

STATE OF ALASKA  
(LELAND R. ESTABROOK)

IBLA 81-210

Decided May 12, 1981

Appeal from decision of Alaska State Office, Bureau of Land Management, holding Native allotment application AA-6974 for approval and rejecting, in part, State selection application AA-4805.

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The Act of May 17, 1906, 34 Stat. 197, as amended, 43 U.S.C. § 270-1 (1970), repealed subject to pending applications, 43 U.S.C. § 1617 (1976), authorized the Secretary to allot not to exceed 160 acres of vacant, unappropriated, and unreserved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: Thomas E. Meacham, Esq., Assistant Attorney General, State of Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The State of Alaska has appealed from a decision dated June 12, 1980, of the Alaska State Office, Bureau of Land Management (BLM), approving Native allotment application AA-6974, made pursuant to the Act of May 17, 1906, as amended (repealed December 18, 1971), and rejecting in part State selection AA-4805 made pursuant to section 6(b) of the Alaska Statehood Act, 72 Stat. 339, as amended, 73 Stat. 141, 48 U.S.C.A. Chap. 2 (West Supp. 1979), to the extent of any conflict with the allotment application.

BLM, citing the Board's decision in State of Alaska, 41 IBLA 309 (1979), informed the State that the decision had given them 65 days from July 5, 1979, to file a private contest (pursuant to 43 CFR 4.450) against Estabrook's Native allotment application AA-6974. The BLM decision further stated that since the State did not file a private contest complaint in the allotted time, State selection application AA-4805 was rejected in part.

The BLM decision also contained a standard appeals paragraph which provides that in accordance with the regulations in Title 43, Code of Federal Regulations (CFR), Part 4, Subpart E, the State of Alaska has the right of appeal to the Board of Land Appeals.

The State of Alaska's selection application AA-4805, filed on December 16, 1968, included the land here involved. On January 20, 1972, the Bureau of Indian Affairs filed Native allotment application AA-6974 for approximately 160 acres in protracted secs. 11 and 14, T. 4 N., R. 8 W., Copper River meridian, on behalf of Leland R. Estabrook. Estabrook claimed use and occupancy of the allotment from

1958 to the date of the application for hunting, fishing, and berrypicking, and listed as his improvements on the land a tent frame, boat dock, and a cleared area for a cabin site.

A BLM field report, filed April 23, 1975, states that two fire pits, a small amount of the litter, and a game trail were found on the land but that there was no verification of use by the applicant. The report further contains the following findings:

This allotment, being located at the lake outlet, receives a considerable amount of recreation pressure. Because of this recreation use, it was impossible to determine if the fires and garbage had belonged to the applicant or to other recreationists. The only indication that the applicant had been there was the corner markings referenced above. No physical evidence of a tent frame, boat dock or cleared area was found.

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Taking into account the local Native traditional and customary uses and occupancy of the land, and the local Native ways of life, it is concluded that the use/occupancy of the allotment by the applicant has been neither substantial nor exclusive of other users.

It is concluded that use, if any, of the parcel by the applicant has been casual and intermittent.

In addition to examining the land for evidence of use and occupancy the field examiner interviewed several people who were either familiar with the Old Man Lake, Glennallen area, or who were themselves allotment applicants for lands in the general vicinity. Those interviewed included Herbert Smelcer, land director from the regional Native corporation for the Glennallen area, who had never heard of applicant Estabrook. Also interviewed was Morrie Secondchief, a lifelong resident of the Old Man Lake area and the holder of an allotment immediately west of the applicant's, who stated that she was also unfamiliar with Estabrook. Several others were interviewed and none could verify the applicant's use of the allotment.

To provide further information bearing on his use of the land the applicant submitted the statements of three witnesses. The statements, all apparently written in the same hand except for the signatures, indicated that the witnesses had seen the applicant use the land, that a campsite, tent, tent frame, fire pit, cleared area, and boat dock were to be found on the land, and that the land was used for hunting, berrypicking, and food gathering.

Based on this information, BLM held that "Mr. Estabrook used the land for which he applied in such a manner as to satisfy the substantial use and occupancy requirements of the Native Allotment Act. Therefore, Native allotment application AA-6974 covering approximately 160 acres is approved for allotment to the applicant." The decision appealed from did not tentatively approve State selection application AA-4805. The decision also advised the State of its right to appeal to this Board.

The State of Alaska appeals on several grounds. First, it asserts, citing Maxie Wassillie, 17 IBLA 416 (1974), that the burden is upon the allotment applicant to produce clear and credible evidence to establish entitlement to an allotment. Appellant contends that based upon the negative field examination and interviews, BLM would have denied the allotment application, but for the applicant's later submission of three unverified written form statements which, in appellant's opinion, lack credibility and should have in any event been outweighed by BLM's field examination and interviews.

The State further argues that the applicant's alleged use and occupancy of the land was insufficient to segregate the land from the States's selection.

The State's final argument contends that the applicant's use was not substantial actual possession and use of the land, at least potentially exclusive of others, as contemplated by the statute and its implementing regulation, 43 CFR 2561.0-5(a).

[1] The applicant filed his 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). 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). However, where the Board determines that the evidence of the allotment applicant's compliance was not "satisfactory to the Secretary," even though accepted by BLM, it may reverse the BLM decision and order it to initiate a contest. See e.g., State of Alaska, John Nusunginya, 28 IBLA 83 (1976).

[2] The Ninth Circuit Court of Appeals has ruled that "Alaska Natives who occupy and use land for at least 5 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, 241-42, 83 I.D. 308 564 (1976), reaff'd, Donald Peters (On Reconsideration), 28 IBLA 153, 83 I.D. 564 (1976).

The Court of Appeals 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 applications 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).

Automatic approval of the allotment application is precluded by section 905(a)(4) of the Alaska National Interest Lands Conservation Act, 94 Stat. 2435.

We have examined the record and the BLM decision in the case at bar and are not satisfied that the controverted evidence, which is of questionable origin, and the unverified statements of applicant's witnesses constitutes a sufficient basis on which to approve the Native allotment application and partially reject the appellant's prior-filed State selection.

In light of the evidence in the record and the Pence decisions above, we vacate BLM's decision of June 12, 1980, and remand this case to BLM so that it might initiate a contest hearing on the factual issues involved.

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.

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Edward W. Stuebing  
Administrative Judge

We concur:

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Bruce R. Harris  
Administrative Judge

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James L. Burski  
Administrative Judge

