

HEIRS OF MACAULEY ALAKAYAK
(ON RECONSIDERATION)

IBLA 75-507

Decided February 25, 1982

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting Alaska Native allotment application A-056093.

Petition for reconsideration granted: Heirs of Macauley Alakayak, 23 IBLA 170 (1975), 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: James G. Robinson, Esq., Alaska Legal Services, Dillingham, Alaska, for appellants.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

The heirs of Macauley Alakayak have petitioned the Board for reconsideration of our decision, 23 IBLA 170 (1975), in which we affirmed the rejection of parcel A in the Native allotment application of Macauley Alakayak, A-056093, because the applicant did not present adequate evidence of substantially continuous use and occupancy of the land for a period of 5 years. ^{1/} Appellants had not been given an opportunity for hearing. In Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), the court held that Native allotment applicants were entitled to notice and an opportunity for hearing where there was an issue of fact with respect to an applicant's qualifications. Appellants filed a petition for reconsideration in light of this decision.

[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 therefore.

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 circumstances that would bar automatic approval would have been the filing of a protest under subsection 905(a)(5), before the end of the 180-day period. ^{2/}

^{1/} Macauley Alakayak died on June 24, 1974. The appeal and the request for reconsideration were filed by Anecia Alakayak and Henry Alakayak as his heirs.

^{2/} 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.

The record shows no reason why appellants' allotment application should not be approved 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 31, 1968. The Native applicant filed his application for parcel A October 27, 1961, which clearly was pending before the Department on December 18, 1971. 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 appellants' 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.

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

Gail M. Frazier
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Bruce R. Harris
Administrative Judge

