

MARY DeVANEY

IBLA 76-414

Decided November 26, 1980

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application and evidence of occupancy. AA-7174.

Remanded.

1. Alaska: Native Allotments

The Act of May 17, 1906, 34 Stat. 197, as amended, 43 U.S.C. § 270-1 (1970), repealed subject to pending applications, 43 U.S.C. § 1617 (1976), authorized the Secretary to allot not to exceed 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Indian, Aleut, or Eskimo who resides in and is a Native of Alaska. No allotment shall be made to any person until said person has made proof satisfactory to the Secretary of substantially continuous use and occupancy of the land for a period of 5 years.

2. 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 witnesses may be submitted.

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

The Court of Appeals for the Ninth Circuit has 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 complies, at least facially, with the due process requirements set forth in the court's mandate in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

APPEARANCES: Bruce C. Twomley, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Monty L. DeVaney appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated November 13, 1975, rejecting the Native allotment application and evidence of occupancy submitted by the Bureau of Indian Affairs (BIA) on behalf of appellant's wife, Mary DeVaney, now deceased. 1/

On March 20, 1972, BIA filed the subject application and evidence of occupancy for 160 acres within protracted secs. 8 and 9, T. 6 S., R. 11 E., Copper River meridian. A mineral examination was thereafter made on September 10, 1974, from which BLM determined that the NE 1/4 NE 1/4 sec. 9, T. 6 S., R. 6 E., was mineral in character due to the presence of sand and gravel therein.

On August 27, 1974, a field examination was conducted of the lands sought. The field examiner found no visible evidence of the applicant's use and occupancy. From this information, BLM concluded that the applicant had not occupied the land as contemplated by the

1/ A notice of appeal was filed in this matter on December 24, 1975, by the Alaska Legal Services Corporation representing Monty L. DeVaney. BLM's decision of November 13, 1975, was sent to BIA alone and received by BIA on a date which cannot be determined from the file. BIA forwarded BLM's decision to appellant by letter of December 2, 1975. We regard appellant's notice of appeal as timely under the regulations set forth at 43 CFR 4.411.

Native allotment Act. Notifying BIA of this conclusion on June 9, 1975, BLM gave BIA 60 days from receipt thereof to supply additional information in support of the application. BIA did not respond with additional materials. Accordingly, BLM issued its decision on November 13, 1975, holding that clear and credible evidence of the applicant's entitlement to an allotment had not been presented.

Prior to either examination of the land by BLM, the applicant, Mary DeVaney, died on September 28, 1973, in Valdez, Alaska. Monty DeVaney, appellant herein, states in his statement of reasons that he is at best a presumptive heir of decedent, as there has been no determination of decedent's heirs by BIA or any other entity. He argues that BLM should not have rejected decedent's application without a hearing prior to such decision.

[1] The applicant filed her Native allotment application pursuant to the Act of May 17, 1906 (the Act), 34 Stat. 197, as amended by Act of August 2, 1956, 70 Stat 954, 43 U.S.C. §§ 270-1 through 270-3 (1970). The Act was later 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. The Act authorizes the Secretary to allot not to exceed 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Indian, Aleut, or Eskimo of full or mixed blood who resides in and is a Native of Alaska. In addition to other requirements, an applicant for allotment must make proof satisfactory to the Secretary of substantially continuous use and occupancy of the lands sought for a period of 5 years. 43 U.S.C. § 270-3 (1970).

[2] 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.

[3] 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, 241-242, 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).

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, supra at 743.

In light of the Pence decisions above, we vacate BLM's decision of November 13, 1975, and remand this case to the Hearings Division Office of Hearings and Appeals, for a hearing on the factual issues involved.

We note that the applicant alleged use and occupancy of the subject lands during the months May through October since 1963 for berry-picking, hunting, and fishing. She acknowledged, however, that she has not occupied the lands throughout the year because of her employment as a draftsman with the State Highway Department in Valdez. It is well settled that the applicant bears the burden to show that the requirements for an allotment have been met. John C. Knutsen, 23 IBLA 296 (1976); Anuska Tugatuk, 23 IBLA 182 (1976). In light of the distance between the lands sought and the applicant's place of regular employment, the burden of showing use and occupancy of the lands at least potentially exclusive of others appears to be an arduous one. John Nanalook, 17 IBLA 353 (1974).

The contest proceedings contemplated here must await a determination of decedent's heirs by BIA or other appropriate authority. Such heirs should be served as contestees in any contest action. The Act

which the applicant has relied upon gives a qualified person the right to select vacant, unappropriated, and unreserved nonmineral land in Alaska. This inchoate right is nonalienable, nontransferable, and noninheritable, and it terminates with death. Where, however, an allotment selection has been made and the applicant fully complies with the law and regulations and accomplishes all that is required to be done, the right to an allotment is earned and becomes a property right which is inheritable. No rights inure to the heirs of the deceased applicant where BLM was unable to verify use and occupancy for the lands described in the application. Mary Olympic, 47 IBLA 58 (1980).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office is vacated and the case remanded for action consistent herewith.

Douglas E. Henriques
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Frederick Fishman
Administrative Judge

