

GUST J. REFT, SR.

IBLA 77-198

Decided August 13, 1979

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA 7596.

Vacated and remanded.

1. Administrative Procedure: Generally – Alaska: Native Allotments – Appeals – Rules of Practice: Appeals: Dismissal – Rules of Practice: Appeals: Failure to Appeal

Where BLM fails to show that there was service of a decision rejecting an Alaska Native allotment and the applicant learns of his rejection 4-1/2 years after rejection, the applicant may file a timely appeal within 30 days of notice of the decision.

2. Administrative Procedure: Generally – Alaska: Native Allotments – Appeals – Bureau of Indian Affairs: Administrative Appeals: Acts of Agents of the United States: Limitation on Authority to Act: Generally – Rules of Practice: Appeals: Generally

Mailing to the Bureau of Indian Affairs a carbon copy of a decision rejecting an application for an Alaska Native allotment is not service upon the applicant so as to comply with 43 CFR 4.401.

APPEARANCES: Matthew D. Jamin, Esq., Alaska Legal Services Corp., for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Gust J. Reft, Sr., appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated August 17, 1972, rejecting his application for Native allotment AA 7596.

On April 13, 1972, appellant filed an application for Native allotment alleging occupancy of certain lands in T. 33 S., R. 34 W., Seward meridian, since 1942. 1/ Appellant's application was made under the Act of May 17, 1906, 34 Stat. 197, 2/ authorizing the Secretary in his discretion

to allot not to exceed one hundred sixty acres of nonmineral land in the district of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a Native of said district, and who is the head of a family, or is twenty-one years of age.

Regulations implementing this Act restrict such allotments to "vacant, unappropriated, and unreserved nonmineral land in Alaska." 43 CFR 2561.0-3.

By decision of August 17, 1972, BLM rejected Reft's application and cited Exec. Order No. 8857, dated August 19, 1941, reserving certain lands as the Kodiak National Wildlife Refuge in the area sought by appellant. The decision also referred to PLO No. 1634 which revoked Exec. Order No. 8857 and further reserved the lands as the Kodiak National Wildlife Refuge.

This decision bears the address of appellant as set forth in appellant's application for allotment. Slightly above this address are the words "Certified Mail, Return Receipt Requested." The decision concludes by notifying appellant that any appeal from the decision must be filed within 30 days from receipt thereof. A carbon copy of the decision was mailed to the Anchorage office of the Bureau of Indian Affairs (BIA). No appeal was taken by Reft until February 23, 1977, some 4 1/2 years after the decision of August 17, 1972. In the meantime, the case file had been closed on April 3, 1973, and the claim removed from the records on April 10, 1973.

1/ The legal description of the lands sought by appellant appears on his application as follows: "Fractional NW 1/4 NW 1/4, Fractional W 1/2 SW 1/4 NW 1/4, NW 1/4 NW 1/4 SW 1/4 sec. 4, Fractional N 1/2 NE 1/4, E 1/2 SW 1/4 NE 1/4, SE 1/4 NE 1/4, NE 1/4 NW 1/4 SE 1/4, N 1/2 NE 1/4 SE 1/4 sec. 5, T. 33 S., R. 34 W., SM Kartuk B-3, BLM S 24-4."

2/ This Act was repealed on December 18, 1971, with the passage of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 (1976), subject to applications pending on that date.

In his statement of reasons on appeal, counsel for appellant makes the following arguments:

1. Notice of the 1972 decision was not received by Reft until counsel for Reft received a letter from BLM dated February 2, 1977, summarizing the decision. BLM's letter was in response to counsel's request for an update on Reft's application.
2. Notice to the Bureau of Indian Affairs does not satisfy BLM's obligation to notify appellant of the decision of August 17, 1972.
3. Appellant seeks an allotment in lands which were specifically exempted from Exec. Order No. 8857.

We shall address each point in order.

[1] The requirements for service of a document are set forth at 43 CFR 4.401 (c):

(c) Service of documents. (1) Wherever the regulations in this subpart require that a copy of a document be served upon a person, service may be made by delivering the copy personally to him or by sending the document by registered or certified mail, return receipt requested, to his address of record in the Bureau.

While it appears that BLM may have met this burden, it must submit proof of such service. The regulation continues at (c)(2):

Service by registered or certified mail may be proved by a post-office return receipt showing that the document was delivered at the person's record address or showing that the document could not be delivered to such person at his record address because he had moved therefrom without having a forwarding address or because delivery was refused at that address or because no such address exists.

The regulation provides in paragraph (3) that a document will be considered served at the time of personal service, of delivery of a registered or certified letter, or of the return by post office of an undelivered registered or certified letter. After examination of the file, we are unable to find that BLM has shown that there was service effectuated because it has not complied with the proof of service requirement. In the absence of any showing by BLM of appellant's receipt of the decision or of the return to BLM of the certified mail return receipt card sent to the appellant's address

of record, prior to February 2, 1977, we will accept that date, per counsel's request, as the date of notice to appellant. As stated above, counsel filed his Notice of Appeal on February 23, 1977. Since this date is within 30 days of the first evidence of notice of decision, we find the instant appeal to be timely.

[2] Implicit in this conclusion is our finding that mailing a carbon copy of the decision to the BIA is not sufficient service upon appellant. Julius F. Pleasant, 5 IBLA 171 (1972).

Appellant's third argument on appeal addresses the merits of his application. Appellant maintains that the lands which he seeks were open to settlement at the time that appellant alleges his occupancy began in 1942. While it appears that appellant's lands are within the exterior boundaries of the withdrawal, a proviso in Exec. Order No. 8857 ameliorates the effect of the withdrawal on certain areas:

That as to said strip of land one statute mile in width bordering on the shore lines, primary jurisdiction thereover shall remain in the General Land Office of the Department of the Interior, and its reservation and use as a part of the Kodiak National Wildlife Refuge shall be without interference with the use and disposition thereof pursuant to the public-land laws applicable to Alaska.

Lands sought by appellant appear to be located within this one-mile strip. This strip remained open until May 9, 1958, when it was withdrawn from entry by PLO No. 1634. Gerald P. Chickenoff, IBLA 73-297, order dated November 1, 1973. Accordingly we vacate BLM's decision of August 17, 1972, rejecting appellant's application.

We remand this case for BLM's further consideration. If upon reconsideration BLM intends to reject appellant's application, it shall follow the procedures set forth by the Court of Appeals for the Ninth Circuit in Pence v. Kleppe, 529 F.2d 135, 143 (9th Cir. 1976):

[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.

In complying with the Pence requirements, BLM shall employ the procedures set forth in 43 CFR 4.451, the Government contest regulations. If, however, it shall find that the application must be rejected as a matter of law, it need neither serve a complaint nor provide a hearing. Donald Peters, 26 IBLA 235, 241 n.1, 83 I.D. 308, 311 n.1 (1976), reaffirmed, Donald Peters (On Reconsideration), 28 IBLA 153, 83 I.D. 564 (1976); Pence v. Andrus, 586 F.2d 733, 743 (9th Cir. 1978). John Moore, 40 IBLA 321, 324 n.1 (1979).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case remanded for action consistent with this opinion.

Douglas E. Henriques
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

Joan B. Thompson
Administrative Judge

