

Editor's note: Reconsideration denied by Order dated Nov. 13, 1986.

STATE OF ALASKA

IBLA 84-199, 84-373

Decided February 27, 1985

Appeals from decisions of the Alaska State Office, Bureau of Land Management, approving Native allotment applications AA 8184 and AA 8149.

Set aside and remanded.

1. Administrative Procedure: Standing -- Rules of Practice: Appeals: Standing to Appeal -- State Selections

Where state selection applications were rejected by decisions approving conflicting Native allotment applications, the State of Alaska has standing to appeal those decisions to the Board of Land Appeals.

2. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Duty of Department of the Interior to Native Allotment Applicants

Native allotment applications describing land in Alaska within a State selection application filed prior to Dec. 18, 1971, are generally excepted from the statutory approval afforded by sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act and must be adjudicated under the provisions of the Alaska Native Allotment Act.

3. Alaska: Native Allotments

Where the record in a Native allotment case contains significant evidence refuting the existence of substantially continuous use and occupancy at least potentially exclusive of others, a decision approving the allotment without any analysis of the facts to support the adjudication will be set aside as unsupported by the record and a contest ordered.

APPEARANCES: Barbara L. Malchick, Esq., Assistant Attorney General, State of Alaska; David C. Fleurant, Esq., Anchorage, Alaska, for Charlie Blatchford, Jr., and Violet Mack; F. Christopher Bockmon, Esq., Office of the Regional Solicitor, Alaska Region, Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The State of Alaska appeals from decisions of the Alaska State Office, Bureau of Land Management (BLM), dated September 9 and November 28, 1983, approving Alaska Native allotment applications AA 8184 and AA 8149, respectively, and rejecting conflicting State selection applications. 1/ Charlie Blatchford, Jr., and Violet Mack, brother and sister, applied separately under the Alaska Native Allotment Act of 1906, Ch. 2469, 34 Stat. 197, as amended by the Act of August 2, 1956, Ch. 891, 70 Stat. 954 (repealed 1971; formerly codified at 43 U.S.C. §§ 270-1 to 270-3 (1970)), 2/ for adjacent parcels of 160 acres and 35 acres of public land located on Yukon Island in Kachemak Bay, Alaska. 3/ This island has received much recognition for its historic, cultural, and scenic values and has also been the subject of several public and private claims.

The cultural resource evaluation report in the file for AA 8184 discloses that, beginning in 1930, anthropologist Frederica deLaguna conducted archeological excavations on a portion of the island's south side. Her research identified 13 strata totaling almost 16 feet thick representing five distinct cultural periods. Public interest in preserving the site of deLaguna's work led to a request for BLM to withdraw all of Yukon Island as an archeological site. Unfortunately, due to an administrative error, a 57-acre parcel on the north side of the island containing none of the known archeological sites was all that was withdrawn by Public Land Order No. (PLO) 1459 issued on August 6, 1957. After realization that the archeological sites uncovered by deLaguna were unprotected, PLO 3275 was issued on November 26, 1963, revoking PLO 1459 and withdrawing all 700 acres of Yukon Island "for protection and preservation of their archeological and historical values." According to the report, the Yukon Island Main Site where deLaguna conducted her primary research was designated as a National Historic Landmark in 1964 and entered on the National Register of Historic Places in 1966.

The record discloses a history of claims to various parts of the island under the public land laws prior to the filing of the Mack and Blatchford allotment applications. In 1931, a 35.86-acre parcel in the southeast corner was patented to Ulysses S. Ritchie. On November 17, 1959, William Abbott filed a homestead application, A-50795, for 140 acres of land adjacent to the Ritchie parcel. This parcel included in part the archeological diggings known as the Main Site. On July 19, 1960, homestead applications were filed by Claude A. Horton, Jr., A-52657, and Pekka Merikallio, A-52658, along with airport lease application A-52659. In 1962, two State selections filed with BLM pursuant to the Alaska Statehood Act, A-57389 and A-58326, included all unreserved land on Yukon Island. The State also filed a selection application for the reserved mineral estate. In January 1964, the State's applications

1/ These two appeals have been consolidated by the Board because of the similarity of the factual context and the legal issues involved.

2/ The Alaska Native Allotment Act was repealed subject to approval of applications pending before the Department on Dec. 18, 1971, by the Alaska Native Claims Settlement Act of 1971 (ANCSA), section 18(a), 43 U.S.C. § 1617(a) (1982).

3/ Yukon Island is an unsurveyed, wooded island of approximately 700 acres located in Kachemak Bay just off the Kenai Peninsula, Alaska, in protracted Tps. 7 and 8 S., R. 13 W., Seward Meridian.

were tentatively approved excluding those lands included within the unsurveyed withdrawal of PLO 3275 and the various homestead claims. ^{4/} Subsequently, the regional Native corporation, Cook Inlet Region, Inc., also selected parts of the island in a number of applications filed in 1975.

Horton's homestead claim and the airport lease application were rejected in 1964 and 1965. Although Merikallio's final proof of his homestead entry was rejected, his application was eventually accepted for a 5-acre homesite on the southwest side of the island. Abbott's application for 140 acres was amended to a trade and manufacturing site application for 75 acres which still included the Main Site. Since Abbott, a scientist conducting private research on the island, sought to preserve its archeological resources, he negotiated with BLM for conveyance of only 10 acres under his application, provided the antiquities and other cultural resources of the Main Site were adequately protected. Patent to 10.64 acres east of the Main Site was issued to Abbott in 1973.

Mack's allotment application, AA 8149, was received by BLM on July 27, 1972. ^{5/} While her application was dated May 7, 1971, it was not certified by the Bureau of Indian Affairs (BIA) until July 24, 1972. She claims use of the 35-acre parcel on Yukon Island beginning in April 1949.

Blatchford's allotment application, AA 8184, was received by BLM on September 18, 1972. His application was dated May 4, 1971, and was certified by BIA on September 14, 1972. He claims use beginning in June 1960.

In 1974, Merikallio and certain heirs of Abbott protested both Native allotment applications. On June 18, 1975, BLM rejected Blatchford's application for failure to occupy the claimed allotment for a 5-year period preceding withdrawal by PLO 3275. ^{6/} The rejected application was reinstated in September 1979 after issuance of Secretarial Order No. 3040 providing for waiver of the requirement that 5 years of occupancy be completed prior to withdrawal where land occupied under a Native allotment was subsequently withdrawn from entry.

On July 27, 1979, BLM, accompanied by Mack, conducted a field examination of her claimed 35-acre parcel. The field examiner concluded that there was insufficient evidence of compliance with the requirements of the Native Allotment Act for her to be entitled to that parcel. A field examination of Blatchford's claimed parcel was performed by BLM on August 24, 1982. The field examiner similarly concluded that he had not met the requirements of the Allotment Act.

^{4/} Lands awarded the State under its selections are presently planned for inclusion in the Kachemak State Park.

As the tentative approval did not include the subject lands on Yukon Island, the State selection was not subject to statutory approval under section 906(c) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1635(c) (1982), and, hence, the Department retains jurisdiction of a contest proceeding regarding the land. See State of Alaska v. Thorson (On Reconsideration), 83 IBLA 237, 91 I.D. 331 (1984).

^{5/} Mack's application described three separate, noncontiguous parcels, of which only one, designated parcel A, is located on Yukon Island.

^{6/} The Native Allotment Act, as amended, required evidence of substantial use and occupancy for a period of 5 years. 43 U.S.C. § 270-3 (1970).

In separate decisions dated September 9 and November 28, 1983, BLM rejected the State's selection for lands conflicting with Blatchford's and Mack's allotment applications because the lands were not "vacant, unappropriated, and unreserved" since the Native applicants occupied them at the time of selection by the State. BLM concluded that, based upon its adjudication of the applications, both applicants satisfied the use and occupancy requirements of the Allotment Act and their applications should be held for approval. The BLM decision regarding Blatchford's allotment, AA 8184, recited that to the extent approval of the allotment was not supported by the field examination, approval was predicated on witness statements subsequently submitted asserting qualifying use and occupancy. The decision in Mack's case, AA 8149, merely contained the conclusory statement that upon adjudication of the application "it has been determined that the applicant has used the land applied for and satisfies the use and occupancy requirements of the Native Allotment Act of 1906." The decision contained no analysis of the evidence of use and occupancy deemed sufficient. Rather, the decision recited that "[a]ny questions regarding use relative to the Native allotment should be directed to the Bureau of Indian Affairs." ^{7/} BLM provided the State of Alaska and any protestor an opportunity to initiate a private contest against the applications within 60 days of receipt of each decision, warning that failure to contest would cause the decision approving the allotment to become final.

Abbott's heirs timely filed a private contest against Blatchford's application. ^{8/} Respondent filed a motion to dismiss the contest for lack of standing. The State of Alaska filed an appeal in each case within 30 days after the 60-day contest period had expired.

On appeal, the State of Alaska argues that BLM erred in failing to initiate a contest to determine entitlement to the Native allotments in question, and that BLM failed to comply with the National Historic Preservation Act and its implementing regulations. The State asserts that in the presence of evidence that Blatchford and Mack did not establish potentially exclusive use and occupancy of the claimed lands, BLM's decisions were arbitrary and capricious because its conclusions were not supported by the record. The State's brief also raises issues concerning the timeliness of filing of both

^{7/} Although we recognize that the use and occupancy requirements must be applied consistently with Native culture and customs, there must be clear, credible, and convincing evidence in the record that these requirements have been satisfied. Andrew Petla, 43 IBLA 186 (1979). It will not do to simply refer the questions about whether these requirements are met to the BIA. It is BLM's responsibility to come to its own determination and to document its decision. Failure to do so in the first place may please a few applicants, but it also costs other members of the public, the State of Alaska, other agencies of the Department, and BLM itself a great deal of time, money, and effort to assure that the decision is legally correct. Worse, it subverts BLM's credibility as an even-handed administrator of the public land laws.

^{8/} No private contest was filed by Abbott's heirs against Mack's application. A letter included in the record indicates their reluctance to pursue such a contest due to financial difficulties in maintaining contests against both applications. Therefore, they relied upon the State of Alaska to challenge Mack's application. The private contest against Blatchford's application is pending.

applications, abandonment of Mack's allotment, and an allegedly improper amendment of Blatchford's application.

[1] Blatchford and Mack both filed a motion to dismiss the State's appeals for lack of standing. Departmental regulation, 43 CFR 4.410, establishes a right of appeal to this Board in any party adversely affected by a BLM decision. Since the State's applications were rejected by the decisions, the facts bring the State squarely within the language of the regulation which grants it standing to appeal. State of Alaska, 41 IBLA 315, 321, 86 I.D. 361, 364 (1979). The applicants argue that the State has no standing to challenge the allotment applications because lands occupied by Natives and homesteaders are not "vacant, unappropriated, and unreserved" and, thus, not allowable for State selection. This argument ignores the fact that the purpose of the appeal is to challenge the sufficiency of the asserted occupancy under the Allotment Act. It is well established, at least since passage of ANCSA, that Native use and occupancy which is not sufficient to qualify under the Allotment Act will not bar an otherwise valid State selection. Further, Native allotment claims cannot serve to preclude the State from challenging applications conflicting with its selections. Id. The State of Alaska has standing to bring these appeals. 9/

[2] The Alaska Native Allotment Act of 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), granted the Secretary of the Interior authority to allot "in his discretion and under such rules as he may prescribe" vacant, unappropriated, and unreserved nonmineral land in Alaska not to exceed 160 acres to any Indian, Aleut, or Eskimo of full or mixed blood who resides in Alaska and is the head of a family or is 21 years of age. Entitlement to an allotment is dependent upon satisfactory proof of substantially continuous use and occupancy of the land for a 5-year period. 43 U.S.C. § 270-3 (1970). Adjudication of Native allotment applications was affected by passage of section 905 of ANILCA, 43 U.S.C. § 1634 (1982), which approved 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 certain exceptions. Subsection 905(a)(4), 43 U.S.C. § 1634(a)(4) (1982), required adjudication of Native allotment applications which conflict with State selection applications pursuant to the Alaska Statehood Act filed prior to December 18, 1971, where the land was not withdrawn under section 11(a)(1)(A) of ANCSA (a "core" township of an eligible Native village).

Since the lands on Yukon Island applied for by both allotment applicants are not within the core township of a Native village and were subject to State selection applications filed with BLM prior to December 18, 1971, BLM is required to adjudicate the allotment applications. Adjudication is

9/ Notwithstanding the express language of the BLM decisions rejecting the State selections in part, counsel for Blatchford and Mack asserts that the State had no interest in the land which was adversely affected because the land within PLO 3275 had been excluded by BLM decision of Jan. 13, 1964. Reading the copy of the decision attached to the motion to dismiss, the decision approves the State selection for certain lands in Tps. 7 and 8 S., R. 13 W., noting certain exclusions including lands in PLO 3275. We find nothing in the approval decision which indicates a decision to reject the State selection as to those lands within the exclusions.

also required because the lands in question were withdrawn by PLO 3275 in 1963, and were not unreserved on December 13, 1968. Therefore, the applications must be adjudicated under the provisions of the Native Allotment Act.

Mack claims that she began use and occupancy of the 35-acre parcel on Yukon Island in 1949. According to the field report, she was 13 years old in that year. Her asserted uses are berrypicking, fishing, and hunting during the summer months (April to August). In addition to her application, her evidence of use is found in three witness statements filed in 1980 by Blatchford and two other friends. Mack alleges only one improvement on the parcel, a shelter campsite constructed in 1959.

The field examiner's report does not support her assertion that she used the claimed allotment in the required manner. At the time of the field examination, the only claimed improvement was a campsite in the vicinity of the bronze monument marker for the Main Site, an area frequented by those interested in the archeological resources of the island. The field report discloses that the parcel she applied for lies partly within Horton's abandoned homestead entry, Abbott's original homestead entry, and Merikallio's amended application of September 19, 1966. The field examination disclosed the remains of Claude Horton's old cabin near the center of the allotment. According to the report of the examiner, Mack claimed she did not know who owned the cabin. Accordingly, the field examiner concluded in his report dated December 11, 1979, that, due to lack of evidence of substantially continuous use and occupancy at least potentially exclusive of others, the applicant had not met the requirements of the Native Allotment Act.

The record discloses a protest of Mack's Native allotment application was filed by the Abbott heirs on May 19, 1981. ^{10/} Protestants claimed ownership of a rope ladder on the parcel, one of the improvements disclosed by the field report. They also claimed ownership of a concrete and stone spring house on the tract. Protestants assert they have resided on the island and maintained dwellings there since 1960. They contend that they were in a position to observe the use and occupancy of the island by others and have never observed regular or seasonal use of any part of the island by the applicant.

Blatchford's alleged use began in 1960 when he was 17 years old. He purportedly used the lands during the summer months for berrypicking, clam digging, fishing, and hunting. He depends upon eight witness statements from family and friends to support his asserted occupancy.

Although the BLM field examiner found ample resources to support Blatchford's alleged uses, she failed to find evidence that Blatchford exclusively occupied the claimed parcel. Three of Blatchford's supporting witness statements indicated that Blatchford began exclusive use of the land in question as the head of a family in the early 1950's when he was 7 years old. Another witness testified that such use began when Blatchford was almost

^{10/} Section 905(a)(5) of ANILCA required adjudication of Native allotment applications where, within 180 days of enactment of ANILCA, a protest of an allotment is filed by a person asserting that the land is the situs of improvements claimed by the protester. 43 U.S.C. § 1634(a)(5) (1982).

12 years old. All witnesses testified in their statements that at least one type of improvement existed, *i.e.*, campsite, firepit, drying racks, dock or boat landing, etc. The field examiner could not find any evidence of improvements.

The lands at issue in Blatchford's application were also included in homestead applications. In a protest filed with BLM on May 19, 1981, the heirs of William Abbott have asserted that Blatchford did not use and occupy the land in a substantially continuous manner at least potentially exclusive of others since 1960 as claimed in his application. They state that a portion of the land claimed is within the Abbott homestead entry and subsequent trade and manufacturing site which the Abbott family occupied between 1959 and 1973 and, further, that they know that Blatchford did not use and occupy that land. Protestants claim improvements on the land in the form of a gravel road built by them while they were homesteading. Protestants contend that they have maintained dwellings on the island since 1960, that they have lived there on a continuous basis in the summer, and that they have lived there on a yearround basis at times in the past so that they were in a position to observe any use of the island by Blatchford.

[3] No allotment may be approved without satisfactory proof of substantial actual possession and use of the land at least potentially exclusive of others. 43 U.S.C. § 270-3 (1970); 43 CFR 2561.0-5(a). Departmental regulation 43 CFR 2561.0-5(a) defines the phrase "substantially continuous use and occupancy" as follows:

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. 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.

There is substantial evidence in the case files indicating that the applicants did not use and occupy the Yukon Island tracts in a substantial and continuous manner which was at least potentially exclusive of others. In light of the conflicting evidence and the failure of BLM to provide any analysis of the facts to support its adjudication in these cases, we are confronted with decisions which are not sustained on the record. In light of this record, we must conclude that there is sufficient doubt as to the adequacy of the allotment applications to require a Government contest. See Katmailand Inc., 77 IBLA 347 (1983). Accordingly, the decisions appealed from are set aside and the cases are remanded for initiation of a Government contest of the allotment applications. See Donald Peters, 26 IBLA 235, 83 I.D. 309, reaffirmed on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976), aff'd, Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978). A copy of the contest complaints shall be served upon the State of Alaska which, upon the filing of a proper motion, shall be allowed to intervene. See State of Alaska, 28 IBLA 83, 89-90 (1976).

We note that both claimants allege use and occupancy beginning at an age of minority. The substantial use and occupancy contemplated by the Native Allotment Act, as discussed above, must be by the Native as an independent citizen for himself or herself or as a head of a family and not as a minor child occupying or using the land in conjunction with his or her parents

or other family members. Andrew Gordon McKinley (On Reconsideration), 61 IBLA 282 (1982).

Pursuant to section 18 of ANCSA, 43 U.S.C. § 1617(a) (1982), the Department is authorized to approve only Native allotment applications which were pending before the Department on December 18, 1971, the date of that Act. In a memorandum to the Director, BLM, dated October 18, 1973, Assistant Secretary Horton stated:

This phrase [pending before the Department on December 18, 1971] is interpreted as meaning that an application for a Native allotment must have been on file in any bureau, division, or agency of the Department of the Interior on or before December 18, 1971. The Department has no authority to consider any application not filed with any bureau, division, or agency of the Department of the Interior on or before said date. Evidence of pendency before the Department of the Interior on or before December 18, 1971, shall be satisfied by any bureau, agency or division time stamp, the affidavit of any bureau, division or agency officer that he received said application on or before December 18, 1971, and may also include an affidavit executed by the area director of BIA stating that all applications transferred to BLM from BIA were filed with BIA on or before December 18, 1971. [Emphasis in original.]

Quoted in Katmailand, Inc., supra at 353-54. Both applications were date stamped by BIA after December 18, 1971, and no evidence exists in the record to suggest receipt of either application by the Department before December 18, 1971. Despite repeated reference to this lack of proof, BLM's records have not been supplemented with evidence regarding this issue. Because Mack and Blatchford are not entitled to an allotment without a timely filed application, this issue is properly addressed at the contest hearings. See Katmailand, Inc., supra at 354.

Because a Native allotment application filed after December 18, 1971, must be rejected, an amendment filed after that date which results in the relocation of the allotment will not be accepted unless it appears that the original description designates land other than that which the applicant intended to claim. 43 U.S.C. § 1634(c) (1982); Pedro Bay Co., 78 IBLA 196, 201 (1984). Blatchford's original application identified the lands he assertedly used as follows: "Frac. W 1/2 NW 1/4 Sec. 3; Frac. E 1/2 NE 1/4 Sec. 4 excepting therefrom US surveys 1507 and 4984, T. 8 S., R. 13 W., SM." A map depicting the claimed allotment accompanied the applications. The southern portion of the aliquot description is occupied by U.S. Surveys 1507 and 4984, the patents to Ritchie and Abbott. The following legal description amending the allotment application was received by BLM on December 4, 1972:

Frac. N 1/2 NW 1/4 NW 1/4, Sec. 3; N 1/2 N 1/2 NE 1/4, NE 1/4 NE 1/4 NW 1/4, N 1/2 SE 1/4 NE 1/4 NW 1/4, Sec. 4, T. 8 S., R. 13 W., SM; S 1/2 S 1/2 SE 1/4, SE 1/4 SE 1/4 SW 1/4 Sec. 33; Frac. S 1/2 SW 1/2 [sic] SW 1/4, Sec. 34; T. 7 S., R. 13 W., SM.

The amended application describes a substantially different tract of land than the original application. The only land common to both description is the N 1/2 NW 1/4 NW 1/4 of sec. 3 and N 1/2 NE 1/4 NE 1/4 of sec. 4. The

proffered reason for the amendment was that the original description "did not describe the lands marked, posted, used, and occupied."

Since the land description was altered in Blatchford's case after December 18, 1971, he must establish by a preponderance of the evidence that the change was made for correction only for the purpose of describing the land which applicant originally intended to claim and not for the purpose of applying for new land. Pedro Bay Co., *supra*; Nora L. Sanford (On Reconsideration), 63 IBLA 335, 338 (1982). Claim markers, as asserted by Blatchford and affirmed by BIA employees, which would verify the allotment boundaries were not found by the BLM field examiner. This issue is properly considered in the contest hearing.

It has been contended that Mack abandoned her allotment prior to withdrawal of unreserved lands by PLO 3275. This argument is based upon apparent nonuse by her since the lands of her allotment were included in homestead entries in 1959 and 1960. The Native Allotment Act was not intended to convey to Natives lands which they had not used, occupied, or needed for many years and one who abandoned the land is disqualified from entitlement to an allotment of the land. Evelyn Alexander, 45 IBLA 28, 37 (1980). Absent timely filing of an application, where a Native has completed the requisite 5-year use and then ceases to use and occupy that land, but permits it to return to an unoccupied state, the right to an allotment of the land terminates regardless of the subjective intent of the Native. United States v. Flynn, 53 IBLA 208, 238, 88 I.D. 373, 389-90 (1981). While Mack claims continual use from 1949 until the present, opponents to her claims have alleged otherwise. BLM's field examination revealed no evidence supporting potentially exclusive use by Mack at the time when the conflicting homestead entries were initiated or PLO 3275 was issued. Where substantial improvements do not exist and evidence of use of the claimed site is conflicting, it is necessary to inquire further into the exact details of use to determine whether the claim was abandoned. Alyeska Pipeline Co., 52 IBLA 222, 225 (1981). The issue of abandonment is also properly considered at the contest hearing regarding the sufficiency of applicant's use and occupancy under the Native Allotment Act.

If, as a result of the contests we order, the applicant's entitlement to the allotments they have applied for is vindicated, there is another matter BLM must attend to before it may convey any land to them. The Yukon Island Main Site is a national historic landmark included on the National Register of Historic Places. See 44 FR 7421 (Feb. 6, 1979). It is therefore subject to the provisions of the National Historic Preservation Act of 1966, as amended, and its implementing regulations. See 16 U.S.C. § 470f (1982); 36 CFR Part 800. These provisions require that before a Federal agency takes any action that might affect such a "National Register property" (see 36 CFR 800.2(e)) it must provide information about the property and confer with the state national historic preservation officer before determining whether the undertaking will have an effect on the characteristics that qualified it for the National Register. 36 CFR 800.4(b). If the agency official determines the effect will be adverse (defined as including "transfer or sale of property without adequate conditions or restrictions regarding preservation, maintenance or use," 36 CFR 800.3(b)(5)), the consultation process set forth in 36 CFR 800.6 must be followed, and the agency must refrain from taking any action that would foreclose the consideration of modifications or alternatives

to the proposed undertaking that could avoid, mitigate, or minimize such adverse effects. 36 CFR 800.4(d) and (e).

BLM suggests these procedures do not apply to Alaska Native allotments, arguing on the basis of Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), that its action in making an allotment to a qualified applicant is "essentially non-discretionary." We cannot agree. There is no exemption to be found in the statutes or the regulations for nondiscretionary actions. Courts that have construed the National Historic Preservation Act with other acts have noted that section 407f is broad and its language mandatory and have sought to vindicate its purposes. See U.S. v. 162.20 Acres of Land, More or Less, 639 F.2d 299, 304 (5th Cir. 1981), cert. denied, 454 U.S. 828 (1981); D.C. Federation of Civic Associations v. Volpe, 459 F.2d 1231, 1265 (D.C. Cir. 1972), cert. denied, 405 U.S. 1030 (1972). Courts that have applied it have been unwilling to give it a "crabbed interpretation." See WATCH v. Harris, 603 F.2d 310, 326 (2d Cir. 1979), cert. denied, 444 U.S. 995 (1979); National Trust v. U.S. Army Corps of Engineers, 552 F. Supp. 784 (S.D. Ohio 1982). Although Pence, supra, applies due process protection to the Secretary's exercise of the discretion provided by the Native Allotment Act and states that the Secretary may not arbitrarily deny an allotment to an Alaska Native who meets the statutory requirements, 529 F.2d at 142, it does not deprive the Secretary of his discretion. And, indeed, we have since held that public policy or equitable considerations may be the basis for exercising this discretion to limit or deny an allotment to an otherwise qualified Native. Alyeska Pipeline Co., supra; Evelyn Alexander, supra. We conclude that BLM must follow the procedures set forth in 36 CFR Part 800 and may exercise discretion to avoid adverse effects on National Register or eligible properties before making an allotment under 43 U.S.C. § 270-1 (1970).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are set aside and the cases remanded to BLM for initiation of contests of the disputed allotment tracts.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Will A. Irwin
Administrative Judge

