

MILDRED SPARKS

IBLA 76-509

Decided August 19, 1979

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA-7610.

Set aside and remanded.

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

Where issues of material fact are in dispute, due process requires that, before a decision is reached to reject an application for an allotment, the applicant for a Native allotment be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and granted an opportunity for an oral hearing before a trier of fact where evidence and testimony of favorable witnesses may be submitted.

2. Alaska: Native Allotments

The nonuse of land within a Native allotment application for a period of time is relevant to the issues of abandonment of the claim, and whether there have been substantially continuous use and occupancy as required by the law. Such nonuse or highly limited and intermittent use also affords a basis for rejecting an application in the exercise of the Secretary's discretion where such nonuse or highly limited and intermittent use demonstrates the land is not needed by the Native and that the purpose of the Native Allotment Act to secure land actually used and occupied by the Native for his/her needs has not been met.

3. Administrative Procedure: Hearings – Alaska: Native allotment – Rules of Practice: Hearings

A hearing will be afforded to a Native allotment applicant to show his/her entitlement to a Native allotment in view of court decisions requiring hearings on Native allotment applications. Where the applicant requests a hearing and alleges there are factual disputes concerning abandonment and nonuse of the claim, although the showings on the application show nonuse of the land for a lengthy period of time sufficient ordinarily to constitute a prima facie case for rejection of the application, a hearing is nevertheless mandated.

APPEARANCES: Alaska Legal Services Corporation for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Mildred Sparks appeals from the decision, dated January 23, 1976, of the Alaska State Office, Bureau of Land Management (BLM), rejecting her Native allotment application and evidence of occupancy AA-7610. ^{1/} BLM held that appellant would have met the requirement of substantial use and possession up to and including 1937, but that appellant's former use and occupancy was not sufficient to qualify for an allotment.

Appellant filed a Native allotment application pursuant to the Act of May 17, 1906, (hereinafter the Act), 34 Stat. 197, as amended by the Act of August 2, 1958, 70 Stat. 954, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed subject to pending applications by section 18(a), Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976)) and the implementing regulations at 43 CFR Subpart 2561.

In her Native allotment application ^{2/} appellant claimed use and occupancy on a seasonal basis from 1910 to 1937. She was born November 16, 1900. She indicated she did not go regularly to the

^{1/} Action on these appeals was stayed pending rulings from the United States Court of Appeals in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), and Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

^{2/} An "Expanded Seacap Land Allotment Questionnaire" was submitted as part of the application, and for the discussion in this decision is considered as the application as well as the official application form.

claimed land after she was married and that her regular use of the land stopped in 1937. In answer to the question, "When is the last time you set foot on the land?," appellant wrote "Oct. 1937." In one part of the questionnaire appellant indicates that she went to the subject lands "once every several years" from 1910 to 1930 and again "once every several years" from 1965 to the present. She also indicated the land was not used from 1930 to 1965. However, in the list of specific types of uses she shows no use from 1934 to the present time. The specific listed uses checked off were for hunting, trapping, and berrypicking. In another question she claims use by herself, her family, and ancestors from 1850 to 1934 for fishing, hunting, trapping, berrypicking and putting up food. No improvements are said to exist on the land.

A field examination of the allotment land was conducted on October 24, 1972. The field report, dated March 20, 1973, states that no evidence of use and occupancy was found. The examiner concluded, based on the answers to the Seacap questionnaire, that appellant would have qualified for an allotment between 1921 and 1937 as her use cannot be disproved. However, he concluded that as she has not been to the land since 1937 and does not make any use of the land for subsistence purposes, she abandoned the land. He recommended that a Government contest be initiated to close the application.

On February 1, 1974, appellant was issued a notice informing her that additional evidence of her use and occupancy was required by the Act before her application could be processed. She was allowed 30 days from receipt of the notice to respond. Appellant responded in a letter dated February 18, 1974, which said she had no more evidence to submit and questioned BLM's need for it.

In August of 1974, an attorney from Alaska Legal Services Corporation entered his appearance as attorney of record in the case. The record indicates no further activity in this matter until June 9, 1975, when BLM allowed appellant an additional 60 days to submit witness statements and other evidence to support her claim. No evidence was submitted and the decision appealed from was issued January 23, 1976.

On appeal, appellant asserts the BLM decision should be reversed because she was not afforded an opportunity for a hearing as required by Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). Appellant's second argument on appeal is that abandonment is not a valid ground for rejecting a Native allotment application. She bases this argument on the fact that the Act grants Natives who comply with it a preference right to the land, and neither the Act nor the regulations mention abandonment. Appellant asserts that filing the application in 1971 indicates there was no abandonment. Finally,

appellant requests a new field examination, and that BLM exercise its powers of equitable adjudication based on the conclusion that she met the requirements of the Act in 1937.

[1] In Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), the United States Court of Appeals for the Ninth Circuit ruled that where issues of material fact are in dispute, due process requires that the applicants

... 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.

Following that decision, the Board ruled that applying the Departmental contest procedures, 43 CFR 4.451-452 would satisfy the requirements of due process. Where a factual issue exists as to the applicant's compliance with the use and occupancy requirements of the Act,

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).

John Moore, 40 IBLA 321, 324 (1979).

Recently, the Court of Appeals held that the Departmental contest procedures would satisfy, at least facially, the due process requirements set forth in Pence v. Kleppe, *supra*. Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

[2] In effect, appellant contends that there is a factual issue here on the question of abandonment. It is asserted on appeal that there was no intent of appellant to abandon the land. The matter of a Native's nonuse of land in his/her allotment application has relevancy in three respects. There is, of course, the question of abandonment of a claim. We reject appellant's argument that there cannot be abandonment of a Native allotment claim. *Cf. Herbert H. Hilscher*, 67 I.D. 410 (1960). In addition, the nonuse reflects upon the issue of substantial use and occupancy as required by the Act. Prior to the decisions issued in Pence, this Board

ruled that a lengthy period of nonuse by an applicant negates any assertion of substantially continuous use and occupancy and militates against a finding of substantial actual possession potentially exclusive of others, as required by law and regulations. Natalia Kepuk, 23 IBLA 99 (1975); Elsie Bergman, 22 IBLA 233 (1975); William Carlo, Sr., 21 IBLA 181 (1975). Furthermore, such a period of nonuse tends to vitiate any effective qualifying use and occupancy which may have preceded the long period of nonuse. Id. In addition, nonuse by an applicant may also serve as another basis for rejecting an allotment application. Thus, where as here there are no improvements on the site, the use was spotty, highly intermittent, and limited to food gathering, hunting, and fishing, uses which might be done on much of the public domain in Alaska by many Natives without evidencing any possession of the land exclusive of others, and the lengthy period of nonuse demonstrates that the land has not been needed for subsistence purposes for years, it is reasonable to deny an allotment. In these circumstances, it has not been shown that the land is needed by the Native nor that the purpose of the Act to secure land actually used and occupied by the Native for his/her needs has been met. Thus, the application can appropriately be rejected in the exercise of the Secretary's discretion under the Act.

[3] From appellant's own submissions it is apparent that she has neither used nor needed the land since sometime in the early 1930's. Since that time she has alleged only that she visited the land "once every several years" since 1965, and not at all for more than 30 years prior to that time. Some of her allegations are inconsistent. Appellant's application is sufficient to establish prima facie that there has not been the substantially continuous use and occupancy required by the Act and also ordinarily in such circumstances would afford a basis for rejecting the application. Nevertheless, as appellant has requested a hearing alleging there is a factual dispute, we believe the essential thrust of the Pence decisions to allow a Native to have a hearing where there are some factual issues disputed compels us to order a hearing in this case. The cases cited above concerning a period of nonuse remain relevant on the legal consequences flowing from such nonuse; there is only a procedural change since Pence to afford the Native a hearing before his application is to be rejected for inadequate use and occupancy. Thus, the case will be remanded for action by BLM in accordance with the Peters decisions cited, supra.

We stress, however, that the Government may present a prima facie case of noncompliance with the Act and a basis for rejecting the application simply by presenting appellant's showings made in her application and her failure to present any other evidence of substantially continuous use and occupancy. Additional evidence, of course, may be submitted. It has always been the burden of the

applicant to show that the requirements for an allotment have been met. John C. Knutsen, 23 IBLA 296 (1976); Anuska Tugatuk, 23 IBLA 182 (1976). This burden is especially great in this case in view of the showings presented so far.

Appellant's allegations concerning the field examination cannot be accepted nor are they relevant where the basis for decision was made on the showings submitted by the applicant. We do not at this time rule on whether the type and showings of use prior to the early 1930's would have been sufficient to meet the requirements of the Act. Further delineation and discussion of the issues concerning use and occupancy can best be made after a hearing. If there are any adverse parties or claimants to the land, notice should be afforded them of future proceedings in this case.

Therefore, 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 set aside and the case remanded for further proceedings consistent with this decision.

Joan B. Thompson
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Frederick Fishman
Administrative Judge

