

STATE OF ALASKA

IBLA 82-715

Decided March 30, 1983

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting application for temporary use permit. AA-43459.

Affirmed.

1. Alaska: Native Allotments

The filing of an acceptable application for a Native allotment segregates the lands from appropriation and subsequent conflicting applications must be rejected.

APPEARANCES: Clair Steffens, Esq., Assistant Attorney General, Office of the Attorney General, Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

The State of Alaska has appealed from a decision dated March 11, 1982, by the Alaska State Office, Bureau of Land Management (BLM), rejecting its temporary use permit application. AA-43459.

The Alaska Department of Fish and Game filed its application on May 20, 1981, for lands on Iliamna Lake described as T. 6 S., R. 37 W., Seward meridian, SW 1/4, S 1/2, NW 1/4 sec. 26; SE 1/4 SE 1/4 sec. 27. The application states that Alaska proposed to use the lands for research and life history study of Lower Talarik Creek and Lake Iliamna rainbow trout.

The decision recites:

There are two Native allotments AA-6127 and AA-6270 on the mouth of Lower Talarik Creek within sections 26 and 27 which almost totally conflict with the State's application.

Filing of an acceptable application for a Native allotment segregates the land from conflicting applications, 43 CFR 2561.1(e). Therefore, the application for Temporary Use Permit AA-43459 must be rejected.

43 CFR 2561.1(e) provides:

(e) The filing of an acceptable application for a Native allotment will segregate the lands. Thereafter, subsequent conflicting applications for such lands shall be rejected, except when the conflicting application is made for the conveyance of lands pursuant to any provision of the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.).

Native allotment application AA-6127 has been previously before the Board. By decision of August 1, 1975, styled Gregory Anelon, Sr., 21 IBLA 230 (1975), the Board affirmed an Alaska State Office decision rejecting Anelon's allotment application AA-6127 filed pursuant to the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed, 43 U.S.C. § 1617 (1976). Anelon, whose application was filed in 1971, filed a petition for reconsideration which was granted in order to review the case in light of the Alaska National Interests Lands Conservation Act (ANILCA), P.L. 96-487, 94 Stat. 2371, 2435 (1980). 1/

Appellant states that on June 1, 1981, it filed a protest of the Anelon application and contends that pursuant to section 905(a)(5) of ANILCA, the application remains subject to adjudication under the Native Allotment Act, supra. 2/ In our decision reconsidering the Anelon application (Gregory Anelon, Sr., 60 IBLA 101 (Nov. 19, 1981)), we remanded the case to BLM for a determination whether AA-6127 qualified under ANILCA. Appellant asserts that BLM has not readjudicated the case.

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1/ In section 905(a)(1) of ANILCA 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 without finality, the case will be remanded to the Alaska State Office to be held for approval pursuant to section 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/ Section 905(a)(1)(5) 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 --

"(A) A Native Corporation files a protest with the Secretary stating that the applicant is not entitled to the land described in the allotment application, and said land is withdrawn for selection by the Corporation pursuant to the Alaska Native Claims Settlement Act; or

"(B) The State of Alaska files a protest with the Secretary stating that the land described in the allotment application is necessary for access to lands owned by the United States, the State of Alaska, or a political subdivision of the State of Alaska, to resources located thereon, or to a public body of water regularly employed for transportation purposes, and the protest states with specificity that facts upon which the conclusions concerning access are based and that no reasonable alternatives for access exist; or

According to the statement of reasons, the facts of the other Native allotment application (AA-6270) are as follows: It was filed by Ira Wassillie, rejected by BLM in 1963, and filed again in April 1971. After field examinations, BLM again rejected the application in 1975. However, in April 1975, it vacated its rejection on the basis of affidavits from Wassillie and his witness. On April 27, 1979, appellant filed a contest challenging BLM's vacation of the rejection. Appellant states that it is awaiting a hearing on this issue.

Appellant contends that neither of the applications is acceptable under 43 CFR 2561.1(e) and, therefore, cannot have any segregative effect. Appellant adverts to 43 CFR 2091.2-1 <sup>3/</sup> arguing in effect that the segregative effect vests only when an allotment is approved by the authorized officer. Appellant also contends that the Wassillie application is unacceptable because of lack of use and occupancy and because the land was not vacant. Appellant states that the Wassillie allotment application is the subject of a pending contest by the State.

As relief, appellant requests that its reapplication for a special use permit be granted. In the alternative, it requests a stay of the segregative effect of 43 CFR 2561.1(e) pending resolution of its challenges to the allotment applications.

The sole issue before us is whether BLM properly rejected appellant's temporary use application. We hold that it did.

[1] Appellant's arguments concerning 43 CFR 2561.1(e) are not persuasive. A reading of this regulation in the context of the accompanying regulations clearly reveals that "acceptability" of an application relates to such elements as the execution of the document by a qualified Native and the filing thereof in the proper BLM office. That proof of use and occupancy are not prerequisites to the acceptability of an application is concisely stated in section 2561.1(f), which allows an applicant to "submit the required proof within six years of the filing of his application in the proper office" (emphasis added). Appellant's reliance on 43 CFR 2091.2-1 is to no avail. If, as appellant urges, the segregative effect occurred only when an allotment was approved, 43 CFR 2561.1(e) and the reiteration of that provision in 43 CFR 2091.6-5 would be rendered wholly without effect. Such an interpretation is not tenable. 43 CFR 2561.1(e) provides simply that the filing of an acceptable application segregates the lands and that thereafter subsequent conflicting applications for such lands shall be rejected. Appellant's application is such a subsequent conflicting application and BLM properly

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fn. 2 (continued)

"(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."

<sup>3/</sup> This regulation states: "§ 2091.2-1 Indian allotment. Where an allotment application is approved by the authorized officer, it operates as a segregation of the land and subsequent applications for the same land will be rejected."

rejected it. The two Native allotment applications are not before us herein and the fact that BLM has not yet adjudicated either of them has no dispositive impact. Consequently, the challenges which appellant filed with BLM and raised on appeal herein in connection with these allotment applications are also not before us.

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.

Gail M. Frazier  
Administrative Judge

We concur:

Douglas E. Henriques  
Administrative Judge

Anne Poindexter Lewis  
Administrative Judge

