

MARY BOBBY

IBLA 76-212
76-227

Decided May 29, 1979

Appeals from decisions of the Alaska State Office, Bureau of Land Management, rejecting applications for Alaska Native allotments F 16998 (Anch.) and F 16490 (Anch.).

Set aside and remanded.

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

When an Alaska Native allotment applicant alleges that there has been substantial use and occupancy of vacant, unappropriated, and unreserved public land in Alaska for a period of at least 5 years pursuant to 43 U.S.C. §§ 270-1 to 270-3 (1970) and 43 CFR Subpart 2561, and the Bureau of Land Management determines the application should be rejected because the land was not so used and occupied, the Native is entitled under contest procedures, 43 CFR 4.451 et seq., to notice and an opportunity for a hearing prior to rejection of his application.

APPEARANCES: Alaska Legal Services Corporation, for appellants.

OPINION BY ADMINISTRATIVE JUDGE GOSS

The appeals 1/ consolidated for the purpose of this decision 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allotment applications filed pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed subject to pending applications, section 18(a), Alaska Native Claims

1/ Mary Bobby, IBLA 76-212, F 16998.
Mary Bobby, IBLA 76-227, F 16490.

Settlement Act, 43 U.S.C. § 1617 (1976)), and the implementing regulations at 43 CFR Subpart 2561. The Alaska State Office, Bureau of Land Management (BLM), rejected both applications as to portions of the land claimed because the evidence in the records failed to establish the required use and occupancy.

[1] The United States Ninth Circuit Court of Appeals has ruled that "Alaska Natives who occupy and use land for at least 5 years, in the amount specified in the Act and the regulations," are entitled to due process in the adjudication of their application 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

[A]pplicants 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.

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, 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, 241-42, 83 I.D. 308 (1976), reaffirmed, on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976).

The Court of Appeals has recently held that application of Departmental contest procedures to provide the allotment applicant with notice and an opportunity for a hearing prior to adverse action on the application, as outlined 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).

It is necessary, therefore, to set aside the decisions herein and remand to the State Office. In connection therewith, both applications are on behalf of an applicant named Mary Bobby. The claims

asserted are to allotments within approximately 50 miles of each other. No information appears in the record which would serve to establish that the claimants are two distinct individuals (e.g., no contrasting birth dates, middle initials, father's names, places of birth, etc.). In order to assure that the two applications were not filed by the same person, and to avoid any possibility of an allotment in violation of 160-acre maximum under 43 U.S.C. § 270-1 (1970), BLM should first make determination as to whether appellants are separate individuals.

Further, upon remand, BLM should review the case files, including any submissions filed subsequent to the initial decisions below. Where it is determined that an application should still be rejected in whole or in part because of the failure 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 Donald Peters, supra.

Counsel has also 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. However, it has been expressly noted that consideration must be afforded to Native customs, 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 firsthand knowledge of the facts and there are no conflicting adverse claimants. John Nanalook, 17 IBLA 353 (1974).

Counsel has also argued that 5 years of use and occupancy is not required. The terms of the statute and the implementing regulation of the Secretary of the Interior are clear in requiring proof of substantially continuous use and occupancy of the land for a period of 5 years by the applicant without regard to whether the land is within a national forest or part of the unreserved public domain. 43 U.S.C. § 270-3 (1970) and 43 CFR 2561.2.

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.

Joseph W. Goss
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON CONCURRING IN THE RESULT:

Because of the court opinions cited in the majority opinion, I agree that before a Native allotment application is to be rejected because of insufficient use and occupancy or inadequate showings thereof, the allotment should be contested and a hearing afforded to the allotment applicant. This does not mean that we are ruling that the showings so far submitted may be adequate. Resolution of the issue of what may constitute sufficient use and occupancy here is best made after resolution of all the facts pertaining to the Native applicant's use and occupancy and that of other individuals or groups, if there has been use by others.

Joan B. Thompson
Administrative Judge.

