

BILL NEKEFEROFF

IBLA 75-390

Decided March 8, 1982

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying Native allotment application AA 7042.

Vacated and remanded.

1. Alaska National Interest Lands Conservation Act: Generally --
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.

2. Alaska National Interest Lands Conservation Act: Generally --
Alaska: Native Allotments

Where an Alaska Native has applied for allotment of two parcels, and conveyance of one of those parcels has been timely protested by persons who dispute the applicant's entitlement thereto and assert claims to the improvements thereon, the case must be adjudicated pursuant to the requirements of the Act of May 17, 1906, and other applicable law, necessitating, inter alia, notice and an opportunity for a hearing.

APPEARANCES: James Grandjean, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Bill Nekeferoff has appealed from the decision of the Alaska State Office, Bureau of Land Management (BLM), dated January 27, 1975, rejecting his Alaska Native allotment application AA 7042 for two separate parcels of land. The first of these, "Parcel A," involves 7-1/2 acres within the Native townsite of Egegik. The second tract, "Parcel B," is comprised of approximately 5 acres situated on Becharof Lake.

A field examination of Parcel B was conducted by BLM on June 13, 1973. The report of the examination states that no improvements existed on the land, that "visible evidence of use that would normally be associated with fishing and trapping [applicant's alleged uses] were not found," and, "[n]o visible signs of use of any kind were found on the parcel." The examiner reported no conflicting claims or applications, and no impediments to approval of the allotment of the parcel due to the legal status of the land.

A field examination of Parcel A was conducted by BLM on June 15, 1973. The applicant had alleged use of the land as a homesite, and claimed improvements consisting of a 12- by 16-foot house, a 10- by 12-foot carpenter shop, a trail costing \$400 to construct, and a space at the shoreline cleared of rocks for boat access. The two BLM examiners were accompanied on their inspection by the Egegik Village Council vice president. Their findings are summarized in the following excerpts from the report of their examination:

The parcel was found to include part of lot 7, all of lot 8 on block 2; lots 1, 2, 3 and 4 on block 3; part of lot 1 and all of lots 2 and 3 on block 4 of the Egegik townsite survey. The parcel also includes part of lot 1, U.S.S. No. 4941. Of these lots 7 and 8 of block 2; lots 1, 3 and 4 of block 3; and lot 3 of block 4 are occupied by persons other than the applicant. Additionally,

lot 1 of U.S.S. No. 4941 was patented as an ASHA on April 6, 1972 under patent No. 50-72-0385. (See attached maps and photos.)

No improvements were found on the parcel belonging to Mr. Nekeferoff. The improvements that he is claiming, according to the Egegik Village Council, belong to a Mr. Krause who is a longtime resident of Egegik. During the field examination Mr. Harlan Willis and Mr. Clarence Bakk, both occupants on the Nekeferoff claim, indicated the applicant owned nothing inside the area and had never utilized the area in any manner sufficient to acquire claim to the land.

The following day the Egegik Village Council was interviewed concerning the Nekeferoff claim. They indicated they did not believe the applicant had any rights to the land claimed. They also provided a written statement to that effect (see attachment No. 1).

Conflicts Identified

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The subject land lies in the withdrawal for the village of Egegik under P.L. 92-203. It also lies in a State selection application dated December 24, 1968.

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EXAMINER'S CONCLUSIONS AND RECOMMENDATIONS

During field examination it was found that a portion of the claim was on patented land and the rest was on areas occupied by other persons or without any occupancy at all. Statements by persons living on the claim and the Egegik Village Council indicated the applicant had no claim to the area involved.

* * * * *

A. No use or occupancy by the applicant was found during field examination.

B. Witness statements indicate the applicant has not used or occupied the land.

C. That portion of the parcel in U.S.S. No. 4941 is already patented.

D. Lots 7 and 8 of block 2, lots 1, 3 and 4 of block 3, and lot 3 of block 4 in the Egegik townsite are occupied by other persons.

Subsequently, BLM notified the applicant that the examinations of the two parcels had indicated that he had not used the lands in a way which would qualify him to receive an allotment, but BLM afforded him an opportunity to submit additional information in support of his claims. The period for so doing was later extended, and, after considerable delay, a printed form "witness statement," unverified and undated, but signed by six individuals, was filed with BLM. The statement merely said that the signatories knew that the applicant had used and occupied the lands described in his application "in the traditional Native subsistence manner." There was no reference to distinctions in use between Parcel A and Parcel B, no reference to potential exclusivity of such use, no dates or terms of time of such use, and no reference to improvements.

BLM then issued its decision of January 27, 1975, which is the subject of this appeal, rejecting the application as to both parcels because the examiners found no evidence of use or occupancy of either tract by the applicant, and because the improvements which he claimed on Parcel A belong to another person, according to the Village Council. The decision also erroneously stated that no additional information had been supplied in support of the claims, apparently overlooking the "witness statement" for whatever value it may have had.

This Board's consideration of the applicant's appeal was delayed initially for procedural reasons and more recently in anticipation of the effect of the passage of the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96-487, 94 Stat. 2371, enacted on December 2, 1980. Section 905 of that Act governs our disposition of this appeal.

[1] Parcel B, which was unimproved, unreserved, and subject to no conflicting claims, appears to fall within the ambit of section 905(a)(1) of ANILCA, which provides for legislative approval of timely-filed applications for such lands on the 180th day following the effective date of the Act. We have held that where an application 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. Wayne C. Williams (on Reconsideration) 61 IBLA 181 (1982). On remand, therefore, the State Office should hold appellant's application for approval as to Parcel B only, subject to any impediment or disqualification under the Act which may have arisen prior to the expiration of the 180-day period prescribed.

[2] As to Parcel A, there appear to be several circumstances which preclude legislative approval under ANILCA and require adjudication of the application pursuant to the Act of May 17, 1906, as amended, and other applicable law. We will address these considerations individually.

On June 16, 1973, the Egegik Land Selection Committee submitted a statement asserting that the signatories felt that Bill Nekeferoff is not entitled to the land which "he filed on in the village townsite, as he has never built on it or proved up on it. Also, there have been homes on the land [which] have been lived in for many, many years." This statement is

signed by the committee chairman, and by the Egegik Council vice president and by the secretary-treasurer. A question arises as to whether this statement qualifies as a "protest" within the definition of ANILCA. It is noteworthy, nevertheless, that the legislative approval of Native allotment applications is expressly granted "subject to valid existing rights."

Although this aspect of the case, viewed in isolation, may arguably be insufficient to preclude legislative approval, there is a more compelling factor.

While this appeal was pending, a letter of protest was filed with BLM by Nick Abalama on behalf of his aged step-father, Andrew Krause, and on behalf of a woman named Lucy P. Amock. In the protest Abalama asserts that Nekeferoff is not entitled to the land, and that the improvements thereon are the property of Krause and Amock. Abalama also states that the Krause home has been there, to his knowledge, since at least 1925. The protest was signed by Abalama, Krause, and Amock.

This statement precisely fits the protest definition of section 905(a)(5), which provides:

(5) Paragraph (1) of this subsection and subsection (d) shall not apply and the Native allotment application shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended, if on or before the one hundred and eightieth day following the effective date of this Act --

* * * * *

(C) A person or entity files a protest with the Secretary stating that the applicant is not entitled to the land described in the allotment application and that said land is the situs of improvements claimed by the person or entity.

Finally, there must be a determination of the effect of the creation of the townsite and the segregative effect of that action on the allotment application, as well as the effect of the State selection application filed December 24, 1968.

Of course, the patented portion of Parcel A should be rejected as a matter of law. See Dorothy L. Standridge, 55 IBLA 131 (1981).

Adjudication of allotment applications pursuant to the Act of May 17, 1906, as amended, requires notice and an opportunity for hearing prior to any decision to reject the application or any portion thereof for reasons relating to disputed questions of fact. Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). The Departmental contest procedures satisfy this requirement. Donald Peters (On Reconsideration), 28 IBLA 153 (1976); accord, Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

Accordingly, 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 vacated and the case is remanded to the Alaska State Office, BLM, for the initiation of contest proceedings to determine the allotment applicant's entitlement to the unpatented portion of Parcel A, the contingent legislative approval of Parcel B pursuant to ANILCA, and other action consistent with this opinion.

Edward W. Stuebing
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Douglas E. Henriques
Administrative Judge

