Appeals, notwithstanding that the appellants reside in the area administered by the Bureau of Indian Affairs office wherein he is employed.

One who, as a government employee, has participated in a matter pending before the Department through his decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, is not authorized to practice before the Department on behalf of a private appellant in a case involving that matter.

Equitable Adjudication: Generally

Where applicants for Alaska Native allotments delivered their evidence of occupancy to the agency office of the Bureau of Indian Affairs which held them past the time when they were required to be filed with the Bureau of Land Management, equitable relief is available under 43 CFR 1871.1-1 (1972), the error or informality having been satisfactorily explained as being the result of some obstacle over which the parties had no control.

APPEARANCES: For the appellants, Roy Peratrovich, Superintendent, Anchorage Agency, Bureau of Indian Affairs, Department of the Interior.

OPINION BY MR. STUEBING

Each of these three appeals involves similar circumstances and are governed by the same statutes and regulations. Accordingly, although each is a separate and individual case, the appeals may be consolidated for disposition.

Each of the appellants applied for an Alaska Native Allotment pursuant to the Act of May 17, 1906, 34 Stat. 197, as amended, 43 U.S.C. §§ 270.1, 270.3 (1970). 1/ Each was certified by the Bureau

1/ Since repealed by the Act of December 8, 1971; 85 Stat. 688. See discussion in text, infra.

of Indian Affairs to be a native entitled to an allotment, and each was notified in writing by the Anchorage land office that his application was in order, that the lands were available for allotment, and that the applicant was required to submit proof of substantially continuous use and occupancy of the land for a period of five years. Each of these notices informed the respective applicant that proof of such continuous use and occupancy must be filed by a certain specified date (six years from the filing of the application) and that failure to submit such proof by that date would result in termination of the application. A copy of each notice was sent to the Juneau area office of the Bureau of Indian Affairs.

In each instance the evidence of occupancy was filed in the Anchorage land office after the expiration of the six year period and the critical date specified in the notice. By separate decisions the Chief, Branch of Lands, Alaska state office, rejected the evidence of occupancy without prejudice to the applicant's right to make another allotment application.

The pertinent portions of the applicable regulations (recodified in 1971) provide as follows:

. . . This proof may be submitted with the application for allotment if the applicant has then used and occupied the land for five years, or may be made at any time within six years after the filing of the application when the requirements have been met. 43 CFR § 2561.2(a) (1972).

. . . If the applicant does not submit the required proof within six years of the filing of his application in the land office, has [sic] application for allotment will terminate without affecting the rights he gained by virtue of his occupancy of the land or his right to make another application. 43 CFR § 2561.1(f) (1972).

The appeals filed on behalf of the applicants by the superintendent, Anchorage agency, Bureau of Indian Affairs, allege substantially the same reasons for the tardy filing.

Each of the forms was completed and executed by the applicant prior to the critical date, and referred to the Bureau of Indian Affairs. The Anchorage agency then executed a certificate at the bottom of each form and filed the document with the Bureau of Land Management, by which time they were past due. The delay is attributed to

"special Alaska transportation conditions and the routing of the document through the Bureau of Indian Affairs for review to assure that regulations were complied with." The superintendent argues for each that, "Since the delay was not of appellant's own making, but rather the fault of the Bureau of Indian Affairs and transportation facilities, appellant should not be penalized."

We note that Wassillie's filing was due on June 4, 1969. 2/ The document was executed by him on May 22, 1969. It was filed in the Bureau of Land Management on January 7, 1970, about seven and one-half months afterward and more than seven months late. Both Pleasant's and Moore's filings were due on October 3, 1969; each executed his respective document on September 25, 1969, and the Bureau of Indian Affairs delivered each to the Bureau of Land Management on October 8, 1969.

Although the superintendent submitted a nearly identical legalistic brief on behalf of each of the appellants, many pertinent questions remain unanswered. When were the documents delivered to the Bureau of Indian Affairs, before or after the due date? How, specifically, was the delay occasioned by "special Alaska transportation conditions"? Why was it necessary to route the documents through the Bureau of Indian Affairs "for a review to assure that the regulations were complied with" rather than filing them directly with the Bureau of Land Management, the agency having the primary responsibility for making that review and determination? 3/

2/ Erroneously given as October 3, 1969, in the decision appealed from. 3/ We note that the form includes a certificate in a separate block as follows:

FOR USE OF BUREAU OF INDIAN AFFAIRS

I Certify Hereby That the above-named applicant is a native entitled to an allotment under the appropriate regulations in 43 CFR 2212. I further certify that the applicant has occupied, marked, and posted the lands as stated in this application and that this claim does not infringe on other Native claims or area of Native Community use.

(Signature)
(Date)
(Title)

This raises the further question of whether the superintendent of the Anchorage agency is performing these functions as the agent of the Department or the individual applicant-appellants. If the proofs in question are reviewed by him, not as a departmental duty, but as a service to the applicants so that any discrepancies may be detected and remedied prior to the Bureau of Land Management's adjudication of the case, then he is acting as their agent, and his errors and omissions may be imputed to his principals. For the purposes of this decision we will assume that this is not the relationship.

Nevertheless, we must hold that the superintendent is not a person privileged to practice before this Department on behalf of individual native citizens resident in the area served by his office. Both statute and regulations bar one in his position from practice before the Department. 43 CFR § 1.4 provides that no individual may practice before the Department if such practice would violate the provisions of 18 U.S.C. §§ 203, 205 or 207. Section 205 of Title 18 U.S.C. (1970) bars an officer or employee of the United States in the executive, legislative or judicial branch of the government or in any agency of the United States otherwise than in the proper discharge of his official duties from:

(1) [acting] as agent or attorney for prosecuting any claim against the United States . . . , or

(2) [acting] as agent or attorney for anyone before any department, agency or court in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy . . . or other particular matter in which the United States is a party or has a direct and substantial interest. . . .

fn. 3 (cont.)

This certificate raises additional questions. Why is it necessary for the Bureau of Indian Affairs to again certify the native applicant's ethnic qualification, having already made an identical certificate at the time the original application was filed? As to the occupation, marking and posting of the claim, was this verified by a field examination? If so, it might explain delay by the Bureau of Indian Affairs; if not, the value and propriety of the certificate is open to additional question. In view of the relatively short period which elapsed between the execution of the respective documents by appellants Pleasant and Moore and the filing of the certificates in the Anchorage land office, it would appear most unlikely that there were field examinations of these allotments. The Bureau of Land Management also performs a field examination in these cases, which further indicates a need for a review of the procedures followed.

An exception to this statutory prohibition tends to reinforce our conclusion. It provides that an officer or employee may act as agent or attorney without remuneration in certain specified instances--

. . . except in those matters in which he has participated personally and substantially as government employee through decision, approval, disapproval, recommendation, rendering of advice, investigation, or otherwise, or which the subject of his official responsibility

43 CFR § 1.5 states a recitation of qualifications to the same effect.

Moreover, there is no indication that this official is otherwise specially qualified to render this sort of service.

Accordingly, future appearances by the superintendent of the Anchorage agency on behalf of this class of appellants will not be recognized by this Board, absent an adequate showing of a statutory or regulatory authority therefor.

The two explanations given for the delays are not mutually and equally applicable. Either special Alaska transportation conditions prevented the applicants from making a timely delivery of the documents to BIA, or else they were timely delivered, special transportation conditions notwithstanding, and they were held beyond their critical dates by the Anchorage agency. Once the documents were delivered to the BIA office, Alaska transportation conditions could not have influenced their filing with BLM because of the close proximity of the two offices.

We reject one reason given for the delays, i.e., that they were occasioned by "special Alaska transportation conditions." This reason is urged as a basis for invoking 43 CFR 1821.7-1, which provides that until Alaska transportation facilities are improved, district land offices will not reject applications to make entry on the ground that such applications were executed more than 10 days prior to filing. First, this regulation is not relevant, since the interval between execution and filing was not the reason for the rejection of the proofs. Second, the nature of these special conditions and their effect on each case has not been explained.

There being no evidence to the contrary, we will accept the superintendent's statement that these delays were occasioned through the

fault of his office. This explanation is also apparently favored by the BLM state director, who has recommended equitable adjudication in the Pleasant and Moore cases, stating, "BIA's realty personnel shortage is acute and under the circumstances . . . timely review would have been very difficult." However, the state director recommended against equitable adjudication in the Wassillie case, noting the seven and one-half month interval between execution and filing. We are of the opinion that having recognized that the documents were held by the BIA past their respective due dates, the several appellants are equally absolved of blame, regardless of how long their individual submissions were delayed in the Anchorage agency.

The error or informality having been satisfactorily explained as being the result of some obstacle over which the parties had no control, equitable relief is available pursuant to 43 CFR 1871.1-1. See also 43 CFR 1821.2-2(g).

Where an entry has been cancelled for failure to submit timely final proof (or "evidence of occupancy," as in these cases) and it appears that there are mitigating circumstances for the failure, the entry will be reinstated and the case remanded for further consideration in accordance with equitable adjudication. Juanita J. Anderson, 4 IBLA 170 (1971).

During the pendency of these appeals the Congress has enacted the Alaskan Native Claims Settlement Act of December 18, 1971; 85 Stat. 688. Section 18 of this Act provides:

(a) No Native covered by the provisions of this Act, and no descendant of his, may hereafter avail himself of an allotment under the provisions of the Act of February 8, 1887 (24 Stat. 389) as amended and supplemented, or the Act of June 25, 1910 (36 Stat. 363). Further, the Act of May 17, 1906 (34 Stat. 197), as amended, is hereby repealed. Notwithstanding the foregoing provisions of this section, any application for an allotment that is pending before the Department of the Interior on the date of enactment of this Act may, at the option of the Native applicant, be approved and a patent issued in accordance with the said 1887, 1910, or 1906 Act, as the case may be, in which event the Native shall not be eligible for a patent under subsection 14(h)(5) of this Act.

(b) Any allotments approved pursuant to this section during the four years following enactment of this Act shall be charged against the two million acre grant provided for in subsection (14)(h).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decisions appealed are set aside and the cases remanded to the Alaska state office of the Bureau of Land Management with instruction to receive the appellants' evidence of occupancy, and further to require each applicant to file a declaration of his respective election to waive his rights under section 14 (h)(5) of the Alaska Native Claims Settlement Act or to withdraw his present application; such statement to be filed before any further action is taken with respect to the applications now pending.

Edward W. Stuebing, Member

We concur:

Martin Ritvo, Member

Frederick Fishman, Member

