

DONALD PETERS

(On Reconsideration)

IBLA 76-147 Decided November 23, 1976

Petition for reconsideration of the Board's decision, styled Donald Peters, 26 IBLA 235, 83 LD. (1976).

Decision sustained.

1. Alaska: Native Allotments--Rules of Practice: Appeals: Reconsideration

Where a petition for reconsideration of a previous Board decision applying departmental contest procedures to Alaska Native allotment applications fails to show that the original decision was erroneous in any matter, the original decision will be sustained.

APPEARANCES: Norman A. Cohen, Esq., Alaska Legal Services Corporation, Bethel, Alaska, and Donald Juneau, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE FRISHBERG

On September 24, 1976, Donald Peters, through the Alaska Legal Services Corporation, filed a petition for reconsideration of the August 17, 1976, decision rendered by this Board in the above-captioned case, found at 26 IBLA 235, 83 I.D. . In that decision this Board, en banc, ruled that upon a determination by the Bureau of Land Management (BLM) that an Alaska Native allotment application should be rejected for failure to use and occupy the land sought in conformity with the Native Allotment Act of May 17, 1906, 34 Stat. 197, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), BLM was to issue a contest complaint pursuant to 43 CFR 4.451 et seq. The decision further stated that upon receipt of a timely answer the case would be referred to the Hearings Division, Office of Hearings and Appeals, for the assignment of an Administrative Law Judge, who would schedule a hearing at which the applicant would be afforded an opportunity to produce evidence and give testimony that would show his entitlement to the allotment. This procedure was adopted by the board in view of the decision of the Ninth Circuit Court of Appeals in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976).

It is difficult to understand the gravamen of appellant's petition, aside from counsel's objection to the alleged technical and formal nature of the Department's contest procedures and 30-day answer requirement under 43 CFR 4.450-7(a). Apparently, appellant's counsel argue that because "[t]he court rejected existing departmental procedures as not comporting with due process" (Pet. for Recon., at 1), and because "existing departmental procedures" include "technical and formal" contest procedures (Id. at 4), the Board, in applying those contest procedures to Native allotment applications, "violated the District Court's Order and the Ninth Circuit's decision in Pence." (Id. at 4.)

The fatal flaw in this argument is the fact that the procedures referred to by the Ninth Circuit as not providing due process are not the departmental contest procedures. Rather, to use the words of the court quoted by counsel, those procedures are "the present on-site inspection procedure[s]." Pence v. Kleppe, 529 F.2d 135, 142 (9th Cir. 1976). As stated by the court:

The Secretary contends that the current procedures used do meet the requirements of due process. He reasons that because an applicant may accompany the field examiner and the examiner is instructed in the customs and patterns of Native land use, the present on-site inspection procedure is the best way to uncover the truth. We agree that the procedure is useful, but do not agree that it provides the due process that is required.

The court then proceeds to discuss the need for notice and opportunity for hearing, summarizing as follows:

Thus, at a minimum, applicants whose claims are to be rejected must be notified of the specific reason 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. The specific problems involved and the demands placed upon the Bureau of Land Management are best judged initially by the Secretary. 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.

Id. at 143.

After quoting this language, appellant's counsel state:

Despite this clear language as to the kind of fair hearing to be employed, I.B.L.A. * * * has decreed that the contest procedure in 43 CFR §§ 4.450 and 4.451 be used on those cases where the applications are rejected * * *. [Emphasis supplied.]

Pet. for Recon. at 3.

Next, counsel complain that because of the strictness of these procedures, especially the 30-day answer requirements, they are inappropriate to Alaska. Finally, they conclude:

While I.B.L.A. seems over-concerned with adherence to nit-picking bureaucratic ukases, it seeks to avoid complying with the clear mandate of the Ninth Circuit. * * * In ignoring the Ninth Circuit's directive, and enacting the technical and formal requirements of the contest procedure, I.B.L.A. has violated the District Court's Order and the Ninth Circuit's decision in Pence.

Id. at 3-4.

It was precisely because of the holding of the court that the Board applied contest procedures to Native allotment applications. This is made abundantly clear in our decision of August 17, 1976. As stated therein:

This Department has generally applied procedures consonant with the requirements of the APA [Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1970)] when it has been determined that due process requires notice and an opportunity for hearing, and it shall do so here.

26 IBLA at 239.

Counsel have not shown wherein the departmental contest procedures deviate from the standards of notice and opportunity for hearing

prescribed by the court. These procedures have been applied to mining locations, homesteads and other land entries in Alaska for decades, without objection.

If counsel for appellant are now contending that a hearing before an Administrative Law Judge entails an undesirable formality and rigidity, this marks a major departure from the position which Alaska Legal Services Corporation, representing Native allotment applicants, has taken before this Board. For the convenience of appellant's counsel we have appended to this decision a list of those cases, presently pending before this Board, in which attorneys in Alaska Legal Services Corporation have filed motions requesting this Board to remand the case for a fact-finding hearing pursuant to 43 CFR 4.415. Hearings ordered under 43 CFR 4.415 are conducted pursuant to the regulations found in 43 CFR 4.430 to 4.439. As an examination of those regulations makes clear, the procedures followed in conducting those hearings are virtually identical with those which are utilized in a contest hearing with one exception relevant herein, which we will discuss infra. It is difficult to give credence to appellant's counsel's anguished objections to the formal nature of the contemplated hearings when it is precisely the type of hearing which they had previously sought.

It must be borne in mind that in Pence, Alaska Legal Services Corporation was seeking a hearing procedure consistent with the Due Process Clause of the Fifth Amendment and sought to invoke the

court's jurisdiction under section 10 of the Administrative Procedure Act, as amended, 5 U.S.C. §§ 701-706. Specifically, plaintiffs contended that the procedures then followed by the Secretary violated their right to due process under the Fifth Amendment by failing to provide them with "an opportunity to be heard, present testimony, and to confront and cross-examine adverse witnesses at a hearing * * *."

Indeed, we would point out that in a brief filed in support of the appeal of Native allotment applicant Warner Bergman, F-17109, Alaska Legal Services Corporation argued that principles of equal protection required that allotment applicants be given the same contest hearing rights afforded homestead and trade and manufacturing site entrymen and claimants, specifically citing 43 CFR 4.450 et seq. Therein counsel stated:

* * * It would be a gross denial of equal protection of the laws to guarantee the right to a hearing on contested issues of fact to Homestead, Trade and Manufacturing site, desert entry, mining, etc., applicants, but not to a Native Land Allotment applicant when the Land Allotment applicant has a protected property interest also. * * *

In that brief the Alaska Legal Services Corporation attorneys also discussed the argument that "fair hearings would be needlessly cumbersome and expensive." They answered this contention by noting that "the fact that a procedure demanded by due process may be

cumbersome and expensive to the government does not free the government of its obligation to comply with that procedure."

Citing Goldberg v. Kelley, 397 U.S. 254, 265-66 (1970). In short, counsel for Alaska Legal Services Corporation now contend that what they heretofore argued was required by due process has become, for some unarticulated reason, violative of due process.

The one manner in which hearings under the contest procedures differ from those held under 43 CFR 4.415 is also the second gravamen of appellant's petition: there is no requirement that a contest complaint be answered within 30 days in a 43 CFR 4.415 hearing. The reason for this omission is, of course, obvious. A discretionary hearing under 4.415 commences only after the case has already been appealed to the Board, and the Board, in its order referring the case for a hearing, prescribes the issues to be litigated on the basis of the record and contentions of the parties already before it.

A hearing by right under the contest procedures, on the other hand, is initiated not by actions of this Board, but by actions of the Bureau of Land Management in filing a contest complaint. It is the nature of all complaints that failure to deny the elements of the complaint works a constructive admission of the truth of the complaint. The question is in what time-frame failure to

respond can be said to constitute an admission of the charges of the complaint.

The regulations governing contest complaints are found at 43 CFR 4.450 et seq. Regulation 4.450-6 provides that "[w]ithin 30 days after service of the complaint * * * the contestee must file in the office where the contest is pending an answer specifically meeting and responding to the elements of the complaint * * *." Appellant's counsel advert to federal court cases which have affirmed decisions of the Department requiring strict adherence to this procedural requirement. They then state that "[i]n view of this strict requirement, the inappropriateness of such a procedure to Alaska would seem to be obvious because of the transportation and communications difficulties within the state." Pet. for Recon. at 3.

This argument, if meritorious, would compel the logical conclusion that the contest procedures are inapplicable within the State of Alaska not only in Native allotment hearings but in mining claim and homestead contests as well. The Department, however, has always applied the regulations concerning contest procedures equally to Alaska and the lower 48 States. Compare Ideal Basic Industries, Inc. v. Morton, No. 74-2298 (9th cir., Sept. 28, 1976), and Nelson v. Kleppe, 529 F.2d 164 (9th Cir. 1976), with Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963), and

Reed v. Morton, 480 F.2d 634 (9th Cir. 1973). Counsel's position would require the amendment of all contest procedures as they apply to Alaska. 1/

While appellant's attorneys allude to decisions of federal courts affirming the imposition of the 30-day answer requirement, viz., United States v. Weiss, 431 F.2d 1402 (10th Cir. 1970); Sainberg v. Morton (identified in their brief as Sandberg v. Morton), 363 F. Supp. 1259 (D. Ariz. 1973), they avoid any discussion of the rationale which led the Secretary to adopt the regulation and the courts to affirm it. In Sainberg the court stated:

The Secretary's rules are reasonable in giving a period of thirty days in which to file an answer. In order to carry out an orderly system of justice the Secretary has not established a grace period 2/ or retained discretion in the application of the regulation. Plaintiffs ask this Court to require the Secretary to waive his own mandatory regulation because the answer was filed one day late as a "result of mistake, inadvertence and excusable neglect". Nowhere in the regulations is the authority given the Secretary to waive his regulations because of excusable

1/ With regard to the problems of climatology in Alaska and the rigors of its winters we note that the Ninth Circuit Court of Appeals has taken judicial notice, albeit in a different circumstance, "of the fact that the rigors of a North Dakota winter may be no less severe than those of Anchorage, Alaska." Nelson v. Kleppe, 529 F.2d 164, 168 (1976). We also note that there are many areas in such states as Montana and Nevada which are remote from the conveniences of modern technology. Many mineral claimants and others have been unable to afford legal counsel and have been required to proceed pro se.

2/ This is not entirely accurate. In Sainberg the answer was hand-carried to the BLM office and filed 1 day late. The 10-day grace period provided by 43 CFR 4.422(a) applies to the filing of all pleadings, including answers, where they are otherwise transmitted within the 30-day period.

neglect or mistake. The defendant is required to abide by his own regulations, so are plaintiffs. If the time requirement was waived this would disturb the Secretary's long-standing procedure of administering the mining laws and other land laws fairly. The regulations would be a farce if they could be applied only if and when the parties felt like complying therewith.

363 F. Supp. at 1263.

Moreover, appellant's counsel appear to misconceive the nature of a complaint and the denial thereof which is necessary to trigger the adversary hearing. Obviously, the purpose of a complaint is to give notice to the applicant of the issues being contested. Generally, the complaint would allege the invalidity of an allotment application for a specific reason or reasons. The applicant is then given an opportunity to respond. A simple denial of the truth of the allegation, (e.g., "Applicant denies each and every allegation contained in the complaint."), or an assertion of use and occupancy sufficient to qualify for an allotment, is all that would ordinarily be needed to raise an issue of fact requiring a hearing. ^{3/}

It is true that such a denial must be transmitted within 30 days of receipt of the complaint. But appellant's attorneys apparently have forgotten that in order to appeal any adverse

^{3/} Subject to agreement by the other parties, Native allotment applicants may waive a hearing. 43 CFR 4.450-7(b). However, the applicant must still answer the contest complaint timely.

decision to this Board a notice of appeal must also be transmitted within 30 days of receipt of the decision appealed. 43 CFR 4.411. We are aware of only a single Native allotment case presently before this Board in which appellants failed to file timely a notice of appeal from a decision of the BLM adverse to their allotment application. ^{4/} We are unable to perceive how requiring a simple denial of an allegation would result in a more onerous burden than that which existed before, and which, with few exceptions, has been consistently met.

We would also point out that the Alaska and Federal Rules of Civil Procedure provide that failure to answer a civil complaint within 20 days permits the complaining party to move for the entry of default and a judgment thereon. See Alaska R. Civ. P. 4(b), 4(e)(5), 12(a), 55(a), Form 1. See also Fed. R. Civ. P. 4(b), 12(a). Admittedly, there are procedures for setting aside a default for mistake, inadvertence, surprise and excusable neglect (Rule 60), but surely neither the State of Alaska nor the federal courts

^{4/} Another recent case originating in Alaska which dealt with the question of a timely filing of the notice of appeal was the appeal of George James, IBLA 76-6. To briefly summarize the facts of that case, James' allotment application was rejected by the Alaska State Office, BLM, for failure to submit adequate proof of use and occupancy of the lands sought in the allotment application. The decision was served on appellant and received and signed for by him on a specified date. Though the case file indicated that a copy of the decision was also sent to his legal representative, an attorney with Alaska Legal Services Corporation, the attorney subsequently alleged that he had not received notice until after the expiration of the period in which to file a notice of appeal computed

would have adopted a 20-day period for answering a civil complaint if it did not feel that a 20-day period for answering a civil complaint should normally be adequate. Furthermore, it should be noted that Federal Rules of Appellate Procedure provide no special rule for Alaska regarding the taking of an appeal from a decision of a Federal District Court. See Fed. R. App. 4(a), 5(b).

Finally, it is argued that much of the alleged difficulty in the application of the contest procedures to cases in Alaska arises from the fact that the Native applicants often reside in remote areas and, as the court in Pence v. Kleppe, *supra*, noted, many Alaska Natives "are even less educated and literate than most American welfare recipients." 529 F.2d at 142. What cannot be ignored, however, is the fact that there are presently pending before this Board only five cases in which the Native allotment applicant is not represented by counsel, in the overwhelming number of cases, Alaska Legal Services Corporation. 5/

fn. 4 (continued)

from the date on which the allotment applicant received the notice. This Board, rather than relying on the presumption of regularity which attends the day-to-day workings of the BLM (see A. G. Golden, 22 IBLA 261 (1975)), accepted as true appellant's attorney's representation and reinstated the appeal by Order of October 26, 1976.

Similarly, in a number of cases recently brought to this Board's attention, notices of appeal which had been rejected because they were improperly filed by the Superintendent, Anchorage Agency, BIA, were held to have been revitalized by the timely entry of qualified attorneys. See e.g., John Moore, IBLA 70-526, Order of November 11, 1976.

5/ One exception is the appeal of Esther Thorson, IBLA 75-663(d), in which Alaska Legal Services Corporation originally represented the applicant, but subsequently withdrew from the case. The appeal of the Heirs of Ernest L. Olson, IBLA 76-238, and the appeal of the

In response to an inquiry from this Office, the Alaska State Director, BLM, in a memorandum, dated October 26, 1976, informed this Board that in approximately 95 percent of the cases presently pending before it the allotment applicant is represented by counsel of Alaska Legal Services Corporation, and that of the remaining cases, private counsel has been retained in a few of them. We also note that in a motion filed on November 1, 1976, by Alaska Legal Services Corporation in an appeal filed by the State of Alaska, IBLA 76-715, counsel stated, "* * * the Alaska Legal Services Corporation represents most all of the Native allotment applicants in the State of Alaska * * *." Accordingly, in the overwhelming number of cases the contest complaint will be served on attorneys, 43 CFR 4.22(b), and the problems which allegedly emanate from the remoteness and educational status of the Natives will not arise.

fn. 5 (continued)

Heirs of Migley Kelly, IBLA 75-639, are being handled by the Superintendent of the Anchorage Agency, Bureau of Indian Affairs, pursuant to his obligation to conserve the estates of deceased Natives. See Thomas S. Thorson, Jr., 17 IBLA 326 (1974). The Native allotment applications of James Sims, IBLA 74-53, and Walla McCarr, IBLA 76-390, are being pursued pro se.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the original decision in Donald Peters, 26 IBLA 235, 83 I.D. (1976), is sustained.

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

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

Martin Ritvo
Administrative Judge

Edward W. Stuebing
Administrative Judge

Joan B. Thompson
Administrative Judge

APPENDIX

Request for Hearing (43 CFR 4.415)

75-462(a)	John Coopchiak	AA 6355
75-462(b)	Anecia Kritz	AA 7442
75-462(c)	Anuska Bavilla	AA 7404
75-462(d)	Sam Fullmoon	AA 7410
75-497	Mary Kanulie	AA 7441
75-501	Dorothy Titus	F 14538
75-520(c)	Flora Myomick	F 16239
75-663(c)	Henry Pavian	AA 7266
76-48	Album A. Anderson	F 16287
76-49	Pauline Dennis Esai	F 1722
76-66	Freda W. Smith	F 18383
76-74	Sarah A. Pence	F 13735
76-86	Olick Ignaty	F 17075
76-172	Frederick Carl Phillips	AA 7608
76-177	Sando Wasuli	F 16411
76-197	James R. Showalter	F 15467
76-212	Mary Bobby	F 16998
76-222	Nicholas A. Charles	F 13872
76-224	Agnes T. Hoelscher	F 16142
76-225	Blanche Alfred	F 17054
76-226	Henry Frank	F 17061
76-227	Mary Bobby	F 16490
76-228	Nick Bobby	F 16491

76-229	Nastasia Evan	F 16494
76-232	Elena A. Triplett	F 17222
76-233	David Mann	F 17215
76-234	Paul S. Phillips	AA 7605
76-235	Jean F. Ferris	F 16225
76-236	Mary F. Romer	F 18203
76-239	Cecelia Nick	F 19199
76-250	Joseph Odinzoff	F 16387
76-253	James Lockwood	F 18031
76-254	Timothy Snowball, Sr.	F 16045
76-255	Florence Newman	F 12611
76-256	Alice Gusty	F 16495
76-261	Della Charles	F 15898
76-273	Mary Alice Kawagley	F 16148
76-286	Ellamae A. Chaney	AA 8279
76-308	Marvarc Zaukar	F 16497
76-310	Trimble Gilbert	F 12606
76-321	Annie David	F 16135
76-322	Helen A. Jack	F 16377
76-323	Katherine R. Willie	F 16049
76-325	Franklin Tritt	F 17443
76-344	Christian Tritt	F 025831
76-350	Walter Chulin	AA 8202
76-351	Alexandra Matsuno	AA 7901
76-381	Arthur R. Martin	AA 7889

76-386	Arthur J. Demmert, Sr.	AA 7873
	Patrick Gardner	AA 7815
	Gabriel D. George	AA 6575
	Norman Jackson	AA 7867
	Thomas Jackson, Jr.	AA 7868
	Roger Howard, Sr.	AA 6604
	Johnny Jack, Sr.	AA 7728
	Willie Jack, Sr.	AA 7733
	Franklin R. James	AA 7629
	Andrew Jim	AA 8001
	Charlie Jim, Jr.	AA 7995
	Frank Jim	AA 7999
	Jennie Jim	AA 8156
	Joseph B. Jim	AA 7886
	Martin Johnson	AA 7886
	Moses Johnson	AA 7734
	Stella Brown Adams	AA 7897
	William H. Samato, Sr.	AA 7890
	Michael Jackson	AA 7804
	Claudine Laws	AA 7727
76-388	Woodrow W. Morrison	AA 7916
	William G. Demmert	AA 7893
	Patricia C. Ware	AA 7632
	Melvin James	AA 7631
76-389	Cecilia Foxie	F 18751

76-399	John O. Nerby, Jr.	F 16154
76-415	Rex Mathlaw, Sr.	F 18463
76-416	Fannie (Brown) Neligan	AA 7957
76-417	Joseph J. Link, Jr.	F 16150
76-418	Susan A. Riley	F 16159
76-427	Larry Sullivan	AA 7876
76-428	Warren Sheakley, Sr.	AA 6549
	Amy G. Walker	AA 7731
	Mary B. Johnson	AA 8017
	Paul F. James	AA 7749
76-436	Benjamin Lindgren, Sr.	AA 8235
76-437	George Waska	F 18285
76-438	George E. Williams	A 061299
76-452	Stanislaus Mike	F 16385
76-507	George W. Nelson, Jr.	AA 7730
76-508	Jacob White, Sr.	AA 8013
76-534	Benson Kadake	A 060671
76-578	Peter Waska	F 13269

ADMINISTRATIVE JUDGE GOSS CONCURRING:

I concur in the result. Petitioner seems to have the impression that in response to a petition for reconsideration the Board of Land Appeals has authority to amend departmental regulations. While the Office of Hearings and Appeals is properly concerned with Department rules, it is the function of the Board to interpret existing statutes and regulations as guided by its authority and by judicial and departmental precedents. I believe that the decision herein was an appropriate interpretation and application of present regulations.

Joseph W. Goss
Administrative Judge

