

ELENA BARTMAN

IBLA 76-209

Decided October 17, 1979

Appeal from the decision of the Alaska State Office, Bureau of Land Management, rejecting Alaska Native allotment application AA-7793.

Set aside and remanded.

1. Alaska: Native Allotments

An allotment may be granted only when the Native applicant demonstrates actual substantial use and occupancy of the land, at least potentially exclusive of others, and not merely intermittent use. The Bureau of Land Management is the proper agency for determining whether the applicant has satisfactorily proven his or her use and occupancy.

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

Where issues of material fact are in dispute, due process requires that an 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 before a decision is reached to reject an application for an allotment.

3. Administrative Procedure: Generally -- Administrative Procedure:
Hearings -- Alaska: Native Allotments -- Contests and Protests:
Generally -- Hearings -- Rules of Practice: Government Contests

Where Bureau of Land Management determines that an application for a Native allotment should be rejected for failure to establish use and occupancy of the land, Bureau of Land Management should initiate a contest proceeding pursuant to 43 CFR 4.451 to 4.452-9.

APPEARANCES: Henry W. Cavallera, Esq., Alaska Legal Services Corporation, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

This appeal involves Native allotment application AA-7793 filed by the Bureau of Indian Affairs (BIA) on behalf of Elena Bartman pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed subject to pending applications, section 18(a), Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976)), and implementing regulations at 43 CFR Subpart 2561. The application covered approximately 5 acres of unsurveyed lands in protracted sec. 16, T. 17 S., R. 58 W., Seward meridian. On August 1, 1975, the Alaska State Office approved the application as to 4 acres and rejected the remaining portion because of the existence of improvements owned by other persons.

Appellant Elena Bartman makes two arguments on appeal. First she argues that BIA, not the Bureau of Land Management (BLM), is responsible for resolving conflicting Native claims and that BIA certified that her claim did not infringe upon that of another Native. She contends that if this Board believes that there is a conflict, the matter should be remanded to BIA for reconsideration. Second, she argues that the allegedly conflicting improvements were placed on the land by a non-Native who sold to a Native, neither of whom now have rights as against her prior and continuous use and occupancy.

[1] Absent a BIA certification, an allotment application must be rejected. 43 CFR 2561.1(d). However, certification is not the sole consideration as to whether an allotment should be granted. BLM, which is responsible for managing and disposing of Federal land, must determine whether the allotment applicant has used and occupied the claimed land for at least 5 years. The use and occupancy requirement contemplates possession at least potentially to the exclusion of others and not mere intermittent use. Maxie Wassillie, 17 IBLA 416 (1974); 43 CFR 2561.0-5(a). When BLM's survey indicates a use other

than the applicant's use of lands for which the application was filed, that evidence goes against the applicant's proof of use and occupancy. It does not necessarily dispute BIA's certification that the claim of the applicant does not infringe on other Native claims. BLM is the appropriate decisionmaker to address the apparent conflict on the land for which appellant has filed an allotment application.

[2, 3] 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

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.

529 F.2d at 143.

Following that decision, the Board ruled that the Departmental contest procedures, 43 CFR 4.451 to 4.452-9, would satisfy the requirements of due process. Thus, when BLM adjudicates a Native allotment application presenting a factual issue as to the applicant's compliance with the use and occupancy requirements, 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, 311-12, reaffirmed on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976). The Court of Appeals has since 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).

In her statement of reasons, appellant alleges various facts as to the ownership of the improvements and their affect on her right to the land at issue. We note that these facts were not brought to the attention of the Alaska State Office prior to its August 1975 decision. The case file indicates that affidavits were sent to the State Office by appellant's attorney in June 1975, but the State Office apparently did not receive them. ^{1/} It is necessary, therefore, to set aside the decision in this case and remand to the Alaska State

^{1/} We also note that these same affidavits are referred to in appellant's statement of reasons for appeal as Exhibits A-C. An Exhibit D is also mentioned. At the time of our review, these exhibits were missing from the case file. Since this appeal must be remanded for further proceedings and appellant will be given an opportunity to present evidence in her favor, the availability of these materials would not have affected our decision.

Office for further review. On remand, BLM should seek to ascertain all of the facts as to those improvements and their effect on the appellant's use and occupancy of the land. If BLM then determines that the application should still be rejected for failure to establish use and occupancy of the land, BLM should initiate a contest proceeding as outlined in our decision in Donald Peters, supra. If BLM initiates a contest proceeding, BLM should give notice and an opportunity to participate to all interested parties.

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.

James L. Burski
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge

