

Editor's note: This case has been expressly overruled to the extent it is construed to require a result different than that set out in Jacqueline Dilts, 145 IBLA 109 (1998).

MICHAEL GLOKO

IBLA 88-139

Decided September 24, 1990

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying a request of a Native allotment applicant to reopen and reinstate Native allotment application A-055109.

Vacated and remanded.

1. Alaska: Native Allotments--Rules of Practice: Appeals: Generally

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), provides that all Native allotment applications which were pending before the Department on or before Dec. 18, 1971, are approved on the 180th day following the effective date of the Act, unless otherwise provided by other paragraphs or subsections of that section. An application is pending on or before Dec. 18, 1971, where the application is filed in 1961 and closed in 1967 for failure to provide any proof of use and occupancy, but the applicant is not notified by decision of the closure. Under such circumstances, BLM erred in rejecting an applicant's request that his Native allotment application be reinstated and either approved or adjudicated pursuant to sec. 905(a) of ANILCA.

APPEARANCES: Tred R. Eyerly, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for appellant; 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 FRAZIER

Michael Gloko has appealed from a decision, dated November 10, 1987, in which the Alaska State Office, Bureau of Land Management (BLM), denied his petition for reinstatement of Native allotment application A-055109.

On July 17, 1961, appellant filed an application for a Native allotment pursuant to the Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed on December 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1982), subject to applications pending before the Department on that date). The application described approximately 160 acres of land located on Amanka Lake near

Manokotak, Alaska, and stated that the applicant commenced occupancy of this land in 1961.

By notice dated October 4, 1961, BLM informed Gloko that the Bureau of Indian Affairs (BIA) had found him to be entitled to an allotment, that BLM had found his application to be in order, and that the selected lands were available for allotment. BLM also informed appellant, however, that in order to receive title to the lands, he must submit proof of substantially continuous use and occupancy of the lands for a period of 5 years, and that if he did not file such proof by July 16, 1967 (6 years from the date he filed his application), his application "will terminate without prejudice" to his filing a subsequent new application.

By notice dated March 30, 1967, BLM informed BIA that the 6-year statutory life of Native allotment application A-055109 would expire in July 1967. BLM advised that evidence of occupancy should be submitted

if the applicant has actually used and occupied the land for 5 years as required. A second version of this March 30 notice also appears in the record indicating that on July 16, 1967, Gloko's application was closed for failure to file this proof pursuant to 43 CFR 2212.9-1(f), now codified at 43 CFR 2561.2. No indication appears in the record that appellant was informed of this closure.

In 1982, BLM reinstated appellant's Native allotment application. A field examination was conducted on July 31, 1982. In his report dated April 1, 1983, the examiner stated that based on the evidence, "I cannot conclude whether the applicant has met the requirements of 43 CFR 2561." On October 30, 1985, appellant submitted an affidavit in support of his Native allotment application. BLM wrote to appellant on May 9, 1986, and advised that his application was reinstated in error, stating that his application was "statutorily closed in 1967 due to his failure to file evidence of use and occupancy within the six year statutory time period." BLM concluded its letter as follows: "We will notify you on any further action we take. If you need to contact us about your application, please refer to serial number A-055109." The record indicates that BLM took no further action. On December 17, 1986, appellant, through counsel, requested that his Native allotment application be reopened and reinstated. The decision on appeal formally denied appellant's request for reinstatement of his Native allotment application.

In the request for reinstatement, counsel for appellant argued that BLM's closure was erroneous on three primary grounds, set forth below:

First, Congress perceived the Allotment Act of May 1906 (34 Stat. 197 as amended) "as a means of granting to the Alaska Natives land to which, on compliance with certain conditions, they would become entitled." Pence v. Kleppe, 529 F.2d 135, 140 (9th Cir. 1976). Passed for the benefit of Alaska Natives, the Act is to be liberally construed in their favor. Mary Olympic, 615 F. Supp. 990 (1985); Pence v. Kleppe, 529 F.2d at 140; Secretarial Order No. 3040 (May 25, 1979).

The Allotment Act requires applicants to provide satisfactory proof of substantially continuous use and occupancy of the land for a period of five years. The Act, however, does not establish a six-year "statutory life" period. This "statutory life" requirement is imposed by regulation and has resulted in the summary closure of over six hundred Native allotment claims. This "statutory life" regulation is inconsistent with "the statutory mandate" and frustrates "the policy that Congress sought to implement." Mary Olympic, 615 F. Supp. [990, 993 (D. Alaska 1985)].

* * * * *

Second, this request is supported by the language in Section 905 of the Alaska National Interest Lands Conservation Act (ANILCA), PL 96-487, December 2, 1980. Section 905(a)(1) provides for the approval of Native allotment applications, with certain exceptions, "which were pending before the Department of the Interior on or before December 18, 1971" (emphasis added). As Michael Gloko's Native allotment application was pending before BLM before December 18, 1971, his claim should be approved or adjudicated pursuant to Section 905. See Frederick Howard, 67 IBLA 157, 159-60 (1982); see also Mary Olympic, 615 F. Supp. 990 (1985).

Finally, Pence v. Kleppe mandates that factual questions regarding the sufficiency of an applicant's use and occupancy must be resolved by an independent decision maker before the case can be closed. Michael Gloko's application was closed for failure to submit sufficient proof of use and occupancy. However, "written testimony is inadequate to satisfy due process when it involves a right as important as the right to be allotted land under the Act." Pence v. Kleppe, 529 F.2d at 143. Accordingly, the closure of his application without affording him the right to a hearing on the sufficiency of his use and occupancy was improper under Pence.

In its November 10, 1987, decision, BLM concluded that the applicant did not "describe the type of use as required in the regulations" 1/ and,

1/ BLM quoted 43 CFR 67.5(f) (1961), which provided as follows:

"The filing of an application for allotment will grant no rights to the applicant over and above those which are specified in §§ 67.6 and 67.11. If the applicant does not submit the proof required by § 67.7 within 6 years of the filing of his application in the land office, his application for allotment will terminate without affecting the rights of the applicant gained by virtue of his occupancy of the land, or his rights to make another application. If the application was filed prior to the effective date of this paragraph [Dec. 6, 1958], the application will be terminated under this paragraph only by decision of the authorized officer after appropriate notice to the applicant, granting him a reasonable period

accordingly, denied the petition for reinstatement. ^{2/} In so doing, BLM specifically rejected the argument that closure of the case file was improper under section 905(a)(1) of ANILCA and Pence v. Kleppe, *supra*, reasoning as follows:

The Pence v. Kleppe decision held that a hearing may be required to resolve disputed questions of fact. However, the issue as to whether or not the required document was timely submitted to BLM has not been disputed. Therefore, a hearing is not required pursuant to Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). Similarly, Section 905(a)(1) of the Alaska National Interest Lands Conservation Act does not apply to this application because the application was not completed and the application was not erroneously closed without an opportunity for hearing on a disputed question of fact.

(Nov. 10, 1987, Decision at 2).

In the statement of reasons on appeal (SOR) to the Board, counsel for appellant challenges BLM's having "closed the application for failure to provide further evidence of use and occupancy, apparently concluding that Mr. Gloko's proof of use and occupancy was insufficient" (SOR at 6). Counsel states that while Gloko was given the opportunity to provide further written evidence, he was "never given an opportunity for an oral hearing or to present witnesses. Nor was he provided with notice informing him why his evidence was deemed insufficient. These procedural deficiencies violated Mr. Gloko's due process rights as set forth in Pence," counsel urges. Id.

Gloko maintains that under Pence v. Kleppe "[t]he process that was due included notice of the specific reasons for the proposed rejection, opportunity to submit written evidence, and an opportunity for an oral hearing

fn. 1 (continued)

within which to file proof of continuous use and occupancy of the land as required by the regulation in this part."

Further, BLM quoted 43 CFR 67.7 (1961), which described the kind of proof required to be filed within 6 years:

"The proof * * * should show the periods each year applicant has resided on the land; amount of the lands cultivated each year to garden or other crops; the amount of crops harvested each year; the number and kinds of domestic animals kept on the land by the applicant and the years they were kept there; the character and value of the improvements made by the applicant and when they were made; and the use, if any, to which the land has been put for fishing or trapping."

^{2/} As an alternative basis for denying the request for reinstatement, BLM stated: "[T]he BLM rejection decision was issued in the 1960's. A judicial action contending that those decisions were wrong would be time barred by 28 U.S.C. 2401(a). Christensen v. United States, 755 F.2d 705 (9th Cir. 1985). The petition for reinstatement is also denied on these grounds."

where evidence and testimony of favorable witnesses may be submitted" 3/ (SOR at 7). Counsel argues that BLM erred in concluding that "the only issue of inquiry was whether a particular document was timely filed," and contends that "[t]he fact that additional written documentation describing use and occupancy was not timely submitted is irrelevant to the issue of whether the BLM granted the process that was due Mr. Gloko" (SOR at 8).

In addition, appellant maintains that reinstatement of his Native allotment application is mandated under section 905(a) of ANILCA, which provides as follows:

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 * * * are hereby approved on the one hundred and eightieth day following the effective date of this Act, except where provided otherwise by paragraph (3), (4), (5), or (6) of this subsection * * *. [Emphasis added.]

Appellant offers the following interpretation of this statutory provision:

All Native allotment applications which were pending before the Department on or before December 18, 1971, are to be approved or adjudicated. [This] application, filed in 1961, falls within the scope of section 905; it was pending before the Department of the Interior on or before December 18, 1971. It must, therefore, be processed accordingly. [Emphasis in original; footnote omitted.]

(SOR at 8-9). Appellant argues that BLM erred in concluding that section 905(a) of ANILCA does not apply to the subject application because it was "not completed and * * * was not erroneously closed without an opportunity for hearing on a disputed question of fact" (SOR at 9).

Appellant takes issue with BLM's position that "only erroneously rejected applications were to be reinstated by section 905 regardless of when they were rejected" (SOR at 10). He refers to the legislative history of section 905, which explained:

An amendment to Section 905 clarifies that the purview of the section includes all Alaska Native allotment applications which

3/ Appellant points out that in order to comply with the mandate of the Ninth Circuit Court of Appeals in Pence v. Kleppe, supra, the Department adopted the contest procedures found at 43 CFR 4.450 through 4.452, and that the Ninth Circuit subsequently found these procedures to facially comply with due process. Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978). Appellant complains that there was no issuance of a contest complaint (43 CFR 4.450-4, 4.451-2), no opportunity to answer (43 CFR 4.450-6), and no assignment of the case to an Administrative Law Judge to conduct a hearing (43 CFR 4.452).

were pending before the Department of the Interior on "or before" December 18, 1971. The amendment clarifies that applications which were erroneously rejected by the Secretary prior to December 18, 1971, without an opportunity for hearing shall be approved or adjudicated by the Secretary pursuant to the terms of the section. [Emphasis added.]

(S. Rep. No. 413, 96th Cong., 1st Sess. 238 (1970), reprinted in 1980 U.S. Code Cong. & Ad. News 5182).

Appellant argues that an application filed and pending before December 18, 1971, even though BLM has rejected the application and closed the file before that date, must be reinstated and either approved or adjudicated pursuant to section 905. He reads section 905(a) to mean that BLM acted "erroneously" in rejecting an application without affording the applicant a hearing in compliance with Pence v. Kleppe, supra. He concludes that in section 905(a), "Congress was acknowledging the mandate in Pence v. Kleppe, where the Court found that applications rejected by the Secretary 'without an opportunity for a hearing,' violated the applicant's due process rights and were therefore erroneously rejected by the Secretary" (SOR at 11).

In its answer, BLM offers two reasons as to why appellant is not entitled to a hearing under section 905 of ANILCA and Pence v. Kleppe. First, argues BLM, "ANILCA only requires the consideration of applications that were erroneously closed before December 18, 1971 * * *" (Answer at 8). Second, BLM asserts that "[t]he lack of any factual issue with respect to an applicant's failure to comply with the requirement of filing of proof of use and occupancy within six years after the date of application takes such a case outside the coverage of the Ninth Circuit's holding in Pence v. Kleppe" (Answer at 9). Thus, BLM concludes that since the applicant failed to file such proof within the prescribed 6-year period, his case was not "erroneously" closed, and ANILCA does not require its reconsideration.

[1] We look to the terms of section 905(a) of ANILCA for the resolution of this appeal. That section, quoted supra, provides with certain qualifications that a Native Allotment application pending before the Department on or before December 18, 1971, shall be legislatively approved or adjudicated. If adjudicated, the provisions of the Act of May 17, 1906, as amended, shall apply.

From the record, it is clear that Gloko's application was pending on or before December 18, 1971. Although the record indicates that BLM regarded Gloko's application as closed for failure to provide evidence of use or occupancy within the 6-year statutory period, it does not appear that Gloko was ever informed of this fact. Indeed, the record suggests that BLM and appellant had no direct communications between 1961 and 1982.

We do not find that BLM's October 4, 1961, letter to Gloko, which notified appellant that his application "will terminate" on or about July 16, 1967, absent receipt of proof of use and occupancy, may be read

to remove the need for a subsequent decision rejecting application A-055109. Indeed, considering BLM's manner of handling other "statutory life" cases, it does not seem likely that BLM intended this letter as a final rejection of the application.

Thus, in the Heirs of Carl Takak, IBLA 88-135, we note that upon Takak's failure to file proof of use and occupancy during the 6-year statutory period provided by 43 CFR 2212.9-1(f), BLM issued a decision to Takak rejecting his allotment application F-023379. Similarly, in the Heirs of Silas Sockpealuk, IBLA 88-137, BLM again issued a decision when it rejected the Native allotment application of an individual who failed to provide evidence of use and occupancy during the 6-year statutory life. Finally, we note that in the Heirs of Saul Sockpealuk, IBLA 88-132, BLM closed Native allotment application F-022704 for failure to file proof of use and occupancy by issuing a decision addressed to Sockpealuk. ^{4/} See Heirs of Saul Sockpealuk, 115 IBLA 317 (1990).

We conclude, therefore, that Gloko's Native allotment application was pending before the Department on or before December 18, 1971, and that reinstatement of this application was denied in error. We direct BLM to reinstate this application and either approve or adjudicate it in accordance with section 905(a) of ANILCA. Heirs of Saul Sockpealuk, *supra*; Frederick Howard, 67 IBLA 157 (1982).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Alaska State Office is vacated, allotment application A-055109 is reinstated, and this case is remanded for further action consistent with this opinion.

Gail M. Frazier

Administrative Judge

I concur:

John H. Kelly
Administrative Judge

^{4/} The Takak application and each Sockpealuk application were filed in 1959, after the effective date of 43 CFR 67.5(f), *infra* note 1. Each applicant received a letter from BLM essentially similar to that issued by BLM to Gloko on Oct. 4, 1961.