

AGNES MAYO MOORE

IBLA 85-280

Decided April 21, 1986, Decided

Appeal from a decision of the Fairbanks District Office, Bureau of Land Management, which rejected Parcel C of Native allotment application F-13514.

Affirmed.

1. Administrative Procedure: Adjudication--Alaska: Native Allotments--Appeals--Evidence: Credibility

Where an application to acquire Federal land is rejected by BLM because applicant's declaration of material facts in the application demonstrates conclusively that he is not entitled to the land as a matter of law, a subsequent effort on appeal to revise, amend, or deny the facts will not be considered, absent a persuasive explanation of error in the application.

2. Alaska: Native Allotments

Secretarial Order No. 3040 of May 25, 1979, requires the commencement of use and occupancy or the filing of a Native allotment application prior to a withdrawal of the land.

3. Administrative Procedure: Adjudication--Alaska: Native Allotments

If, when all of the allegations of material fact made by an applicant for a Native allotment are accepted as true, allowance of the application is barred as a matter of law, and the rule of Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), is not applicable. The application is properly rejected without a hearing.

APPEARANCES: David C. Fleurant, Esq., Anchorage, Alaska, for appellant; Michael G. Hotchkin, Esq., Anchorage, Alaska, for the State of Alaska; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Agnes Mayo Moore appeals from a decision of the Fairbanks District Office, Bureau of Land Management (BLM), dated December 18, 1984, which rejected parcel C of appellant's Native allotment application F-13514.

Appellant submitted a Native allotment application to BLM on March 15, 1971. The application described two parcels of land, identified as parcels A and B. Appellant claimed use of the described lands since 1936. Each parcel contained approximately 80 acres.

On May 5, 1971, appellant completed a second application describing lands identified as parcel C. This tract encompassed 66.2 acres of surveyed lands. An entry relinquishment form was completed by appellant on May 10, 1971, by which she waived her interest in the lands described as parcel A. The second application and the relinquishment were submitted to BLM on May 19, 1971. ^{1/}

By notarized affidavit submitted as exhibit 2 to her statement of reasons for appeal, appellant states that she completed her application for parcel C with assistance from an employee of the Bureau of Indian Affairs (BIA). Appellant contends that when answering question "8 a" on the application form in response to the question, "From what date have you occupied the land applied for?" the BIA employee advised her that the significance of the question was not when her use began but that she merely had to demonstrate use of the land for 5 years. Accordingly, appellant answered question "8 a" by counting back the requisite number of years needed to qualify for an allotment. Appellant contends the importance of taking the time to remember when she first began her use of parcel C was never revealed to her.

According to the statement of reasons, appellant moved a cabin onto parcel C and lived in it for 10 months in 1971. Appellant states her use of the parcel prior and subsequent to 1971 consisted of rabbit snaring, grouse hunting, and berrypicking.

As noted in appellant's statement of reasons, a field examination of the parcel was conducted by a BLM employee on July 26, 1974. The examiner was accompanied by appellant and her husband. Based on his findings and the

^{1/} Parcels B and C are described as follows:

"Parcel B: Fairbanks Meridian
T. 5 N., R. 19 W. (unsurveyed)
Within Sec. 27.
Containing approximately 80 acres.

"Parcel C: Fairbanks Meridian
T. 2 N., R. 1 E.
Sec. 30, Lot 3, W 1/2 NE 1/4 SW 1/4, SE 1/4 NE 1/4 SW 1/4
Containing 66.20 acres.

"Aggregating approximately 146.20 acres."

statements of two witnesses, the examiner concluded that appellant's use was consistent with the requirements of the Native Allotment Act, Act of May 17, 1906, 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).

On June 30, 1978, BLM approved appellant's Native allotment application as to both parcels B and C. Relying on the approval from BLM, appellant states that she improved parcel C by, among other things, laying a gravel pad for a second cabin.

On December 18, 1984, BLM issued the decision which is the subject of this appeal vacating the prior June 30, 1978, decision. The December 18, 1984, decision states:

At the time Ms. Moore entered the lands within Parcel C as described above, they were embraced within Trade and Manufacturing Site (T&M) application F-031248 and segregated from the initiation of rights under the Native Allotment Act until its removal from the records. Therefore the lands within Parcel C were not unreserved on December 13, 1968, as required for legislative approval under ANILCA. The T&M Site application was filed on May 7, 1963 and was not removed from the records until January 12, 1970.

At the time the T&M Site application was removed from the records, Public land Order (PLO) 4582[,] effective December 13, 1968[,] attached[,] withdrawing the lands from all forms of appropriation under the public land laws to expire at 12 midnight December 31, 1970. From January 1, 1971 until 12 noon on April 2, 1971 the State of Alaska was given a preferred right of selection after which time the lands would become subject to appropriation under the public land laws, subject to valid existing rights, the provisions of existing withdrawals and the requirements of applicable law.

Native allotments in Alaska can be granted only for vacant, unappropriated, and unreserved nonmineral land. An application for land withdrawn from entry is nugatory and cannot be given life. See Paul P. Tony, 43 IBLA 245 (1979). No rights may be initiated under the Alaska Native Allotment Act by occupation and use of lands not open to appropriation. See David Capjohn, Et Al, 14 IBLA 330 (1974).

As the lands within Parcel C were segregated from appropriation by the T&M Site application and then PLO 4582, the application must be and hereby is rejected.

In her statement of reasons for appeal appellant states the date given on her application is not accurate and her use actually began prior to the filing of the T&M Site application. Appellant states that prior to the December 18, 1984, decision she was led to believe the information contained in her application met the requirements of the Native Allotment Act and had she been notified of the insufficiency of her information she could

have provided more accurate information as to the date she commenced occupancy of parcel C. Appellant requests a remand of this case to BLM to provide a reasonable opportunity to explain the error in her application and establish through clear and convincing evidence the actual date her use and occupancy commenced. Appellant argues that BLM's rejection of parcel C was based on a summary determination of a material fact and that where, as here, a material fact is in dispute, the applicant must be notified of the specific reasons for the proposed rejection and be granted the opportunity to present supporting evidence. Appellant cites Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), and Eleanor H. Wood, 46 IBLA 373 (1980), as authority for her arguments.

[1] Where an application is rejected by BLM and the basis for rejection is the applicant's own declaration of material facts which demonstrates conclusively that the application must be rejected, as a matter of law, an effort on appeal to revise, amend, or deny such facts will not be considered by this Board absent a persuasive explanation of error in the application. Andrew Petla, 43 IBLA 186 (1979).

In the present case appellant submitted two applications. On the application submitted prior to the one for parcel C, appellant stated that her use of the lands had been "since 1936" (Statement of Reasons at 2). Appellant now argues that, on her application submitted 2 months later for parcel C, she "answered question '8 a' by counting back the requisite number of years to qualify for an allotment" (Statement of Reasons at 3). As noted by the State of Alaska in an answer filed on May 16, 1985, "[f]ive has always been the requisite number of years. * * * Counting back five years from May 5, 1971, gives a date of May 5, 1966, not May 19, 1964" 2/ (Answer at 11).

As noted by the State of Alaska and stated in the Field Report Acceptance (Exh. 3 to Appellant's Statement of Reasons), appellant's husband told the field examiner that appellant's use began in 1964. Further, during the field examination, two residents of the community reported that appellant's use began in 1964 (Appellant's Exh. 3 at 4, 5, and 8; State of Alaska's Exh. B at 7).

Appellant has submitted no evidence other than her own affidavit that she used and occupied the land described as parcel C prior to May 28, 1964. The application for parcel C was correctly completed in all other respects and her explanation on appeal for the date used as the date of her initial occupancy of that parcel does not chronologically correspond with the date shown on the application. Clearly, appellant has not presented a persuasive explanation for an error in her original application.

[2] Appellant's application was filed pursuant to the Native Allotment Act. The Native Allotment Act authorizes the Secretary of the Interior to allot not more than 160 acres of vacant, unappropriated, and unreserved

2/ Actually, May 20, 1964, is the date given on the second application in answer to question 8a.

nonmineral land in Alaska 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. The Native Allotment Act was repealed on December 18, 1971, subject to pending applications, by section 18(a), Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1982).

Section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634 (1982), provides for approval of applications for Alaska Native allotments pending before the Department on December 18, 1971, for land unreserved on December 13, 1968, with specified exceptions. However, the land sought in this application was segregated on May 7, 1963, and the provisions of section 905 of ANILCA do not apply.

In situations such as this, a Native allotment application may be granted, subject to certain use and occupancy requirements, provided the applicant filed for a Native allotment application or commenced use and occupancy prior to the withdrawal of the land described in the application. Catherine Angaiak (On Reconsideration), 65 IBLA 317 (1982). Appellant does not show commencement of use before the land was reserved.

[3] As appellant has not presented a persuasive explanation of error in the original application which would place material facts in dispute, the disposition of the case is controlled exclusively by applicable law. The case does not fall within the ambit of the rule in Pence v. Kleppe, supra, and no hearing is necessary. Andrew Petla, supra at 196; Pence v. Andrus, 586 F.2d 733, 743 (9th Cir. 1978).

Accordingly, 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.

R. W. Mullen
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Will A. Irwin
Administrative Judge

