

WILLIAM CARLO, SR. (ON RECONSIDERATION)

IBLA 75-318

Decided March 12, 1981

Appeal from decision of the Fairbanks District Office, Bureau of Land Management, rejecting Native allotment application F-13523.

Petition for reconsideration granted; William Carlo, Sr., 21 IBLA 181 (1975) and decision appealed from vacated; case remanded.

1. Alaska: Native Allotments -- Powersite Lands -- Withdrawals and Reservations: Powersites

When a Native allotment application has been rejected because the applicant failed to complete 5 years of qualifying use and occupancy prior to the filing of an application for withdrawal for powersite purposes, the case will be remanded for readjudication under sec. 905 of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371, 2435-37 (1980), unless the described land is included as part of a project licensed under part I of the Federal Power Act of June 10, 1920 (41 Stat. 24), as amended, or is presently utilized for purposes of generating or transmitting electrical power or for any other project authorized by act of Congress. If the allotment applicant commenced the qualifying use of the land after its withdrawal or classification, the allotment shall be made subject to the right of reentry provided the United States.

APPEARANCES: Carmen L. Massey, Esq., Fairbanks, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

William Carlo, Sr., has petitioned for reconsideration of our decision in William Carlo, Sr., 21 IBLA 181 (1975), in which we affirmed a decision of the Fairbanks District Office, Bureau of Land Management (BLM), rejecting Native allotment application F-13523. We held that appellant had failed to demonstrate substantially continuous use and occupancy for a 5-year period prior to the withdrawal.

[1] This case must be remanded for readjudication in light of a recently enacted statutory provision that affects Native allotment applications for lands within powersite withdrawals. Section 905 of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371, 2435-37 (1980), provides in pertinent part as follows:

(a)(1) Subject to valid existing rights, all Alaska Native allotment applications made pursuant to the Act of May 17, 1906 (34 Stat. 197, as amended) which were pending before the Department of the Interior on or before December 18, 1971, and which describe either land that was unreserved on December 13, 1968, or land within the National Petroleum Reserve -- Alaska (then identified as Naval Petroleum Reserve No. 4) are hereby approved on the one hundred and eightieth day following the effective date of this Act, except where provided otherwise by paragraph (3), (4), (5), or (6) of this subsection, or where the land description of the allotment must be adjusted pursuant to subsection (b) of this section, in which cases approval pursuant to the terms of this subsection shall be effective at the time the adjustment becomes final. The Secretary shall cause allotments approved pursuant to this section to be surveyed and shall issue trust certificates therefor.

* * * * *

(d) Where the land described in an allotment application pending before the Department of the Interior on or before December 18, 1971 (or such an application as adjusted or amended pursuant to subsection (b) or (c) of this section), was on that date withdrawn, reserved, or classified for powersite or power-project purposes, notwithstanding such withdrawal, reservation, or classification the described land shall be deemed vacant, unappropriated, and unreserved within the meaning of the Act of May 17, 1906, as amended, and as such, shall be subject to adjudication or approval pursuant to the terms of this section: Provided, however, That if the described land is included as part of a project licensed under part I of the Federal Power Act of June 10, 1920 (41 Stat. 24), as amended, or is presently utilized for purposes of generating or transmitting electrical power or for any other project authorized by Act of Congress, the foregoing provision shall not apply and the

allotment application shall be adjudicated pursuant to the Act of May 17, 1906, as amended: Provided further, That where the allotment applicant commenced use of the land after its withdrawal or classification for powersite purposes, the allotment shall be made subject to the right of reentry provided the United States by section 24 of the Federal Power Act, as amended: Provided further, That any right of reentry reserved in a certificate of allotment pursuant to this section shall expire twenty years after the effective date of this Act if at that time the allotted land is not subject to a license or an application for a license under part I of the Federal Power Act, as amended, or actually utilized or being developed for a purpose authorized by the Act, as amended, or other Act of Congress.

If the project is not licensed or if the land described in the application is not presently utilized for the purposes of generating or transmitting electrical power or any other project authorized by Congress, the application may be approved. However, if substantially continuous use and occupancy were not commenced until after the withdrawal, the allotment shall be made subject to the right of reentry provided the United States by section 24 of the Federal Power Act. If there is a factual dispute as to when the applicant initiated his occupancy in determining whether to make his application subject to a right of reentry, the applicant has a right to a hearing under Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), and the Bureau of Land Management should initiate a contest pursuant to Donald Peters, 26 IBLA 235, 83 I.D. 309, sustained on reconsideration, 28 IBLA 153, 83 I.D. 534 (1976).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, appellant's petition for reconsideration is granted; our prior decision and the decision appealed from are vacated, and the case is remanded for further action consistent with this opinion.

Anne Poindexter Lewis
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Douglas E. Henriques
Administrative Judge

