

WALTER TITUS (ON RECONSIDERATION)

IBLA 75-494

Decided December 1, 1983

Petition for reconsideration of Walter Titus, 22 IBLA 233 (1975), in which the Board affirmed decision of Fairbanks District Office, Bureau of Land Management, rejecting Alaska Native allotment application in part. F-034715.

Petition for reconsideration granted; Walter Titus, 22 IBLA 233 (1975), and decision appealed from vacated; case 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, 43 U.S.C. § 1634(a)(1) (Supp. IV 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, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970).

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

Where a Native allotment applicant alleges use and occupancy prior to the filing of a State selection application, it is improper to reject his application without affording him notice and opportunity for a hearing. The Bureau of Land Management must initiate contest proceedings against the application and give the State of Alaska an opportunity to participate as a party to such contest.

APPEARANCES: Carmen L. Massey, Esq., and Judith K. Bush, Esq., Fairbanks, Alaska, for appellant.

## OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Walter Titus has petitioned for reconsideration of the Board's decision in Walter Titus, 22 IBLA 233 (1975), which affirmed, inter alia, a decision of the Fairbanks District Office, Bureau of Land Management (BLM), dated March 27, 1975, rejecting parcel B of his Native allotment application, F-034715.

On August 3, 1965, appellant filed a Native allotment application in part for 39.98 acres of land (parcel B) situated in secs. 10 and 15, T. 1 N., R. 7 W., Fairbanks meridian, Alaska, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (subsequently repealed by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C.A. § 1617(a) (West Supp. 1982)). Appellant claimed use and occupancy from 1945. In its March 1975 decision, BLM rejected the application because appellant had not submitted satisfactory proof of use and occupancy, in compliance with 43 CFR 2561.2(a) and the Act of May 17, 1906, supra. In his appeal, appellant offered no additional evidence to support his claim of use and occupancy, and we affirmed BLM's decision in Walter Titus, supra.

On February 17, 1976, appellant petitioned for reconsideration of the Board's decision in Walter Titus, supra, contending that he had not been afforded an opportunity for a hearing prior to rejection of his Native allotment application, in accordance with Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). In Pence, the court held that Native allotment applicants were entitled to notice and an opportunity for a hearing where there was an issue of fact with respect to their qualifications.

[1] During the pendency of appellant's petition, on December 2, 1980, Congress passed the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96-487, 94 Stat. 2371 (1980). Section 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (Supp. IV 1980), approved, in part, all Native allotment applications pending before the Department on or before December 18, 1971, which described land which was unreserved on December 13, 1968, subject to valid existing rights and except where otherwise provided by other subsections of that section. The exceptions provide circumstances under which an application would remain subject to adjudication under the Act of May 17, 1906, supra. In this case, it appears that the only circumstance that would bar automatic approval would be where an application describes land which 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." <sup>1/</sup> 43 U.S.C. § 1634 (a)(4) (Supp. IV 1980). The record indicates that the subject land was selected by the State under an application (F-026809) filed

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<sup>1/</sup> Section 11(a)(1)(A) of ANCSA, 43 U.S.C.A. § 1610 (a)(1)(A) (West Supp. 1982), withdrew land in the core townships of certain eligible Native villages.

September 29, 1960, and was not withdrawn under ANCSA. Therefore, in accordance with section 905(a)(4) of ANILCA, supra, appellant's Native allotment application is not automatically approved and must be adjudicated pursuant to the provisions of the Act of May 17, 1906, supra. Mary A. A. Aspinwall (On Reconsideration), 66 IBLA 367 (1982); Victor A. Anahonak (On Reconsideration), 64 IBLA 289 (1982).

[2] Appellant's application asserts that he began qualifying use and occupancy of parcel B in 1945, before the State of Alaska filed selection application F-026809 on September 29, 1960. 2/ Where a Native allotment applicant alleges use and occupancy prior to the filing of a State selection application, it is improper to reject his application without affording him notice and an opportunity for a hearing. Accordingly, BLM must initiate contest proceedings against the application. Aguilar v. United States, 474 F. Supp. 840 (D. Alaska (1979)); see also Pence v. Kleppe, supra; Donald Peters, 26 IBLA 235, 83 I.D. 308, sustained on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976). The State of Alaska must be given an opportunity to participate as a party to such contest. See State of Alaska, 41 IBLA 315, 86 I.D. 361 (1979).

If, however, upon further review of this case, BLM determines that the allotment 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. State of Alaska, 42 IBLA 94 (1979).

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2/ By order dated Aug. 5, 1983, this Board required appellant to submit "an affidavit under oath stating that he did in fact use and occupy the land described in parcel B." We were prompted to issue the order by the fact that in a field report, dated June 13, 1974, a BLM realty specialist reported that appellant had stated that he had "never used" parcel B, but had filed on it because it was a "better location" than the land actually used on the banks of the Goldstream Creek, and that appellant had never repudiated his statements. In response to our order, counsel for appellant advised that appellant died "in approximately 1980" and filed two affidavits which attest to appellant's use and occupancy of parcel B. In an affidavit dated Sept. 30, 1983, Edmund Titus, appellant's son, states that his father used parcel B as a "spring trapping camp" in conjunction with trapping activities "up and down Goldstream Creek and Willow Creek." Attached to the affidavit is a handdrawn map signed by appellant which indicates the location of parcel B, which roughly conforms to BLM's location of the parcel on its survey plat of the area. The affidavit of James Alexander, appellant's cousin, dated Sept. 30, 1983, confirms the statements in the first affidavit.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board's decision in Walter Titus, supra, and the decision appealed from is vacated, and the case remanded for further action consistent herewith.

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Gail M. Frazier  
Administrative Judge

We concur:

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James L. Burski  
Administrative Judge

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Anne Poindexter Lewis  
Administrative Judge

