

JOHN MOORE ET AL.

IBLA 70-526

Decided April 30, 1979

Appeals from decisions of the Alaska State Office, Bureau of Land Management, rejecting Native allotment applications A-060257, etc.

Set aside and remanded.

1. Administrative Procedure: Hearings—Alaska: Native Allotments—Rules of Practice: Hearings

Alaska Natives who allege substantial use and occupancy of vacant, unappropriated, and unreserved public land in Alaska for a period of at least 5 years pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970), and the regulations at 43 CFR Subpart 2561 are entitled to notice and an opportunity for a hearing prior to rejection of their application. Such notice shall specify the reasons for the proposed rejection. Claimant shall have an opportunity to present evidence and testimony of favorable witnesses at a hearing before the trier of fact prior to a decision.

2. 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: Alaska Legal Services Corporation, for appellants.

OPINION BY CHIEF ADMINISTRATIVE JUDGE FRISHBERG

The appeals which have been consolidated for the purpose of this decision all involve Native allotment applications filed pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed subject to pending applications, section 18(a), Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976)), and the implementing regulations at 43 CFR Subpart 2561. The cases are identified in Appendix A attached hereto. All of the applications in the subject cases have been rejected in whole or part because the evidence

in the record failed to establish the required use and occupancy. Thus, a common factual issue in all of the cases is the nature and extent of use and occupancy of the land claimed by the applicant.

[1] The Ninth Circuit Court of Appeals has ruled that "Alaska Natives who occupy and use land for at least five years, in the manner specified in the Act and the regulations, * * *" are entitled to due process in the adjudication of their applications for allotment of that land. Pence v. Kleppe, 529 F.2d 135, 141-42 (9th Cir. 1976). The court ruled that due process requires, at a minimum, that

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.

Pence v. Kleppe, supra at 143.

[2] The Board subsequently ruled that the due process requirements set forth in the decision in Pence v. Kleppe, supra, may be implemented by applying the Departmental contest procedures found in the regulations at 43 CFR 4.451-1 to 4.452-9. In the adjudication of Native allotment applications presenting a factual issue as to the applicant's compliance with the use and occupancy requirements of the

statute and implementing regulations, ^{1/} BLM must initiate a contest giving the applicant notice of the alleged deficiency in the application and an opportunity to appear at a hearing to present favorable evidence prior to rejection of the application. Donald Peters, 26 IBLA 235, 241-242, 83 I.D. 308 (1976), reaffirmed, Donald Peters (On Reconsideration), 28 IBLA 153, 83 I.D. 564 (1976).

The Court of Appeals has recently held that application of the Departmental contest procedures to provide the allotment applicant with notice and an opportunity for a hearing prior to adverse action on the allotment application as outlined in the decisions of the Board in Donald Peters, supra, and Donald Peters (On Reconsideration), supra, complies, at least facially, with the due process requirements set forth in the court's mandate in Pence v. Kleppe, supra. Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

Accordingly, upon remand of the subject cases BLM should review the case file, including any submissions filed subsequent to the initial decision below. Where it is determined that the application should still be rejected in whole or in part because of the failure

^{1/} Cases involving issues of fact as to the nature and extent of use and occupancy by the Native claimant may be distinguished from cases where the BLM determines that, assuming the truth of all relevant matters stated in the application, the application must be rejected as a matter of law. In the latter context, an application may be rejected without a hearing, subject to the right of appeal to the Board. Donald Peters, supra at 241 n.1; see Pence v. Andrus, 586 F.2d 733, 743 (9th Cir. 1978).

of the record to establish applicant's use and occupancy of the land in compliance with the requirements of the statute and regulations, BLM should initiate a contest proceeding in accordance with our decision in Donald Peters, *supra*. ^{2/}

Several additional issues have been briefed before the Board in certain of the cases. Counsel has briefed the issue of what constitutes use and occupancy in the Native manner, including the question of whether improvements are required and whether allotments can be restricted to the area of the improvements. The Board has held that use and occupancy under the Alaska Native Allotment Act contemplates possession which is at least potentially exclusive of others and not mere intermittent use. John Nanalook, 17 IBLA 353 (1974). However, it has been expressly noted that consideration must be afforded to Native customs and mode of living, climate, and the character of the land. Further, permanent improvements as an index of use are not necessarily a prerequisite in appropriate circumstances where the claim is supported by sworn statements of credible witnesses with first hand knowledge of the facts and there are no conflicting

^{2/} The records disclose that some of the cases involve conflicting State and Native village selection applications filed subsequent to the date the Native allotment applicant's use and occupancy allegedly commenced. Such conflicting applicants should be given notice and an opportunity to participate in any contest proceedings initiated. In the event the BLM after review of the record on remand determines that a Native allotment application should be granted, any conflicting applicant should be given notice and an opportunity to initiate a private contest.

adverse claimants. John Nanalook, *supra*. In the absence of any evidence of the nature and extent of applicant's use and occupancy which may be introduced at a hearing, it is inappropriate to define further what constitutes qualifying use and occupancy – cases must be decided on an individual basis according to the evidence.

Counsel for some of the allotment applicants has argued that 5 years of use and occupancy is not required. This issue is well settled. The terms of the statute and the implementing regulation of the Secretary of the Interior both require proof of substantially continuous use and occupancy of the land for a period of 5 years by the applicant, 43 U.S.C. § 270-3 (1970) and 43 CFR 2561.2, without regard to whether the land is within a national forest or part of the unreserved public domain. See also Medina Flynn, 23 IBLA 288 (1976); Paul Koyukuk, 22 IBLA 247 (1975); Heldina Eluska, 21 IBLA 292 (1975); Wamer Bergman, 21 IBLA 173 (1975).

An allotment right is personal to one who has fully complied with the law and the regulations, and a Native may not tack on parental or ancestral use and occupancy to establish that right. Sarah F. Lindgren, 23 IBLA 174 (1975); Lula J. Young, 21 IBLA 207 (1975). Substantial use and occupancy as contemplated by the Act must be by the Native as an independent citizen for himself and not as a minor child using the land in the company of his parents. Natalia Wassilliey,

17 IBLA 348 (1974). Whether an applicant's use and occupancy is sufficiently independent to qualify can best be determined after relevant evidence is elicited at the hearing.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are set aside and the cases remanded for further proceedings consistent with this decision.

Newton Frishberg
Chief Administrative Judge

We concur.

James L. Burski
Administrative Judge

Douglas E. Henriques
Administrative Judge

APPENDIX A

70-526	MOORE, John	A-060257
75-6	BOGEYAKTUK, Anatole	F-12783
75-77B	KICHOK, Farmer	AA-7181
75-392	AYOJIAK, Moses	AA-6297
75-400	SINKA, Cecilia	F-18167
75-423	GREGORY, Gabby A.	AA-6277
75-430	CARLO, Kenneth J.	F-14016
75-438	LINUS, Kathleen	F-14264
<u>75-447</u>		
	a) EVAN, Elena	A-056034
	b) AVILLA, Evan	AA-6623
	c) ATAKITLIG, Olia P.	AA-7402
	d) NELSON, Eleanor	AA-7704
	e) NANALOOK, Moses	AA-7978
<u>75-462</u>		
	a) COOPCHIAK, John	AA-6355
	b) BAVILLA, Anuska	AA-7404
	c) FULLMOON, Sam	AA-7410
	d) KRITZ, Anecia	AA-7442
75-469	NANALOOK, Emma	AA-7322
75-471	NELSON, JR., Alex	AA-7715

75-472	EVAN, Carl L.	A-056064
75-474	NECK, Lloyd	AA-7416
75-475	ANDREWS (HAWKINS), Rosalind M.	F-16234
75-477	WHYMN, Pavilla	AA-7057
75-478	MATSON, Lena	AA-7940
75-481	NICK, Willie	AA-7420
75-482	WASSILLIE, Andrew	AA-6723
75-484	LUKE, Gladys	F-14724
75-495	PEDERSON, Alvin N.	AA-5984
75-497	KANULIE, Mary	AA-7441
75-498	WALLIS, Marguerite Roehl	AA-7241
75-501	TITUS, Dorothy	F-14538
<u>75-502</u>		
	a) MILLER, Fred	F-17742
	b) SNOW, JR., Peter	F-17788
	c) ANDERSON, Dorothy A.	F-18974
75-520C	MYOMICK, Flora	F-16239
75-521	SHARP, Ferdinand	AA-7423
75-533	PETE, Agatha	F-16390
75-534	MONSEN, Annie	AA-7907
75-540	BARTMAN, Gust	A-055105
75-541	BLUE, Robert T.	AA-6353
75-543	ESAI, Esai	F-17180
75-544	ESAI, SR., Bobby	F-17520
75-545	ELUSKA, Steve	F-16051

75-546	SNOW, Evelyn	F-17792
75-547	JOHN, Mary	F-17768
75-548	ANDREWS, Heldina	F-17638
75-549	NICKOLI, Nickiti	A-056300
75-552	WASKEY, Agafia	AA-7186
75-553	AYOJLAK, Willie	AA-6350
75-555	WILLIAMS, Edison	F-14286
75-560	SNOWBALL, Mark	F-16400
75-561	RAYMOND, Adam J.	F-16397
75-591	PETE, Daisy	F-16392
75-598	ACOMAN, Clyde W.	F-16412
75-599	OTTEN, SR., Ambrose A.	F-18431
75-600	ALEXIA, Bernie	F-17870
75-612	ESAI, Minnie Dora	F-17521
75-613	ATCHAK, Archie B.	F-16413
75-624	APOSIK, Adam D.	AA-7452
75-651	KINIKALK, Evan	AA-7967
75-663C	PAVIAN, Henry	AA-7266
76-48	ANDERSON, Album A.	F-16287
76-49	ESAI, Pauline Dennis	F-17522
76-66	SMITH, Freda W.	F-18383
76-86	OLICK, Ignaty	F-17075
76-129	ODOMIN, SR., Nick	AA-6004
76-130	PETER, Lena	F-034711
76-135	OPOKEDAK, Stephanita	AA-6374

76-149	REFT, JR., Gust J.	AA-7475
76-151	Nickolai, Murphy	A-059290
76-156	GAMECHUCK, Billie	A-056042
76-157	ANDERSON, Ralph S.	F-18305
76-158	SAM, Elma	F-14323
76-177	WASULI, Sando	F-16411
76-197	SHOWALTER, James R.	F-15467
76-201	CHYTHLOOK, Molly B.	AA-7281
76-223	BLUE, Agnes	F-15241
76-224	HOELSCHER, Agnes T.	F-16142
76-225	ALFRED, Blanche	F-17054
76-226	FRANK, Henry	F-17061
76-228	BOBBY, Nick	F-16491
76-229	EVAN, Nastasia	F-16494
76-239	NICK, Cecelia	F-19199
76-250	ODINZOFF, Joseph E.	F-16387
76-253	LOCKWOOD, James	F-18301
76-254	SNOWBALL, SR., Timothy	F-16045
76-255	NEWMAN, Florence	F-12611
76-256	GUSTY, Alice	F-16495

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76-257	MIKE, Gregory	AA-6262
76-261	CHARLES, Della	F-15898
76-262	TUGATUK, Wassillie	AA-7215
76-267	JAMES, Lillian	F-14789
76-273	KAWAGLEY, Mary Alice	F-16148
76-275	PETE, Elias	F-16393
76-307	TRITT, Lincoln	F-18450
76-310	ZAU KAR, Marvara	F-16497
76-310	GILBERT, Trimble	F-12606
76-318	WELLS, Walter	F-18822
76-322	JACK, Helen A.	F-16377
76-323	WILLIE, Katherine R.	F-16049
76-335	TRITT, Franklin	F-17443
76-367	WASHINGTON, Oswald J.	F-16409
76-374	GILBERT, Mary	F-12607
76-375	GOODWIN, Pearl Outwater	F-17980
76-379	BIDDLE, Doris Begay	F-14711
76-389	FOXIE, Cecilia	F-18751
76-390	McCARR, Walla	AA-7183
76-399	NERBY, JR., John O.	F-16154
76-400	NICHOLAS, SR., Wilbert	F-15950
76-406	EDWARDS, Jimmie	F-14319
76-409	ABSTON, Reginia C.	AA-7316
76-410	ROCK, Bertha	F-13859
76-412	WOODFORD, Ralph	F-15480

76-415	MATHLAW, SR., Rex	F-18463
76-425	KUSEGTA, Gus	A-05510
76-427	SULLIVAN, Larry	AA-7876
76-436	LINDGREN, SR., Benjamin P.	AA-8235
76-437	WASKA, George	F-18285
76-438	WILLIAMS, George E.	A-061299
<u>76-444</u>		
	a) BERGMAN, Grafton L.	F-13520
	b) ENGLISHOE, Ronald S.	F-13836
	c) WILLIAMS, Mark H.	F-14735
76-445	REED, Tommy	F-17939
76-446	ARSENTI, Willie	AA-7380
76-457	GRIEST, Oscar A.	F-18004
76-472	TENAS, Charley	A-053876
76-475	LARSON, Mary S.	AA-7688
76-477	MALUTIN, Lydia	AA-7312
76-479	JOHN, Vonga	F-14293
76-485	EDWIN, Issac S.	F-027065
76-492	ALOYSIUS, SR., Jake	F-022857
76-493	MALUTIN, JR., Herman	AA-7310
76-494	MALUTIN, JR., Herman	AA-7310
76-504	GLOKO, Andrewski	AA-7213
76-519	AGA, Alberta E.	AA-7395
76-520	BUTLER, Shirley A.	F-15539
76-523	KAPATAK, Tantania	AA-7662

76-543	LEAVITT, Judy M.	F-13671
76-578	WASKA, Peter	F-13269
76-688	PANNINGONA, Dorothy	F-17781
77-6	JAMES, George	AA-7741
77-32	STEPANOFF, Walter	AA-5980
77-33	KITCHOK, Nick	AA-7599
77-34	WASSILLIE, Wassillie	AA-6301
77-35	HERRMAN, Gerald L.	AA-6283
77-277	PANRUK, David	F-17818
77-279	TIRCHICK, Peter F.	F-17821
77-326	BUNYAN, Gertrude M.	F-14690

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