

WARNER BERGMAN
(ON RECONSIDERATION)

IBLA 75-388

Decided November 27, 1981

Reconsideration of the Board's decision styled Warner Bergman, 21 IBLA 173 (1975), affirming the decision of the Fairbanks District Office, BLM, rejecting Native allotment application F-17109.

Petition for reconsideration granted; Warner Bergman, 21 IBLA 173 (1975), 31 IBLA 21 (1977), and decision appealed from vacated; case remanded.

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 describe either land that was unreserved on Dec. 13, 1968, or land within the National Petroleum Reserve -- Alaska, are 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 to be held for approval pursuant to sec. 905 of the Alaska National Interest Lands Conservation Act, subject to the filing of a protest before the end of the 180-day period.

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

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On June 20, 1977, this Board issued a decision, which remanded a previous Board decision styled Warner Bergman, 21 IBLA 173 (1975), to the Alaska State Office, Bureau of Land Management (BLM), for further action.

In Warner Bergman, *supra*, we held, in part, that an Alaska Native seeking an allotment pursuant to the Act of May 17, 1906 (34 Stat. 197, as amended), must have satisfied the requirement of 5 years of substantially continuous use and occupancy prior to repeal of the 1906 Act on December 18, 1971, by enactment of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617 (1976).

The June 20, 1977, decision, Warner Bergman (On Reconsideration), 31 IBLA 21 (1977), noted that the factual basis for the rejection of Bergman's application, as recounted in the February 5, 1975, decision of the Fairbanks District Office, had not been resolved. Before a decision might be made rejecting the application on that basis, we held that the applicant must be afforded notice and an opportunity for hearing to resolve the issues presented. Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976).

[1] At the present time, 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. §§ 270-1 through 270-3 (1970), repealed, 43 U.S.C. § 1617 (1976). In this case, it appears that the only circumstance that would bar automatic approval would be the filing of a protest under subsection 905(a)(5), before the end of the 180-day period. 1/

The record shows no reason why appellant's allotment application should not be approved under this statutory provision. There appear to

1/ In addition to the filing of a protest, such circumstances include a determination that 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.

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. The State Office, therefore, should hold 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. Jack Gosuk, 54 IBLA 306 (1981).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, our decisions in Warner Bergman, supra, and the decision appealed from are vacated, and the case remanded for further action consistent with this opinion.

Edward W. Stuebing
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Douglas E. Henriques
Administrative Judge

^{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 Bergman's application was dated Nov. 12, 1971, it was not filed with the BLM until Mar. 28, 1972, when the Bureau of Indian Affairs (BIA) filed it on Bergman's behalf. It appears that many Native allotment applicants had filed their applications or evidence with the Bureau of Indian Affairs prior to Dec. 18, 1971, but BIA held them past the time when they were required to be filed with the BLM. Such applications are deemed to be pending on Dec. 18, 1971. See, e.g., Julius F. Pleasant, 5 IBLA 171 (1972). On remand Bergman should be required to establish that his application was filed with BIA prior to Dec. 18, 1971.

