

Editors' note: 83 I.D. 308; Reconsideration granted; decision sustained -- See Donald Peters (On Reconsideration), 28 IBLA 153, 83 I.D. 564 (Nov. 23, 1976)

DONALD PETERS

IBLA 76-147

Decided August 17, 1976

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application F-15742 (Anch.).

Set aside and remanded.

1. Administrative Procedure: Generally -- Alaska: Native Allotments -- Contests and Protests: Generally -- Hearings -- Rules of Practice: Government Contests

Where the Bureau of Land Management determines that an Alaska Native allotment application should be rejected because the land was not used and occupied by the applicant, the BLM shall issue a contest complaint pursuant to 43 CFR 4.451 et seq. Upon receiving a timely answer to the complaint.

which answer raises a disputed issue of material fact, the Bureau will forward the case file to the Hearings Division, Office of Hearings and Appeals, Department of the Interior, for assignment of an Administrative Law Judge, who will proceed to schedule a hearing at which the applicant may produce evidence to establish entitlement to his allotment.

APPEARANCES: Donald C. Mitchell, Esq., Alaska Legal Services Corporation, Bethel, Alaska.

OPINION BY CHIEF ADMINISTRATIVE JUDGE FRISHBERG

Donald Peters has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated June 25, 1975, rejecting his Native allotment application F-15742 (Anch.), filed pursuant to the Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), 43 CFR Subpart 2561. The rejection was based on appellant's failure to present clear and credible evidence of his entitlement to an allotment.

Appellant's allotment application, dated June 29, 1971, describes 160 acres in Section 9, T. 21 S., R. 13 E., K.R.M.

Appellant claimed seasonal use for subsistence living from 1952 to the present. In the application appellant explained his use as follows:

I've been using this land every year from 1952 to present for hunting and trapping. Some years it is one or the other. I visited here often as a child because my grandparents, aunts and uncles lived here. My grandparents and I feel this is my home. I feel like I could make a homestead here and make a living. I want my land in my name to keep in the family for generations to come.

BLM conducted a field examination of the land on August 3, 1973. The field examiner found no evidence of use and occupancy by appellant. There were old buildings on the claim, but the examiner concluded that they had been deserted by non-Natives who had in prior years engaged in the mining or trapping business.

In March 1975 the State Office informed appellant that his application would be rejected unless he supplied additional information in support of his claim within 60 days. On April 18, 1975, appellant submitted additional evidence in the form of two affidavits, one signed by appellant and the other signed by his sister, Catherine Peters. The State Office determined the evidence submitted to be insufficient and rejected the application by decision dated June 25, 1975.

The procedures followed by BLM in Native allotment cases came under judicial scrutiny in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), rev'g Pence v. Morton, 391 F. Supp. 1021 (D. Alaska 1975). Pence was initiated by certain Native Alaskans, on their behalf and on behalf of all other Natives similarly situated, who asserted entitlement to allotments of public land pursuant to the Alaska Native Allotment Act of May 17, 1906, supra. They alleged that the procedures utilized by the Secretary of the Interior in determining whether to grant allotments denied them due process and sought injunctive relief requiring the Secretary to adopt and utilize procedures guaranteed to afford applicants due process. The district court dismissed the action on the ground that the granting or denial of an allotment was committed to agency discretion and not reviewable by the courts.

The Ninth Circuit Court of Appeals reversed the district court, holding that Native applicants for allotments have a sufficient property interest to warrant due process protection. In discussing "what process is due," the court stated:

* * * [T]he Alaska Native applicants whose applications the Secretary intends to reject must be given some kind of notice and some kind of hearing before the rejection occurs.

* * * * *

* * * [A]t a minimum, applicants whose claims are to be rejected must be notified of the specific reasons

for the proposed rejection, allowed to submit written evidence to the contrary, and, if they request, granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment. Beyond this bare minimum, it is difficult to determine exactly what procedures would best meet the requirements of due process. * * * It is up to the Secretary, in the first instance, to develop regulations which provide for the required procedures, subject to review by the district court and, if necessary, by this court.

Pence v. Kleppe, *supra* at 142, 143 (emphasis in original).

Thus, the court did not attempt to define those procedures necessary to effectuate its mandate, leaving that determination to the Secretary. Since the court did not refer to the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.* (1970), except in regard to its jurisdiction, it apparently felt that all of the procedural requirements of that act need not be met. Nevertheless, this Department has generally applied procedures consonant with the requirements of the APA when it has been determined that due process requires notice and an opportunity for hearing, and it shall do so here.

While the court seemed to contemplate the promulgation of new regulations, past departmental practice discloses an alternative and more expeditious method of implementing the court's decision: application of the Department's existing contest regulations.

Well-established precedent exists for determination by adjudication of matters which are subject to the Department's contest procedures. As early as 1893 the Department ruled that a homestead entry, once having been allowed, and being a matter of record, should not be canceled without notice to the entryman and opportunity to show why the claim should not be canceled. William A. Fowler, 17 L.D. 189 (1893). Desert land entries have been accorded similar treatment. See Claude E. Crumb, 62 I.D. 99 (1955); Johnnie E. Whitted, 61 I.D. 172 (1953). Notice and opportunity for a hearing have also been afforded to applicants for trade and manufacturing site patents under appropriate circumstances. Bythel J. Compton, 18 IBLA 148, 151 (1974); Don E. Jonz, 5 IBLA 204 (1972).

Until 1956 it was departmental practice to grant a mining claimant a hearing before a Land Office Manager prior to a decision on the validity of the mining claim. The Land Office Manager was not a qualified presiding officer within the ambit of the Administrative Procedure Act, supra. The Secretary ruled in United States v. O'Leary, 63 I.D. 341 (1956), that since a mineral claimant had a "property claim which may not be invalidated without due process of law," the provisions of the APA applied, and the hearing must be before persons qualified under the APA. As the other substantive provisions in the regulations relating to contests were found to be in compliance with the provisions of

the APA, the Department simply amended the procedures to provide that the hearings be before "Examiners." 21 F.R. 7622 (October 4, 1956).

To carry out the mandate of the court in Pence and insure due process in the adjudication of Native allotment applications, the contest regulations included at 43 CFR 4.451 et seq. shall henceforth be applied to such cases. Incorporated in 43 CFR 4.451 by reference, with exceptions, are the provisions of 43 CFR 4.450, relating to private contests. Also applicable are the general hearings procedures contained in 43 CFR 4.20-4.30 and 4.420-4.423. These procedures, used in implementing the right to notice and an opportunity for hearing, 1/ have been repeatedly approved by various federal courts. See Orchard v. Alexander, 157 U.S. 372, 383 (1895), relating to pre-emption claims; Cameron v. United States, 252 U.S. 450, 459-60 (1920), relating to mining

1/ Pursuant to the procedures and departmental decisions, where BLM determines a claim or application must be rejected as a matter of law, assuming the truth of all relevant matters stated in the claim or application, it may reject the claim or application without a hearing. See Brace C. Curtiss, 11 IBLA 30 (1973); W.J.M. Mining and Development Company, 10 IBLA 1 (1973); Norman A. Whittaker, 8 IBLA 17 (1972). The aggrieved claimant or applicant may appeal such decision to this Board. 43 CFR 4.400 et seq. If, however, BLM determines such a claim or application is invalid because the facts are not as stated therein, it must serve a contest complaint upon the claimant or applicant alleging wherein the claim or application is deficient. If the claimant or applicant answers within 30 days and thereby raises a disputed issue of material fact, the procedures outlined infra apply.

claims. The United States Supreme Court has implicitly accepted the procedures as modified subsequent to O'Leary in a number of cases. E.g., United States v. Coleman, 390 U.S. 599 (1968); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963).

Accordingly, the present case, which involves a factual issue, will be remanded for proceedings pursuant to 43 CFR 4.451 et seq. Those procedures are summarized as follows. 2/ Upon receipt of the present case file BLM should review the evidence. If it is determined that the application should still be rejected because of applicant's failure to show use and occupancy of the land or to comply with the other requirements of 43 CFR Subpart 2561, BLM should prepare a contest complaint and serve it upon the applicant. The contest complaint should particularize the grounds upon which the allotment is being contested.

The applicant will have 30 days from receipt of the complaint within which to file an answer in the BLM office which issued the complaint. If an answer is not filed within 30 days, the allegations of the complaint will be taken as admitted, and BLM will decide the case without a hearing. 43 CFR 4.450-7(a); United States v. Weiss,

2/ The summary is intended only as a general outline. It is not intended, nor may it be relied upon, as a substitute for the specific procedures contained in the Department's regulations and their interpretation in departmental decisions.

431 F.2d 1402 (10th Cir. 1970); Sainberg v. Morton, 363 F. Supp. 1259 (D. Ariz. 1973); United States v. Weiss, 15 IBLA 198 (1974). If an answer is filed raising a disputed issue of material fact, BLM will forward the case record to the Hearings Division, Office of Hearings and Appeals, Department of the Interior, for assignment of an Administrative Law Judge to hear the case. 43 CFR 4.450-7(b).

Upon assignment, the Administrative Law Judge will issue to the parties a formal notice of hearing. 43 CFR 4.452-2. A prehearing conference may first be ordered. 43 CFR 4.452-1. The hearing will be held in Alaska at a time and place fixed by the Administrative Law Judge. 43 CFR 4.452-2.

At the hearing BLM, represented by the Solicitor, will first go forward with its evidence. The applicant will follow with a presentation of his case. All parties will have the right to cross-examine and to rebut. The ultimate burden of proof as to entitlement to an allotment rests with the Native applicant. 3/

3/ Pursuant to 43 U.S.C. § 270-3 (1970):

"No allotment shall be made to any person under sections 270-1 to 270-3 of this title until said person has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years."

As defined in 43 CFR 2561.0-5(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

See Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). At the conclusion of the hearing the parties shall be given a reasonable amount of time by the Administrative Law Judge within which to submit proposed findings of fact and conclusions of law. 43 CFR 4.452-8(a).

As promptly as possible after the time allowed for filing proposed findings and conclusions, the Administrative Law Judge will render a written decision in the case. A copy of such decision will be served on all parties to the case. 43 CFR 4.452-8(b).

Any party, including BLM, adversely affected by the decision may appeal to the Board pursuant to 43 CFR 4.400 et seq.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the

fn. 3 (continued)

substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use."

As required by 43 CFR 2561.0-3, an applicant must be an "Indian, Aleut or Eskimo of full or mixed blood who resides in and is a Native of Alaska, and who is the head of a family, or is twenty-one years of age;" the land must be "vacant, unappropriated, and unreserved * * *."

decision appealed from is set aside and the case remanded for further proceedings not inconsistent with the views expressed herein.

Newton Frishberg
Chief Administrative Judge

We concur:

James R. Richards
Director, Office of Hearings and Appeals
Ex-Officio Member of the Board

Frederick Fishman
Administrative Judge

Joseph W. Goss
Administrative Judge

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

Martin Ritvo
Administrative Judge

Edward W. Stuebing
Administrative Judge

Joan B. Thompson
Administrative Judge

