

MARY A. A. ASPINWALL (ON RECONSIDERATION)

IBLA 76-88

Decided August 27, 1982

Petition for reconsideration of Mary A. A. Aspinwall, 23 IBLA 309 (1976), in which the Board affirmed a decision of the Alaska State Office, Bureau of Land Management, rejecting Alaska Native allotment application AA 6578.

Petition for reconsideration granted. Decision sustained in part and vacated in part and remanded.

1. Alaska: Native Allotments

An Alaska Native allotment application is not approved under sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371, 2435 (1980), if the land is included in a state selection application but is not within a core township of a Native village. Under subsection (a)(4) of that section, such an application shall be adjudicated pursuant to the requirements of the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970).

2. Patents of Public Lands: Effect

The effect of the issuance of a legal patent is to transfer legal title from the United States and to remove the land from jurisdiction of the Department of the Interior. Applications for land, title to which has passed from the United States by issuance of a legal patent, must be rejected.

3. Administrative Procedure: Adjudication--Administrative Procedure: Hearings--Alaska: Native Allotments--Alaska: Statehood Act--Hearings--Rules of Practice: Hearings

An application for a Native allotment must be rejected if the alleged use and

Occupancy commenced after the time that a state selection application was filed for the land. But where the Native allotment applicant alleges use and occupancy prior to the filing of a state selection application, it is improper to reject the application without affording the applicant notice and opportunity for a hearing. BLM must initiate contest proceedings against the application, and give the State of Alaska an opportunity to participate as a party to such contest.

4. Administrative Procedure: Adjudication--Administrative Procedure: Hearings--Alaska: Native Allotments--Alaska: Statehood Act--Rules of Practice: Hearings

If BLM determines that a Native allotment application that conflicts with a state selection application may be allowed without a Government contest against the Native allotment applicant, it must notify the State of Alaska of this determination. Upon such notification, the State, if dissatisfied, has an election of remedies. It may initiate a private contest within the time period prescribed in the notice, or it may appeal the decision of BLM, after it becomes final, to this Board. If the Board concludes that the Native's application is deficient, it will order the initiation of a Government contest. But if it finds the allotment application acceptable, it will order the issuance of a patent, if all else be regular.

APPEARANCES: Carmen Massey, Esq., Alaska Legal Services Corporation, for appellant; and Avrum M. Gross, Esq., Attorney General, and James N. Reeves, Esq., Assistant Attorney General for the State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Mary A. A. Aspinwall has petitioned for reconsideration of our decision in Mary A. A. Aspinwall, 23 IBLA 309 (1976), in which we affirmed the rejection of her Native allotment application AA 6578 filed pursuant to the Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed December 18, 1971). Appellant did not have a hearing. Her request for reconsideration is based on the decision in Pence v. Kleppe, 529 F.2d 135 (9th Cir. (1976)), wherein the court held that no Native allotment application may be rejected without a hearing on disputed issues of fact.

The Act of May 17, 1906, (the Act), 34 Stat. 197, as amended by the Act of August 2, 1956, 70 Stat. 954, 43 U.S.C. §§ 270-1 through 270-3 (1970), authorizes the Secretary of the Interior to allot not to exceed 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska, including lands in national forests, to any Indian, Aleut, or Eskimo of full or mixed blood who resides in and is a Native of Alaska and who is the head of a family or is 21 years of age. No allotment shall be made to any person until the applicant has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of 5 years. 43 U.S.C. § 270-3 (1970). The Act was later repealed on December 18, 1971, subject to pending applications, by section 18(a), Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1976). Appellant's allotment encompasses the S 1/2 SW 1/4 of surveyed sec. 27 and the N 1/2 NW 1/4 of protracted sec. 34, T. 30 S., R. 58 E., Copper River meridian. The Board affirmed the June 2, 1975, BLM decision because sec. 27 had been patented to the territory of Alaska on February 18, 1955, pursuant to the Act of January 21, 1929, 45 Stat. 1091, 43 U.S.C. § 852 (1976), and because appellant failed to submit satisfactory proof of independent use and occupancy of the land she claimed in sec. 34.

While this petition was pending, Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96-487, 94 Stat. 2371 (1980), 16 U.S.C. § 3101 (Supp. IV 1980), which has a provision concerning Alaska Native allotments. It is therefore appropriate that we initially determine whether this statute affects the adjudication of this case.

[1] Section 905(a)(1) of that statute, 43 U.S.C. § 1634(a)(1) (1976), approved all Native allotment applications pending before the Department on or before December 18, 1971, which described either land that was unreserved on December 13, 1968, or land within the National Petroleum Reserve in Alaska subject to valid existing rights, except where otherwise provided by other subsections of that section. Subsection 905(a)(4) concerns the adjudication of Native allotment applications which conflict with State selection applications. That subsection provides in pertinent part:

[W]here an allotment application describes land * * * which on or before December 18, 1971, was validly selected by or tentatively approved or confirmed to the State of Alaska pursuant to the Alaska Statehood Act and was not withdrawn pursuant to section 11(a)(1)(A) of the Alaska Native Claims Settlement Act from those lands made available for selection by section 11(a)(2) of the Act by any Native Village certified as eligible pursuant to section 11(b) of such Act [i.e., a "core" township selection by an eligible Native village], paragraph (1) of this subsection and subsection (d) of this section shall not apply and the application shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended, the Alaska Native Claims Settlement Act, and other applicable law.

The parcel for which appellant applied is not within the core township of a Native village, and because a State selection application was filed for

part of the land (AA 208, Sept. 8, 1966), the allotment is not approved by Congress and must be adjudicated pursuant to the provisions of the Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed, 43 U.S.C. § 1617 (1976).

[2] We adhere to our earlier holding in Mary A. A. Aspinwall, *supra*, that appellant's application for the patented lands must be rejected. The effect of the issuance of a patent is to transfer the legal title from the United States. Robert Dale Marston, 51 IBLA 115 (1980); Federal American Partners, 37 IBLA 330 (1978); State of Alaska, 35 IBLA 140 (1978); Basille Jackson, 21 IBLA 54 (1975). Accordingly, since the portion of the parcel in sec. 27 involves lands patented to the territory of Alaska in 1955 prior to her initiation of use and occupancy, we affirm our decision with respect to that portion.

[3] Appellant asserts that she began qualifying use and occupancy of that portion of the parcel in sec. 34 in 1958 before the State of Alaska filed a State selection application (AA 208) for sec. 34 on September 8, 1966. An application for a Native allotment must be rejected if the alleged use and occupancy commenced after the time that a state selection application was filed for the land. Roselyn Isaac (On Reconsideration), 53 IBLA 306 (1981); Andrew Petla, 43 IBLA 186 (1979). However, where, as here, the Native allotment applicant alleges use and occupancy prior to the filing of a state selection application, it is improper to reject her application without affording her notice and opportunity for a hearing. Daniel Johansen (On Reconsideration), 54 IBLA 295 (1981). Accordingly, BLM must initiate contest proceedings against the application. Aguilar v. United States, 474 F. Supp. 840 (D. Alaska, 1979). See Pence v. Kleppe, *supra*; Donald Peters, 26 IBLA 235, 83 I.D. 308, sustained on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976). 1/ The State of Alaska must be given an opportunity to participate as a party to such contest. 2/ Daniel Johansen (On Reconsideration), *supra*. See State of Alaska, 41 IBLA 315, 86 I.D. 361 (1979).

[4] If, upon further review of this case, BLM determines that the allotment may be allowed without a Government contest against the Native

1/ The application indicates that appellant used the land from 1958 to 1961. A field examiner reported that when he spoke with appellant in 1972, she stated that she had not used the land since 1958. Appellant's May 28, 1975, affidavit states in part:

"Any statement that I made in October, 1972 to the Field Examiner of the BLM concerning my not being on the land since 1958 is incorrect. The only time I was not able to seasonally use the land I am claiming was in 1961 when I temporarily resided in New York City for nine months. Otherwise I have gone back to this land every year for picking berries."

2/ The record indicates that this parcel is subject to conflicting allotment applications. These applicants should be notified of the proceedings and, if they are still pursuing their claims, be given an opportunity to participate.

allotment applicant, it must notify the State of Alaska of this determination. Upon such notification, the State, if dissatisfied, may elect either to initiate a private contest within the time period prescribed in the notice, or to appeal the final BLM decision to this Board. If the Board then concludes that the application is deficient, it would order the initiation of a Government contest. If the Board finds the application acceptable, it will order the issuance of a patent, if all else be regular. State of Alaska, 42 IBLA 94 (1979).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is granted; the prior Board decision is sustained in part and vacated in part and the case is remanded.

Gail M. Frazier
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

James L. Burski
Administrative Judge

