

KATE AIKEN ET AL.

IBLA 86-1158, 87-785

Decided April 21, 1988

Appeals from decisions of the Alaska State Office, Bureau of Land Management, rejecting Native allotment applications. F-15492 et al.

Affirmed.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Duty of Department of the Interior to Native Allotment Applicants--Alaska National Interest Lands Conservation Act: Native Allotments--Naval Petroleum Reserves

Sec. 905 of ANILCA, 43 U.S.C. | 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. The Department is not required by Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), to recover title to land conveyed to Atkasook Corporation in 1977 where a Native allotment application describing such land had been finally rejected prior to conveyance on the basis that the land was within the National Petroleum Reserve-Alaska.

APPEARANCES: David C. Fleurant, Esq., Anchorage, Alaska, for appellants; Bruce E. Schultheis, Esq., Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Kate Aiken et al. l/ have appealed from decisions of the Alaska State Office, Bureau of Land Management (BLM), dated April 18, 1986, and July 28, 1987, rejecting their Native allotment applications. Lands sought by

l/ Appellants in IBLA 86-1158 are:

F-15492	Kate Aiken	F-14597	Abel Akpik
F-14638	Carrie M. Peter	F-13495	Mildred Akpik
F-14628	John Nayukuk	F-14598	Simeon Akpik
F-14610	Lollie Hopson	F-14639	Peter Riggs
F-14609	Alfred Hopson, Jr.		

The appellant in IBLA 87-785 is Nina Nayukok. By order of Oct. 8, 1987, these cases were consolidated.

appellants are located in the National Petroleum Reserve - Alaska (NPR-A) and, prior to BLM's decisions, were conveyed to Atkasook Corporation by interim conveyance.

Native allotments are authorized by the Act of May 17, 1906, 43 U.S.C. | 270-1 (1970), repealed by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. | 1617(a) (1982), subject to pending applications. The Act of May 17, 1906, as amended, authorized the Secretary, in his discretion and under such rules as he may prescribe,

to allot not to exceed one hundred and sixty acres of vacant, unappropriated, and unreserved nonmineral land in Alaska or, subject to the provisions of sections 270-11 and 270-12 of this title, vacant, unappropriated, and unreserved land in Alaska that may be valuable for coal, oil, or gas deposits, 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 twenty-one years of age; * * *. [Emphasis supplied.]

BLM rejected appellants' applications because appellants' use and occupancy of the subject lands commenced after the withdrawal of these lands for NPR-A. Rejection of appellants' applications on identical grounds had also occurred prior to BLM's 1977 conveyance to Atkasook Corporation. These applications were subsequently reinstated by BLM, citing section 905 of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. | 1634 (1982).

NPR-A was formerly known as Naval Petroleum Reserve No. 4. 42 U.S.C. | 6502 (1982). On February 27, 1923, President Harding issued Exec. Order No. 3797-A "setting apart" as Naval Petroleum Reserve No. 4 a vast acre- age 2/ not then covered by valid entry, lease, or application. These lands were to be "reserved for six years for classification, examination, and preparation of plans for development and until otherwise ordered by the Congress or the President." The Order concluded with the following lan- guage: "The reservation hereby established shall be for oil and gas only and shall not interfere with the use of the lands or waters within the area indicated for any legal purpose not inconsistent therewith."

Appellants contend that prior to enactment of ANILCA the Department of the Interior issued contradictory opinions and decisions regarding the status of lands within NPR-A. Section 905 of ANILCA resolved this issue in favor of Native allotment applicants, appellants argue, because Congress there determined that lands in NPR-A shall be considered vacant, unappro- priated, and unreserved for purposes of the Act of May 17, 1906, supra. Section 905(a) legislatively approved, subject to valid existing rights, all Native allotment applications pending on or before December 18, 1971, and which described either land that was unreserved on December 13, 1968, or land within NPR-A. Legislative approval was denied, however, to those applications receiving a timely protest.

2/ Noted on the Executive order is the phrase "Area 35,984 sq. miles."

In support of their position, appellants refer to remarks of Representative Udall of Arizona addressing an amendment that added NPR-A to the terms of section 905:

Paragraph 36 of House Concurrent Resolution 452 amended section 905(a)(1) of the act to include allotments located within the national petroleum reserve--Alaska (NPR-A) within the purview of the Alaska Native allotment amendment. The amendment resolves an historical difficulty peculiar to land status within the NPR-A. The purpose of the amendment is to provide that all land within the NPR-A shall be considered as "vacant, unappropriated and unreserved" within the meaning of the act of May 17, 1906 (34 Stat. 197 as amended) for the purpose of adjudicating entitlement to an allotment under that act.

The amendment removes any impediment to consideration of an allotment application describing land within the NPR-A presented by any land status which was or may have been created, if at all, by any executive withdrawal order including, but not limited to, Executive Order 3797-A, Public Land Order 82, and Public Land Order 2215. It is the intent of the amendment that the decision of the Congress that land within the NPR-A be considered "vacant, unappropriated and unreserved" within the meaning of the act of May 17, 1906, is determinative of the land status issue, and, consequently, such issue is outside the purview of any adjudicative proceeding conducted pursuant to subsection (5) of section 905.

126 Cong. Rec. 33472 (1980). BLM's rejection of these applications is, therefore, inconsistent with the clear intent of Congress, appellants maintain.

Appellants pray that their allotment applications be remanded to BLM to determine whether appellants satisfied the use and occupancy requirements of the Act of May 17, 1906. If these requirements are met, BLM should initiate proceedings to recover title to the lands described in the applications, appellants state. These lands, as stated above, were conveyed on January 10, 1977, to Atkasook Corporation pursuant to section 12(a)(1) of ANCSA. Such title recovery, appellants state, is consistent with Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), which imposes a duty on the Department to adjudicate an allotment application despite the Department's prior conveyance of the lands sought.

Appellants further charge that BLM's decisions render the NPR-A amendment in section 905 superfluous. They state that approximately 5 years prior to enactment of ANILCA, virtually all Native allotment lands within NPR-A had been conveyed to Native corporations. To construe section 905 so as to deny the benefits of the amendment to applications requiring adjudication per Aguilar, appellants argue, is to render the amendatory language inoperative.

Finally, appellants argue that BLM's decisions run contrary to the understanding of the parties in Leavitt v. United States, Civ. No. A78-287 (D. Alaska dismissed 1981). Plaintiffs in Leavitt represented all Alaska Natives who made timely allotment applications for lands within NPR-A and whose applications were denied or would be denied by this Board on grounds that such lands were considered to be reserved or otherwise unavailable. This suit was dismissed in 1981 after passage of ANILCA. Appellants state that both parties acknowledged that Congress' adoption of the NPR-A amendment in section 905 resolved finally the primary issue in Leavitt.

Our discussion of appellants' arguments must begin with section 905 of ANILCA. That section states in part:

Subject to valid existing rights, all Alaska Native allotment applications made pursuant to the Act of May 17, 1906 (34 Stat. 197, as amended) which were pending before the Department of the Interior on or before December 18, 1971, and which describe either land that was unreserved on December 13, 1968, or land within the National Petroleum Reserve--Alaska (then identified as Naval Petroleum Reserve No. 4) are hereby approved on the one hundred and eightieth day following the effective date of this Act, except where provided otherwise * * *.

Legislative approval was denied, however, to those applications receiving a timely protest, which protest would cause BLM to adjudicate the application pursuant to the requirements of the Act of May 17, 1906. The legislative approval implemented by section 905 was intended to summarily approve allotments in all cases where no countervailing interest required full adjudication. S. Rep. No. 413, 96th Cong. 2d Sess. 238 (1980).

Prior to enactment of ANILCA, the issue whether a Native allotment could be granted for lands in NPR-A had been repeatedly resolved in the negative. See, e.g., Silas Negovanna, 15 IBLA 408 (1974); Georgianna Fischer, 15 IBLA 79 (1974); Terza Hopson, 3 IBLA 134 (1971); Lester Suvlu, 3 IBLA 125 (1971); and Elsie May Pikok Crow, 3 IBLA 114 (1971). Appellants can point to no contrary decision or to any patented allotment. At best, they point to Solicitor's opinions that conclude that mining claims may be located in a petroleum reserve. The remarks of Representative Udall, referring to the "historical difficulty peculiar to land status within the NPR-A," do not suggest that the Board's decisions in this regard have been in error. In section 905(a)(1), Congress sought to remove the obstacle to obtaining a Native allotment in NPR-A by legislatively approving pending applications.

[1] Where, as here, the lands described in a Native allotment application have been conveyed out of Federal ownership, we have rejected the argument that legislative approval occurs. Heirs of Doreen Itta, 97 IBLA 261, 265 (1987). Appellants would, however, have BLM review their applications for compliance with the use and occupancy requirements of the Act of May 17, 1906, and, if these requirements are met, recover title to the lands. Appellants' request reveals a misunderstanding of the Aguilar decision.

Aguilar requires the Department, after an appropriate hearing, to recover title to land that was wrongfully conveyed. Appellants would have this Board hold that BLM's 1977 conveyance to Atkasook Corporation was wrongful because their allotment applications, although closed and removed from the public records ^{3/} at the time of conveyance, had been improperly rejected. Rejection was improper in appellants' view because BLM failed to recognize, consistent with Representative Udall's remarks, that lands in NPR-A were "'vacant, unappropriated and unreserved' within the meaning of the act of May 17, 1906."

Similar arguments were addressed and rejected in Heirs of Doreen Itta, supra. Therein, the Board held that to construe section 905 as requested by appellants would raise constitutional concerns:

Legislation passed by Congress concerning disposition of the public lands cannot generally dispose of lands previously conveyed into private ownership and, hence, no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment.

97 IBLA at 265. In order to determine whether BLM's 1977 conveyance to Atkasook Corporation was wrongful, appellants must show that as of the date of conveyance, the lands were properly subject to allotment claims. This, they concede, was not the case. Appellants would apply Representative Udall's remarks nunc pro tunc to show that BLM erred substantively in its decisions. In view of the constitutional problems raised by this procedure and in the absence of specific language in section 905 or its legislative history, we decline to adopt such an approach.

We read the amendatory language of section 905 to effect legislative approval of Native allotment applications that were pending on or before December 18, 1971, and that described unconveyed land in NPR-A, subject to valid existing rights. See also the concurring opinion in Heirs of Doreen Itta, supra, for the view that an allotment application will not be defeated by a protest alleging the commencement of use and occupancy after 1923. These views do not render the amendatory language of section 905 superfluous or inoperative. Contrary to appellants' view, lands in NPR-A described by allotment application were available for legislative approval. In Heirs of Doreen Itta, for example, BLM granted the Native allotment application of Wilber Ahtuangaruak for all but 20 acres of the land he sought in NPR-A. 97 IBLA at 263 n.2.

Appellants' contention that BLM's decisions are contrary to the understanding of the parties in Leavitt is similarly unavailing. Attached as exhibit 9 to appellants' statement of reasons is an opinion of the Regional Solicitor, Alaska Region, dated January 21, 1983, stating that section 905

^{3/} Leavitt v. United States, supra, was filed on Oct. 26, 1978, more than 21 months after the conveyance to Atkasook Corporation.

did not moot those cases where lands sought by a Native had been conveyed out of Federal ownership prior to ANILCA. Moreover, it does not appear from appellants' description of the Leavitt case that the parties there focused upon NPR-A lands that had been previously conveyed out of Federal ownership.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions of the Alaska State Office are affirmed.

Franklin D. Arness
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

John H. Kelly
Administrative Judge