

Appeal from a decision of the Alaska State Office, Bureau of Land Management, holding Native allotment application F-14789 for approval and dismissing appellant's protest thereto.

Appeal dismissed.

1. Administrative Procedure: Standing--Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Duty of the Department of the Interior to Native Allotment Applicants--Appeals: Generally--Rules of Practice: Appeals: Standing to Appeal

The owner of improvements located on land described in a Native allotment application has standing to protest the allotment application under sec. 905 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. | 1634 (1982). Standing to appeal favorable adjudication of the allotment application and rejection of the protest to the Board of Land Appeals requires a showing of a legally cognizable interest adversely affected by denial of the protest. The interest of a trespasser on the land without claim or color of right will not afford such standing.

APPEARANCES: Eugene M. Witt, pro se; Judith K. Bush, Esq., Fairbanks, Alaska, for appellee Lillian James Garnett.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Eugene M. Witt (Witt) has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated June 10, 1987, holding Native allotment application F-14789 for approval and dismissing appellant's protest thereto.

On December 16, 1971, Lillian James Garnett (Garnett) filed a Native allotment application with BLM for a parcel of land, totalling 160 acres located at the southwestern tip of Timber Lake in protracted secs. 21, 22, and 27, T. 12 S., R. 24 E., Umiat Meridian, Alaska. The application, which was filed pursuant to section 1 of the Act of May 17, 1906, as amended (the

Native Allotment Act), was assigned serial No. F-14789. ^{1/} In her application Garnett claimed seasonal use and occupancy for hunting and fishing, commencing September 8, 1958.

On June 21, 1972, Witt filed a notice of location and application to purchase a portion of the land subject to Garnett's application pursuant to the Act of May 14, 1898, as amended, 43 U.S.C. § 687a (1982). His notice and application was assigned serial No. F-19130.

A BLM field examination was conducted on September 25, 1972. The examiner concluded that there was no evidence of use or occupancy other than statements of Garnett's use made by village residents. The examiner recommended that the allotment application be rejected to the extent it conflicted with Witt's trade and manufacturing site application.

On August 16, 1973, the Fairbanks District Office, BLM, issued a decision that Witt's notice of location was unacceptable for recordation and rejecting his application for purchase. That decision was based on BLM's finding that on the date Witt filed his notice and application the land had been withdrawn from entry and settlement under the public land laws. Witt then filed an appeal from that decision and, in a decision styled Eugene M. Witt, 15 IBLA 378 (1974), the Board affirmed the BLM decision. No appeal was taken from the Board decision and it became final.

On September 10, 1974, a second BLM examination was conducted with Garnett and Witt in attendance. Following this second examination the examiner concluded that Garnett could show no evidence of use or occupancy and had failed to satisfy the 5-year use and occupancy requirement of the Native Allotment Act.

On August 28, 1975, BLM rejected Garnett's allotment application, finding that she had failed to establish use or occupancy of the land described in her application as required by the statute and regulations. An appeal from this decision also followed, and by decision styled John Moore, 40 IBLA 321 (1979), the Board set aside and remanded the August 28, 1975, BLM decision to provide Garnett notice and an opportunity for a hearing as mandated in Pence v. Kleppe, 529 F.2d 135, 141-42 (9th Cir. 1976).

On May 29, 1981, Witt filed a protest to Garnett's application pursuant to section 905(a)(5)(C) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. | 1634(a)(5)(C) (1982). In his protest Witt asserted that Garnett had not met the 5-year use and occupancy requirement of the Native Allotment Act, and that there were no signs of Garnett's use and occupancy of the land. Witt further asserted that between August 1, 1968, and September 18, 1980, he had used and occupied the land as a base camp and had made improvements thereon, including two platform storage

^{1/} The Native Allotment Act, formerly codified at 43 U.S.C. | 270-1 (1970), was repealed by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. | 1617(a) (1982), subject to applications pending on or before Dec. 18, 1971.

aches, a meat cache, 50-gallon steel storage drums, tent frames, airstrip, flag pole, latrine, and a garbage dump. Appellant further asserted that he never saw the applicant on or in the vicinity of the land.

Following the Board's remand in Moore, supra, and Witt's protest, additional affidavits were filed in support of Garnett's claim of use and occupancy. As a result, a third BLM field examination was conducted on April 11, 1983. On April 26, 1983, the field examiner submitted a report of his examination recommending that Garnett's Native allotment application be approved.

The June 10, 1987, BLM decision followed. This decision stated, in part:

The protest filed by Eugene M. Witt on May 29, 1981, has been considered. Mr. Witt has improvements on the land, but the affidavits, evidence in the case file and a favorable field report substantiate that the Native allotment applicant did maintain potentially exclusive use and occupancy of the land for various types of hunting and fishing from 1955, until the application was filed on December 16, 1971, at which time the inchoate right of the applicant vested and the land became segregated as of the date of occupancy.

Based upon adjudication of the application, this office has determined that the applicant has used the land and satisfies the use and occupancy requirements of the Native Allotment Act of 1906. Therefore, allotment application F-14789 is hereby approved.

Witt then appealed the decision to this Board.

[1] Section 905(a)(5)(C) of ANILCA extended to the owner of improvements situated on land claimed in a Native allotment application the standing to protest the application, thus requiring the Department to adjudicate the application under the Native Allotment Act. 43 U.S.C. | 1634(a)(5)(C) (1982). The decision of BLM fulfilled this obligation.

Standing to appeal to this Board is governed by regulation 43 CFR 4.410: "Any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management or an administrative law judge shall have a right to appeal to the Board * * *." The Board has consistently interpreted this regulation to require that two distinct criteria be satisfied to prosecute an appeal before the Board: (1) that appellant be "a party to the case," and (2) that the appellant be "adversely affected" by the decision on appeal. Oregon Natural Resources Council, 78 IBLA 124, 125 (1983).

In order to be adversely affected, the record must show that the appellant has a legally recognizable interest. In Re Pacific Coast Molybdenum Co., 68 IBLA 325, 331 (1982). In Fred J. Schikora, 89 IBLA 251

(1985), the Board held that the interest of a trespasser who made improvements upon land without color or claim of right was insufficient to serve as the legally cognizable interest necessary for standing to appeal a decision granting a conflicting Native allotment application. Accord James M. Wright, 95 IBLA 387 (1987); Eugene M. Witt, 90 IBLA 330, 336 (1986). 2/

Consistent with our holding in Schikora, supra, we hold that Witt does not have a legally cognizable interest in this controversy so as to confer upon him standing to appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

R. W. Mullen
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

2/ Following the remand of this case the Alaska State Office, BLM, issued a decision finding that the allotment applicant had shown sufficient use and occupancy of the land and dismissing Witt's protest. Witt's appeal from that decision was dismissed by Order dated Dec. 29, 1987.