

Editor's note: Reconsideration granted; decision modified in part -- 80 IBLA 221 (April 30, 1984)

VILLAGE AND CITY COUNCIL OF ALEKNAGIK
MAY M. OLSON
LAWRENCE MURPHY, SR.

IBLA 83-821

Decided November 15, 1983

An appeal from a decision of the Alaska State Office, Bureau of Land Management, dismissing protests against Alaska Native allotment application A-054491.

Affirmed in part, dismissed in part.

1. Appeals--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Statement of Reasons

An appeal to the Board of Land Appeals will be dismissed when the appellant fails to file timely a statement of reasons and no reason for maintaining the action is apparent.

2. Act of May 17, 1906--Alaska: Native Allotments--Applications and Entries: Priority

The Alaska Native Allotment Act, 43 U.S.C. § 270-1 (1970), granted to qualified applicants a preference right to the land occupied which gives the applicant first choice in the land.

3. Administrative Procedure: Hearings--Hearings--Rules of Practice: Hearings

In order to be entitled to an adjudicative hearing, as an adjunct of due process, a party must have a sufficient property interest in that which is the subject of the Government action.

APPEARANCES: Wilson A. Rice, Esq., Anchorage, Alaska, for May M. Olson and Lawrence Murphy, Sr.; Randall Simpson, Esq., Anchorage, Alaska, for the Village and City Council of Aleknagik.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

May M. Olson, Lawrence Murphy, Sr., and the Village and City Council of Aleknagik appeal from the June 8, 1983, dismissal of their protests against

the approval of Alaska Native allotment application, A-054491, by the Alaska State Office, Bureau of Land Management (BLM). The subject of their protest is the Native allotment application filed by Peter Krause, Sr., on May 17, 1961, for approximately 28 acres of public land located in sec. 25, T. 10 S., R. 56 W., and sec. 30, T. 10 S., R. 55 W., Seward meridian. ^{1/} The application was filed under the authority of the Alaska Native Allotment Act of May 17, 1906, 48 U.S.C. § 357 (1958) (Later codified as 43 U.S.C. § 270-1 (1970) before its repeal by section 703(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2789).

The Lake Aleknagik area surrounding the subject lands was the site of a Native village which was decimated by a flu epidemic in 1919. The survivors abandoned the settlement, leaving the area largely uninhabited. In 1933, the Moody family built a log cabin on the north shore of Lake Aleknagik at a spot now known as Mosquito Point. The area residents constructed a Seventh Day Adventist Church (Church) meetinghouse near the Moody cabin during 1938. Adjacent to the churchhouse is a cemetery, which was in existence in 1932.

During 1939, Ken Armstrong built a house east of and Roland Moody built a house north of the original Moody cabin, which was occupied by Moody's mother and his stepfather, Blackie Rawls. The Armstrong house was purchased and occupied by Peter Krause, Sr., in 1943. Krause, a fisherman, raised 15 children there, and in 1957, his son, Robert, built and occupied a small cabin northeast of it, where he raised 8 children. Soon after Peter Krause, Sr., filed his Native allotment application, the village of Aleknagik filed a townsite application, A-054709, on May 24, 1961, which included lands in Krause's application. Robert Krause was one of the original petitioners for the townsite. On November 28, 1962, Moody filed a homesite application, A-058368, for lands also claimed in Krause's application. The applicant, Peter Krause, Sr., died on March 23, 1962, but his heirs have maintained his application for the lands he claimed to use from 1943 until his death in 1962.

In 1964, while Robert Krause was under judicial restraint, the Lawrence Murphy house and the Wassilly Nicholai house were moved onto the land east of the Krause buildings. Robert's wife, Pauline, protested the bulldozing and settlement of this land, especially since her clothesline was where the Murphy house was placed. The Krause family had also used that area to tether

^{1/} The metes and bounds description of the subject lands is as follows:

"Beginning at corner No. 1, which is in common with corner No. 1 of U.S. Survey No. 3091; thence northeast along the southeast boundary of said survey to corner No. 4 of said survey; thence No. 48 degrees 52' E., 1320 feet to corner No. 2; thence due east 1056 feet to corner No. 3; thence due south to corner No. 4 on the mean high-water line of Lake Aleknagik; thence meandering southwesterly along the mean high-water line of Lake Aleknagik to the point of beginning * * *. Containing approximately 28 acres."

their dogs. Upon his release, Robert openly opposed the settlement of the Murphy and Nicholai houses. He protested to this Department.

In 1967, the townsite was surveyed. This survey plat, USS 4873, was approved by BLM in 1970. The survey divided the lands claimed in Krause's application, along with the other lands selected for the townsite, into lots. No patents were issued for the townsite because of its conflicts with the other pending applications.

Field examinations of the lands claimed by Krause were conducted by BLM in 1975 and 1976. Based on those reports, on June 26, 1979, it issued a complaint against the application, charging:

The Act of May 17, 1906 (34 Stat. 197), as amended August 2, 1956 (70 Stat. 954), 43 U.S.C. 270-1 to 270-3 (1976) and the regulations thereunder, specifically Sec. 2561.2(a), Title 43, Code of Federal Regulations (CFR) provides that an allotment will not be made until the lands are surveyed by the Bureau of Land Management, and until the applicant or the authorized officer of the Bureau of Indian Affairs has made satisfactory proof of substantially continuous use and occupancy of the land for a period of five years by the applicant. As defined in 43 CFR 2561.0-5, the term "substantially continuous use and occupancy" contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family, and such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use. The claimant has failed to show sufficient proof of substantially continuous use and occupancy by himself for a period of five years.

The complaint was amended to further read: "In addition the claimant has failed to show that his use of the claimed land was substantial actual possession and at least potentially exclusive of others. The land claimed was an area of communal use by the residents of the village of Aleknagik." BLM noted in the complaint that the following applications for interests in portions of the lands claimed by Krause were pending:

- a. A-058368 - Homesite application of Roland Moody;
- b. A-054709 - Townsite application;
- c. Public Law 92-203 withdrew township for the village of Aleknagik;
- d. AA-6648A - Aleknagik Natives Limited village selection;
- e. Public Land Order 5184 withdrawal for classification; and,

f. A-054326 State selection filed May 2, 1961. [2/]

Krause's heirs contested BLM's charges and a hearing was held before Administrative Law Judge E. Kendall Clarke in Dillingham, Alaska, on September 28, 1979, and in Anchorage, Alaska, on October 1, 1979. On March 28, 1980, he approved Peter Krause, Sr.'s, Native allotment application "to the extent it does not conflict with the interests of Roland Moody's homesite and the Seventh Day Adventist Church property." His supplemental decision, dated April 17, 1980, and second supplemental decision, dated June 1, 1980, clarified the description of the approved allotment and the lands excluded from the original application description. 3/

On April 25, 1980, May Marie Murphy Nicholai Olson filed a notice of appeal of Judge Clarke's decision. A notice of appeal was also received on April 28, 1980, from Olson and her father, Lawrence Murphy, Sr., both nonparticipants in the hearing before Judge Clarke. Together, they submitted a motion to intervene which was received by him on June 2, 1980. He denied their motion the following day on the basis that the decision approving application A-054491 had been rendered.

No statement of reasons was received in support of either notice of appeal.

The Alaska National Interest Lands Conservation Act (ANILCA), 94 Stat. 2371, was enacted December 2, 1980. Section 905(a)(1) of the Act approved, subject to valid existing rights and certain enumerated exceptions, all Native allotment applications for lands unreserved on December 13, 1968, made pursuant to the Act of May 17, 1906, which were pending before the Department on December 18, 1971. Subsection (a)(5) of Section 905 provided an exception to the legislative approval when a protest was filed by certain parties within 180 days following the effective date of the Act. Such a protest mandates adjudication of the application pursuant to the requirements of the 1906 Act. On May 29, 1981, Olson and Murphy filed with the Department a protest pursuant to Section 905(a)(5). Aleknagik Natives, Ltd., and the Village and City Council of Aleknagik jointly filed a similar protest on June 1, 1981.

2/ 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 the state selection application, contest proceedings against the application must be initiated. If BLM finds the allotment application acceptable, it will order the issuance of a patent, if all else be regular. Mary A. A. Aspinwall (On Reconsideration), 66 IBLA 367 (1982).

3/ An agreement was reached which declared the following described lands were not used and occupied by Peter Krause:

"Lot 1, 2 and 3, Block 7 and Lot 3, Block 9, Tract A of U.S. Survey No. 4873, the Aleknagik townsite survey located in T. 10 S., R. 55 and 56 W., Seward Meridian; plus any area which lies to the south of the line which marks the southwestern boundary of Lot 3, Block 9, Tract A of U.S.S. 4873 and also lies west of the line which marks the southeastern boundary of Lot 3, Block 9, Tract A of U.S.S. 4873."

On August 6, 1981, Aleknagik Natives, Ltd., withdrew from the proceeding. The protests were then summarily dismissed by BLM on June 8, 1983, because Judge Clarke's decision had previously approved the subject Native allotment application.

[1] While the Village and City Council of Aleknagik has filed a notice of appeal of the dismissal of their protest, no statement of reasons has been received from it. The applicable regulation, 43 CFR 4.412, states that "[i]f the notice of appeal did not include a statement of reasons for the appeal, such a statement must be filed with the Board * * * within 30 days after the notice of appeal was filed." Failure to file the statement of reasons subjects the appeal to summary dismissal. 43 CFR 4.402(a). No explanation has been given for the failure to file such a statement. An appeal to the Board will be dismissed at the discretion of the Board when the appellant fails to file timely a statement of reasons and no reason for maintaining the action is apparent. Irvin Wall, 68 IBLA 308 (1982); see Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969). Since the application was approved prior to enactment of ANILCA and the filing of the protest and no conflicting superior claim is asserted by the Village and City Council of Aleknagik, we see no reason to maintain their appeal.

[2] In their timely received statement of reasons, appellants Olson and Murphy claim that they were denied due process during the Government contest of the Krause allotment application because notice of the proceedings was not provided them. They allege that they were unable to submit testimony or evidence relevant to the outcome of the hearing, and argue that fundamental due process, requiring notice and an opportunity to be heard be provided where property interests are directly affected by governmental action, was violated when they did not receive notice that the title to their property was being adjudicated.

Appellants state that "[p]ortions of the application were denied on the grounds that the land was not open to entry," and argue that the lands they now occupy were segregated from entry and should have been declared unavailable to Krause.

The purpose of the contest proceeding, including the hearing, was to gather evidence to determine whether Krause, the applicant for a Native allotment, occupied and used the land in the manner specified in the 1906 Act. Judge Clarke's task was limited to a ruling concerning the application in relation to the lands claimed by the applicant. His findings were summarized by him as follows: "From the evidence adduced at the hearing, these lands [the Roland Moody homesite and the Seventh Day Adventist Church meeting site] were not vacant and unappropriated when Peter Krause moved into the area since they were already occupied." Thus, the application was denied relative to those lands because it did not fit the statutory mandate that allotted land be "at least potentially exclusive of others." No evidence was presented at any time during the field examination or during the hearing process that the lands now occupied by appellants were not used by the applicant, prior to appellants' settlement, for a length of time exceeding the statutory period. Even the Department, in its posthearing brief, accepted the fact that the lands occupied by Krause included the land now claimed by Olson and Murphy, neither of whom had moved onto the allotment claimed by Peter

Krause, Sr., until some 2 years after his death. The contest proceeding concerned only the issue of whether Peter Krause had qualified for the land, or part of it, during his lifetime.

Olson and Murphy's argument for segregation of the subject land from entry is based upon an asserted relationship with the excluded Church property. They claim that "although those houses were not moved onto the land until after the allotment application was filed, the land was considered a part of the Seventh Day Adventist Church property which was segregated prior to the allotment application." Their houses were moved on the property, they argue, at the specific request of the Church and, therefore, Judge Clarke's decision should have also recognized this portion of the Church property "as not being available for segregation by the allottee [sic]."

Although Olson and Murphy claim that the Church had superior right to the property, such claim has not been alleged elsewhere nor has evidence thereof been produced by them. The lands occupied by Krause, Moody, and the Church are all recorded as public lands. Hence, we find numerous conflicting applications to appropriate these lands which are pending and need to be adjudicated. However, the Native Allotment Act granted to qualified applicants a preference right to the land occupied by such applicants. Indeed, the preference right under the Act is very similar to the rights of preemption frequently granted homestead settlers who occupy public lands. In much the same way, the preference right of a Native allotment applicant relates back to his first use and occupancy of the land. Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979). Herbert H. Hilscher, 67 I.D. 410 (1960). ^{4/} The preference right gives a Native allotment applicant first priority for the land included in a pending application provided he can establish the facts required under the Act. Unless the Church has paramount right or title which has remained undisclosed, the land in question was segregated from the subsequent entry or claim, including appellant's settlement.

Appellants argue that they have the same property expectation as an allottee. However, they do not present evidence that they or the Church have ever submitted an application for appropriation of the subject lands or any such other recorded claim of right or title. The Church has no legal power to grant allotments of Federal public lands.

[3] Based on their assumed interest, Olson and Murphy seek a ruling requiring the Department to afford them a "due process" type of hearing adjudicating the application with respect to their interests. However, in order to be entitled to due process, a person must have a sufficient "property interest" in that which is to be deprived. Board of Regents v. Roth, 408 U.S. 564 (1972). Although the test for identifying a sufficient property is not

^{4/} Moreover, Departmental regulation in 1961, 43 CFR 67.11 (1959 Supp.), provided that lands occupied in good faith by Indians, Aleuts, and Eskimos were not subject to entry or appropriation by others, and was still in effect in 1964 as 43 CFR 2013.9-3 (1964).

Likewise, Section 8 of the Act of May 17, 1884, 23 Stat. 24, provided that Native claimants should not be disturbed in the possession of lands actually in their use and occupation or then claimed by them.

clearly defined, the Supreme Court capsulized the meaning of the term in Roth as follows:

Certain attributes of "property" in interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire to it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

Id. at 577.

Appellants cite a quote from Baldwin v. Hale, 68 U.S. 223, 233 (1863), found in Pence v. Kleppe, 529 F.2d 135, 142 (1976): "Parties whose rights are to be affected are entitled to be heard." (Emphasis added.) Olson and Murphy appear before the Board with what presently amounts to a mere hope or expectation since they have not demonstrated a legally recognizable right or interest affected by approval of the application. As due process is not an essential right attending such hope or expectancy, the decision to dismiss the protest is not fundamentally defective and void, as appellants argue. They seek for this Board to nullify the dismissal on the basis of their due process arguments, but they have not shown that due process is owed. Thus, they fail to present to the Board a claim for relief to which they are entitled. Moreover, when they failed to support their allegation that the decision appealed from was improper or unreasonable, they failed to meet their obligation to show error. Therefore, the appeal cannot be afforded favorable consideration. United States v. Connor, 72 IBLA 254 (1983).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision Olson and Murphy appeal from is affirmed, and the appeal taken by the Village and City Council of Aleknagik is dismissed.

Edward W. Stuebing
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge,
Alternate Member

C. Randall Grant, Jr.
Administrative Judge

