

STANISLAUS MIKE

IBLA 76-452

Decided July 10, 1981

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting Alaska Native allotment application F-16385.

Affirmed in part; set aside and remanded in part.

1. Alaska: Native Allotments

In sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371, 2435 (1980), Congress provided that all Native allotment applications which were pending before the Department on Dec. 18, 1971, which described either land that was unreserved on Dec. 13, 1968, or land within the National Petroleum Reserve -- Alaska, were approved on the 180th day following the effective date of that Act subject to valid existing rights, unless otherwise provided by other paragraphs or subsections of that section. Failure to provide adequate evidence of use and occupancy does not bar approval of an allotment application under that provision. Where such an application has been rejected, the case will be remanded to the Alaska State Office for approval pursuant to sec. 905 of the Alaska National Interest Lands Conservation Act, subject to resolution of any protest filed before the end of the 180-day period.

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

Where a Native allotment application declares that the applicant first initiated use and occupancy after the date

that the land was withdrawn for lighthouse purposes, allowance of the Native allotment application is precluded as a matter of law and may be properly rejected without a hearing.

APPEARANCES: James Grandjean, Esq., Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Stanislaus Mike has appealed from the November 25, 1975, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting Native allotment application F-16385. Appellant applied for two parcels of land of which he claimed occupancy since July 1932. The State Office rejected the application for parcel A because the land had been withdrawn from all forms of appropriation since February 13, 1921, under Exec. Order No. 3406 for a lighthouse reserve. Furthermore, the State Office found, on the basis of a report of a field examination, that appellant had not presented clear and credible evidence of his entitlement to an allotment, and rejected his application in full.

[1] Before considering appellant's arguments on appeal, however, we must consider the following provision of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371, 2435, enacted on December 2, 1980:

Sec. 905. (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.

Those other paragraphs describe circumstances under which the application would remain subject to adjudication under the Native Allotment Act, 43 U.S.C. §§ 201-1 through 270-3 (1970), repealed, 43 U.S.C. § 1617 (1976). 1/

1/ In addition to the filing of a protest, circumstances that would bar automatic approval of an application include a determination that

The record shows no reason why appellant's allotment application for parcel B should not be held for approval under this statutory provision. There appear to be no valid existing rights in conflict with the application and the land was not reserved on December 13, 1968. We have no basis for concluding that appellant's application was not pending before the Department on December 18, 1971. 2/ Where a Native allotment applicant meets the requirements of subsection 905(a)(1), failure to provide adequate evidence of use and occupancy does not bar approval of the allotment application. Jack Gosuk (On Reconsideration), 54 IBLA 306 (1981). Thus, it appears that the only circumstance that would bar automatic approval of the application for parcel B would be the filing of a protest under subsection 905(a)(5), before the end of the 180-day period. The State Office, therefore, should consider appellant's application for approval, subject to any action which may have arisen before the end of the 180-day period which would preclude approval under subsection 905(a)(1) and require adjudication pursuant to the provisions of the Native Allotment Act.

[2] Although Congress approved certain Native allotments in section 905(a)(1) of the Alaska National Interest Lands Conservation Act, supra, it did not approve applications for land which was withdrawn as of December 13, 1968. Thus, appellant's application for parcel A can only be approved if it meets the requirements of the Alaska Native Allotment Act. 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed, 43 U.S.C. § 1617 (1976). The State office has already held that the application for parcel A must be rejected. We affirm.

Appellant argues that it is improper to require him to show that he had completed 5 years' use and occupancy prior to the withdrawal.

fn. 1 (continued)

the land is valuable for certain minerals, or a determination that the application describes land in a previously established unit of the national park system or in a state selection but where the allotment is not within the core township of a Native village.

2/ The requirement that an application be pending before the Department on Dec. 18, 1971, must be met regardless of whether the application is approved under section 905(a)(1) of the Alaska National Interest Lands Conservation Act or the Alaska Native Allotment Act, because the Native Allotment Act was repealed on that date and no application could be approved thereunder unless it was pending before the Department of the Interior on Dec. 18, 1971. 43 U.S.C. § 1617(a) (1976). Although appellant's application was dated Jan. 12, 1971, it was not filed with the Bureau of Land Management until Mar. 17, 1972, when the Bureau of Indian Affairs (BIA) filed it on appellant's behalf. It appears that many Native allotment applicants had filed their applications or evidence with BIA prior to Dec. 18, 1971, but BIA held them past the time when they were required to be filed with the Bureau of Land Management. Such applications are deemed to be pending on Dec. 18, 1971. See, e.g., Julius F. Pleasant, 5 IBLA 171 (1972). On remand, appellant should be required to establish that his application was filed with BIA prior to Dec. 18, 1971.

Since the State Office's decision in this case, the Secretary of the Interior by Secretarial Order No. 3040 of May 25, 1979, ruled that a Native applicant may be granted an allotment on withdrawn lands, if all other requirements have been met, when the applicant has merely commenced the required use and occupancy prior to the withdrawal. See Bella Noya, 42 IBLA 59 (1979). Appellant, however, does not allege use and occupancy at any time prior to the withdrawal. His application states that he commenced use and occupancy in 1932, 11 years later. Where a Native allotment application declares that the applicant first initiated use and occupancy after the date that the land was withdrawn, allowance of the Native allotment application is precluded as a matter of law. See Roselyn Isaac (On Reconsideration), 53 IBLA 306 (1981); Andrew Petla, 43 IBLA 186 (1979). Because approval of appellant's application is barred as a matter of law even if his allegations of material fact are accepted as true, the rule of Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), is not applicable, and the application is properly rejected without a hearing. Roselyn Isaac (On Reconsideration), *supra*; Andrew Petla, *supra*; *see also* Weinberger v. Hynson, Wescott & Dunning, Inc., 412 U.S. 609 (1973). Accordingly, appellant's request for a hearing is denied.

Appellant further argues that he should be permitted to tack on ancestral use and occupancy to avoid any segregative effect of the withdrawal, and that the Federal trust responsibility to Alaska Natives requires granting an allotment in this case. These arguments differ little from those raised in numerous other appeals from rejections of Native allotment applications. It is sufficient to note that claims based on aboriginal occupancy have been extinguished. 43 U.S.C. § 1603 (1976). The right to a Native allotment vests solely upon completion of 5 years' use and occupancy of the land and the filing of an application therefor. United States v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981).

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 affirmed with respect to its rejection of parcel A, and set aside and remanded for further action consistent herewith as to parcel B.

Anne Poindexter Lewis
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Douglas E. Henriques
Administrative Judge