WARNER BERGMAN
(On Reconsideration)

IBLA 75-388 Decided June 20, 1977

Reconsideration of the Board's decision styled Warner Bergman, 21 IBLA 173 (1975), affirming the decision of the Fairbanks District OFfice, BLM, rejecting Native Allotment Application F-17109.

Modified and remanded.

1. Administrative Practice--Appeals--Rules of Practice: Appeals: Reconsideration--Secretary of the Interior

   Where a decision of the Board of Land Appeals is based upon an interpretation of Departmental policy, and that policy is subsequently revised and clarified so as to impel a different result in the case without prejudice to the right of any third party, on reconsideration by the Board that portion of its original decision will be modified and the revised policy will be implemented.

2. Alaska: Native Allotments

   Where an Alaska Native has timely filed an allotment application pursuant to the Act of May 17, 1906 (34 Stat. 197, as amended), asserting that his use and occupancy of the land was initiated prior to the withdrawal imposed on January 17, 1969, by Public Land Order 4582, neither the imposition of that withdrawal nor the subsequent repeal of the 1906 Act will interdict his continuing lawful occupancy or preclude him from thereafter completing the required 5 years of substantially continuous use and occupancy.

APPEARANCES: William B. Schendel, Esq., Alaska Legal Services Corp., Fairbanks, Alaska; Curtis V. McVee, Alaska State Director, Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The Alaska State Director of the Bureau of Land Management has petitioned for reconsideration of the Board's decision in Warner Bergman, 21 IBLA 173 (1975). In that decision we held, in part, that an Alaska Native seeking an allotment pursuant to the Act of May 17, 1906 (34 Stat. 197, as amended), must have satisfied the requirement of 5 years of substantially continuous use and occupancy prior to repeal of the 1906 Act on December 18, 1971, by enactment of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617 (Supp. IV, 1974).

[1, 2] The decision in question was reached by this Board in conformity with its interpretation of the then-existing policy of this Department. Subsequently, however, by a memorandum dated January 21, 1976, signed by the Assistant Secretary, Land and Water Resources, the Department's policy was revised and clarified. That memo adopted an interpretation of law which would allow an applicant who had initiated his use and occupancy of the land prior to the withdrawal imposed by Public Land Order No. 4582 on January 17, 1969, to thereafter complete the 5-year requirement notwithstanding the withdrawal imposed by PLO 4582 or the repeal of the 1906 Act by ANCSA.

Inasmuch as the record does not indicate that the rights of any third party would be prejudiced by reconsideration of the decision and the application of the legal interpretation expressed in the Assistant Secretary's memo, supra, the Board's original decision will be modified to conform therewith.

However, it must be noted that the factual basis for the rejection of Bergman's application, as recounted in the February 5, 1975, decision of the Fairbanks District Office, has not been resolved. Before a decision may be made rejecting the application on that basis, the applicant must be afforded notice and an opportunity for hearing to resolve the issues presented. Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976).

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

Board's decision styled Warner Bergman, 21 IBLA 173 (1975), is hereby modified, and the case is remanded to the Alaska State Office, Bureau of Land Management, for further action consistant herewith.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Frederick Fishman
Administrative Judge