

INTERIOR BOARD OF LAND APPEALS

Louie A. John

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LOUIE A. JOHN

IBLA 94-416

Decided December 12, 1997

Appeal from a decision of the Alaska State Office, Bureau of Land Management, finding that a Native allotment application earlier rejected with administrative finality had been reinstated in error and again closing the case. F-13711.

Reversed in part, set aside and remanded for hearing in part.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Powersite Lands--Segregation--Withdrawals and Reservations: Powersites

Section 905(a) of ANILCA, as amended, 43 U.S.C. § 1634(a) (1994), requires reinstatement of Native allotment applications pending before the Department of the Interior on Dec. 18, 1971, which describe land that was unreserved on Dec. 18, 1968, for legislative approval or adjudication, including applications rejected prior to the effective date of ANILCA.

2. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Powersite Lands--Segregation--Withdrawals and Reservations: Powersites

The BLM is required to reinstate a Native allotment application that was rejected by the Department without notice to the applicant and an opportunity for a hearing. Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), establishes the principle that procedural due process requires BLM to afford the applicant notice and an opportunity for a hearing on a disputed issue of fact before rejecting a Native allotment application. Even if the applicant receives notice of the rejection and fails to appeal, reinstatement is required because lack of compliance with Pence vitiates the administrative finality that otherwise attends the rejection.

APPEARANCES: Judith K. Bush, Esq., and William E. Caldwell, Esq., Alaska Legal Services Corporation, Fairbanks, Alaska, for Appellant; E. John Athens, Jr., Esq., and Paul R. Lyle, Esq., Office of the Attorney General, State of Alaska, Fairbanks, Alaska, for the State of Alaska; Regina L. Sleater, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Louie A. John has appealed from the Decision of the Alaska State Office, Bureau of Land Management (BLM), dated March 7, 1994, finding that his Native Allotment Application, F-13711, had been reinstated in error after being rejected by a Decision dated December 4, 1972. John, who was born on June 6, 1949, and in 1972 resided in Circle, Alaska, had filed his Native Allotment Application on March 29, 1971, seeking 160 acres of public land in the NE $\frac{1}{4}$ sec. 12, in protracted T. 10 N., R. 16 E., Fairbanks Meridian, Alaska, pursuant to the Act of May 17, 1906, the Alaska Native Allotment Act (Native Allotment Act), as amended, formerly codified as 43 U.S.C. §§ 270-1 through 270-3 (1970). ^{1/} In his Native Allotment Application, John claimed seasonal use and occupancy of the land, for hunting, trapping, and fishing, starting on November 8, 1964.

Because of the missteps in the processing of John's Native Allotment Application, we will set out all the relevant events chronologically and in some detail before addressing the issues posed by this appeal.

As noted, Appellant's original Native Allotment Application described sec. 12 in protracted T. 10 N., R. 16 E., Fairbanks Meridian. It is bounded by the Steese Highway to the south and is about 1/2 mile east of Birch Creek and about 10 miles south of Circle. The Steese Highway was transferred to the State of Alaska (the State) on June 30, 1959, by section 21 of the Alaska Omnibus Act, Pub. L. No. 86-70, 73 Stat. 141 (1959). On July 21, 1960, the State applied for a right-of-way in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of sec. 12, T. 10 N., R. 16 E., which was approved on August 22, 1960. See Case File Abstract dated May 12, 1983. The right-of-way was issued on October 21, 1960, subject to valid existing rights, for the purpose of authorizing the removal of materials from a 3.44-acre parcel of land known as Pit No. 39, adjacent to and north of the highway, to be used in maintaining the Steese Highway.

On January 9, 1963, the U.S. Geological Survey (USGS) filed application F-030632, seeking the withdrawal of all of the land in protracted sec. 12, T. 10 N., R. 16 E., Fairbanks Meridian, Alaska, and other lands,

^{1/} The Native Allotment Act was repealed by § 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1994), effective Dec. 18, 1971, subject to applications pending before the Department on that date.

from all forms of appropriation under the public land laws for classification as a power site and subsequent development as the Rampart Canyon Power Project. 28 Fed. Reg. 2828 (Mar. 21, 1963). While the lands were segregated as a result of the USGS application, the Secretary of the Interior issued Public Land Order (PLO) No. 3520, 30 Fed. Reg. 271 (Jan. 9, 1965), by which all of the land in protracted T. 10 N., R. 16 E., was made part of Power Site Classification No. 445, effective January 9, 1963, subject to valid existing rights. The effect of the classification was to immediately withdraw all of the affected land from appropriation under the public land laws, including the Native Allotment Act. Charles L. John, 42 IBLA 260, 264 (1979); Lindberg Alexander, 41 IBLA 382, 384-85 (1979). That withdrawal remained in effect until it was revoked by PLO No. 6795, 55 Fed. Reg. 38549 (Sept. 19, 1990).

As stated, Appellant filed his original Native Allotment Application on March 29, 1971, alleging that he had commenced qualifying use and occupancy on November 8, 1964. By memorandum dated October 27, 1971, the BLM State Office notified the Superintendent, Alaska Bureau of Indian Affairs, that it was "preparing to reject" John's application, among others, because the Native Allotment Applications sought land that was subject to PLO No. 3520. The Superintendent was afforded 60 days in which to submit comments or recommendations before the applications were rejected. No notice or opportunity to comment was provided to John.

In a Decision dated December 4, 1972, the BLM District Manager rejected John's application on the ground that the NE $\frac{1}{4}$ sec. 12 was "not available for settlement at the time Mr. John claims occupancy on November 8, 1964," and concluded that he had acquired no rights that predated the withdrawal by virtue of such occupancy. The Decision was mailed to John by certified mail and received by him on December 14, 1972. He did not appeal, the Decision became final for the Department, and the case was officially closed on January 26, 1973.

On November 14, 1978, the State filed State Selection Applications FF-44663 for land in secs. 6 and 7, T. 10 N., R. 17 E., and F-44664 for sec. 12, T. 10 N., R. 16 E.

On December 2, 1980, Congress enacted section 905 of the Alaska National Interest Lands Conservation Act (ANILCA), as amended, 43 U.S.C. § 1634 (1994). Section 905(a)(1) of ANILCA legislatively approved on the 180th day following December 2, 1980, "all Alaska Native allotment applications * * * which were pending before the Department of the Interior on or before December 18, 1971, and which describe * * * land that was unreserved on December 13, 1968," subject to certain exceptions that required adjudication under the Native Allotment Act. 43 U.S.C. § 1634(a)(1) (1994).

On March 12, 1980, BLM reinstated John's Native Allotment Application with the notation on a Native Allotment Review Sheet "pending FERC [Federal Energy Regulatory Commission] or d(2)." This document was signed

by BLM personnel on March 4 and 7, 1980, although various Case File Abstracts throughout the record state the reason for reinstatement as "LANDS WITHIN RAMPART POWER PROJECT (PLO 3520)."

On June 1, 1981, the State filed a protest, as authorized by section 905(a)(5) of ANILCA, which thus prevented legislative approval of John's Native Allotment Application. As grounds for its protest, the State alleged that the land described in his Native Allotment Application was used for an existing highway and a boat launch, and that these represented a public access route for which no reasonable alternative existed. The case accordingly proceeded to adjudication under the Native Allotment Act.

Diane C. Haack, a BLM realty specialist, examined the land claimed by John on March 23, 1983, accompanied by his brother, Paul E. John. Also present was Dwight Hempel, who is not further identified in the Field Examination Report (Field Report) Haack prepared or elsewhere in the record. Appellant was not present. Haack determined that the 160-acre parcel of land, which was posted, ran north from the "centerline" of the Steese Highway, falling on both sides of the line between secs. 1 and 12, in protracted T. 10 N., R. 16 E., Fairbanks Meridian. (Field Report dated Mar. 30, 1983, at 5.) Haack described the parcel of land claimed by Louie John for survey purposes using the centerline of the Steese Highway, which runs generally east-west, as the southern boundary of the claim. Id. at 5, 6, 7, "Site Plot." All references to the centerline were later changed on September 21, 1987, to refer to the "boundary" of the highway. Neither the reason for the alteration nor its significance to the parties appears from the record, but when the land was surveyed in 1990, infra, the centerline was identified as the southern boundary. (Plat, Sheet 1, U.S. Survey No. 9710, Alaska.)

On the Field Report form, Haack indicated there was no man-made evidence of use or occupancy other than an area that Louie John reportedly had cleared for timber and camping. (Field Report at 4.) She noted that the land was a "good berry-picking area" and had "numerous small mammal tracks." Id. The Field Report further states that Louie John had begun using the land for berry-picking in 1958 and had used it for camping "through 1976," that he had ceased trapping in recent years due to the presence of wolverines, and had continued with "[t]imber use" to the present. Id. at 3. Haack recorded her observation that Louie John was "quite familiar with [the] area applied for (phone conversation 3/30/83)." Id. at 4. She concluded that he had complied with Native Allotment Act. Id. at 5. According to the notes in a Case File Abstract dated April 12, 1983, the Area Manager of the Yukon Resource Area, Alaska, concurred in Haack's conclusion on April 6, 1983. The Field Report does not explain why 1958, rather than 1964, was stated in the report as the year in which John claimed to have entered the land, and we are unable to conclude from the Field Report that this information was provided or asserted by him in the March 3, 1983, telephone conversation with Haack.

Pursuant to sections 14(a) and 22(j) of ANCSA, as amended, 43 U.S.C. §§ 1613(a) and 1621(j) (1994), on September 30, 1985, BLM issued Interim

Conveyance (IC) No. 1129 to the Danzhit Hanlaih Corporation (Danzhit), a Native Village Corporation, for the surface estate of all of the land situated in unsurveyed sec. 12, T. 10 N., R. 16 E., Fairbanks Meridian, expressly excluding the land described in John's application. Corresponding IC No. 1130 was issued to Doyon, Ltd. (Doyon), a Native Regional Corporation, for the subsurface estate of that land. On May 2, 1986, BLM issued IC No. 1162 to Danzhit for the surface estate of all of the land situated in unsurveyed sec. 1, T. 10 N., R. 16 E., again excluding land subject to John's Native Allotment Application. Corresponding IC No. 1163 was issued to Doyon for the subsurface estate of that land. All of the IC's were expressly subject to valid existing rights. (BLM letter to Danzhit and Doyon dated Mar. 24, 1992.)

In 1990, BLM surveyed the land claimed by Appellant. The land was designated Lot 1 of U.S. Survey No. 9710, Alaska, which was accepted by the BLM Deputy State Director for Cadastral Survey, Alaska, on September 26, 1991, and officially filed on October 11, 1991. The survey plat depicted the claim's southern boundary as the "Apparent Centerline" of the Steese Highway. (Plat, Sheet 1, U.S. Survey No. 9710, Alaska.) The BLM later described the land claimed as being "crossed" by the highway. See Decision of July 22, 1992, at 2. Lot 1 contains 159.98 acres in secs. 1 and 12 of protracted T. 10 N., R. 16 E., and also the S $\frac{1}{2}$ sec. 6 and N $\frac{1}{2}$ sec. 7 of protracted T. 10 N., R. 17 E., Fairbanks Meridian. Following notice dated January 15, 1992, to John, the State, and others, and absent any objection thereto, BLM conformed the description of the land in John's Native Allotment Application to Lot 1 of U.S. Survey No. 9710, Alaska. Thus, at that juncture, Appellant's Native Allotment Application described land in four sections in two Ranges (16 E. and 17 E.), only part of which was subject to the Rampart Dam Power Site Classification. In addition, however, the survey subjected most of the land in Appellant's Native Allotment Application to the State's claims, as the State's right-of-way pertains to sec. 12, and its State Selections described land in secs. 6 and 7, T. 10 N., R. 17 E.

In September 1990, the Secretary of the Interior issued PLO No. 6795, which revoked PLO No. 3520 in its entirety, thus revoking the Power Site Classification withdrawal of the land here at issue. 55 Fed. Reg. 38549 (Sept. 19, 1990).

In early 1992, BLM proposed to approve John's Native Allotment Application and issue his Certificate of Allotment. However, BLM noted that IC Nos. 1162 and 1163 to Danzhit and Doyon, respectively, covered the surface and subsurface estates of the S $\frac{1}{2}$ sec. 6 and N $\frac{1}{2}$ sec. 7, T. 10 N., R. 17 E., Fairbanks Meridian, but did not exclude Native Allotment Application F-13711, which after survey included land in those subdivisions. The effect of the IC's was to remove the affected land from the jurisdiction of the United States in the same manner as the issuance of a patent and to thus preclude adjudication of John's Native Allotment Application

and conveyance of any land to him. 43 U.S.C. § 1621(j)(1) (1994); Bay View, Inc., 126 IBLA 281, 286 (1993); Heirs of Linda Anelon, 101 IBLA 333, 336 (1988). The BLM therefore obtained instruments titled "Title Affirmation on Survey of Inholdings" (Title Affirmation) from Danzhit and Doyon. The Title Affirmation executed by Danzhit on May 26, 1992, and by Doyon on June 2, 1992, served as the means by which the Native Village Corporations disclaimed any right, title, and interest, if any, conveyed in the IC to the lands claimed by John, so that his Native Allotment Application could proceed, and a final legal description confirming boundaries of land conveyed to the corporations could be identified for the patents.

On July 22, 1992, the State Office issued its Decision approving John's Native Allotment Application, based upon the determination that the lands were vacant, unappropriated, and unreserved at the time the claim was initiated and that John had satisfied the use and occupancy requirements of the Native Allotment Act, having commenced such use and occupancy in 1958. (July 1992 Decision at 2.) That Decision concluded that, contrary to the State's claim, there was no boat launch that conflicted with John's Native Allotment Application. Id. Accordingly, that part of the State's protest was dismissed.

The State Office rejected State Selection Applications F-44663 and F-44664 to the extent that they conflicted with Appellant's Native Allotment Application, since they were filed on November 14, 1978, while the land was segregated from appropriation by the filing of the John Native Allotment Application, again based on the assumption that he commenced use and occupancy in 1958. Id. at 3. The State's material site right-of-way F-026288 similarly was declared null and void because it had been granted on October 21, 1960, subject to valid existing rights. With respect to valid existing rights, the July 1992 Decision declared that "these rights included Louie A. John's inchoate preference rights to a Native allotment established by his use and occupancy at the time of the grant. The preference rights relate back to the initiation of use and occupancy and preempt conflicting applications filed after that time." Id.

Lastly, the July 1992 Decision provided that a Certificate of Allotment would issue, subject to a 200-foot-wide easement for the Steese Highway reserved to the State on June 30, 1959. Id.

The State, through its Department of Transportation and Public Facilities, timely appealed BLM's July 1992 Decision. The Appeal was docketed as IBLA 92-596. The State challenged the July 1992 Decision to the extent that BLM, in approving John's Native Allotment Application, declared the State's material site right-of-way null and void. It argued that as a matter of law, BLM was required to approve John's application subject to the State's right-of-way, regardless of whether John had initiated qualifying use and occupancy before the State applied for the right-of-way, and that BLM was estopped from denying the validity of the right-of-way. The State further contended that before deciding that John had a valid right that

predated its right-of-way, BLM was required to initiate a Government contest to determine whether he was engaged in qualifying use and occupancy, asserting that the record failed to support BLM's determination.

On February 16, 1993, BLM moved the Board to vacate the July 1992 Decision and remand the case with directions to close John's Native allotment case. It did so on the basis that the Decision had been issued in error, because BLM had rejected John's Native Allotment Application in December 1972 for failing to initiate qualifying use and occupancy prior to segregation and withdrawal of the claimed land, with administrative finality. (Motion to Vacate and Remand at 3.) The BLM thus asserted that John's Native Allotment Application was erroneously reinstated and that the case should be closed. In the alternative, BLM requested remand of the case for further adjudication of John's entitlement under the Native Allotment Act in view of the meager evidence of initiation of use and occupancy before the segregation and withdrawal: "Without crediting a source, the field examination report, dated March 30, 1983, states that '[b]erry picking began 1958.' No additional evidence was received." (Motion at 2.) The State filed notice that it did not oppose BLM's Motion. Nothing was filed by or on behalf of John. By Order dated July 29, 1993, the Board vacated BLM's July 1992 Decision and remanded the case "for further appropriate action." We did not, however, accede to the invitation to specify whether the case should be closed or BLM should undertake further adjudication.

On remand, the State Office issued its March 7, 1994, Decision, the subject of the instant appeal, in which it was concluded that, in the absence of a timely appeal from the December 1972 Decision, BLM had properly rejected John's Native Allotment Application. More particularly, the Decision articulated the following rationale:

On December 4, 1972, the Bureau of Land Management (BLM) issued a decision rejecting Native allotment application F-13711, citing the lands were not available for settlement on the date Mr. John commenced his use and occup[anc]y. This decision was sent certified mail and the return receipt indicates Mr. John personally received the decision. No appeal was filed and the case was closed on January 26, 1972, and removed from the records.

On its own initiative, the BLM reviewed case file F-13771 and reinstated the application on March 12, 1980, "pending FERC determination or (d)(2)." However, cases decided with administrative finality are not subject to reconsideration in the absence of compelling legal or equitable reasons for doing so. See Turner Brothers Inc. v. OSMRE, 102 IBLA 111, 121 (1988). Neither of the above reasons the BLM used for reinstatement affect the validity of closed Native allotment applications.

Since the Native allotment application was properly rejected by a matter of law [sic], and the BLM did not have a compelling legal or equitable reason to reinstate the application, Native allotment application F-13711 should have remained closed. See Franklin Silas, 117 IBLA 358 (1991).

(Decision at 2.)^{2/}

On October 24, 1994, the Board was first notified by the State that the parties were engaged in settlement discussions and that it seemed likely that a settlement could be achieved. On November 22, 1994, the State advised us that only it and John had been able to reach a settlement.

A "Stipulation for Settlement" (Stipulation) executed by representatives of the State, John's counsel, and John was filed with the Board on January 23, 1995. The Stipulation principally provided that if John is successful in obtaining the Native allotment sought under Native Allotment Application F-13711, his allotment would be subject to the State's material source within BLM right-of-way F-026288 and the Steese Highway. The Stipulation further provided that the land subject to the right-of-way would revert to John or his heirs or successors, when the State, in its sole discretion, determined in writing that the right-of-way no longer was needed by the State. (Stipulation at 2.) The State and John further agreed to the "entry of an order by the IBLA incorporating the terms of this settlement," upon which the settlement would be effective, and the State would "withdraw its protest" to John's application, subject to reinstatement if BLM failed to make the allotment subject to either the right-of-way or the highway. Id. at 3. If the contingencies did not occur as anticipated, the settlement agreement would be "null and void," and each party would proceed with the case. Id. With the Stipulation, the State filed a Motion for Order Incorporating Terms of Settlement (Motion to Incorporate) with this Board.

The Stipulation subsequently was modified in response to BLM's opposition to the motion by inserting language to the effect that reversion shall occur only where BLM accepts the State's determination that it no longer requires the right-of-way and acts to cancel it. (Amended Stipulation at 2-3; Joint Reply to BLM's Opposition to Motion to Incorporate at 5.) The BLM has refused to become a party to the settlement agreement, contending that the settlement is contrary to law to the extent that it provides that approval of John's Native Allotment Application shall be subject to the State's right-of-way. The BLM correctly contends that should it be determined that John is entitled to all of the land he seeks because his qualifying use and occupancy predates the grant of the right-of-way, BLM is legally obligated to allot the land free of the burden of the

^{2/} On Sept. 26, 1994, John filed a petition seeking a stay of the effect of BLM's Mar. 7, 1994, Decision, pending his appeal. In an Order dated Oct. 26, 1994, this Board took the petition under advisement, noting that settlement discussions were then underway. No further action on that petition is necessary, as the issue has been mooted by this Decision.

right-of-way, and the State's right-of-way would be subject to John's existing rights. (Opposition to Motion to Incorporate at 2-3.) Accord State of Alaska Department of Transportation & Public Facilities (DOTPF) (In Re Irene Johnson & Jack Craig), 133 IBLA 281, 287-88 (1995). The BLM further argues that if, on the other hand, it is determined that John's qualifying use and occupancy postdates the grant of the right-of-way and therefore was not potentially exclusive, it is required to exclude the land covered by the right-of-way from the allotment because John is not entitled to it under the Native Allotment Act. (Opposition to Motion to Incorporate at 2-3.) Contra State of Alaska DOTPF (In Re Irene Johnson & Jack Craig), 133 IBLA at 288. Thus, BLM avers that it could not make the allotment subject to the right-of-way absent such a determination, and the Board could not order it to do so, consistent with the law.

We now turn to the merits of the Decision of March 7, 1994. Notwithstanding the long history of this Native Allotment Application, the March 1994 Decision purports to correct certain errors on the part of BLM, and to return the case to its posture prior to the issuance of BLM's December 4, 1972, Decision. Although the record and the parties' arguments reveal apparent changes in policy and interpretation over the years, we believe that this appeal turns on whether John's Native Allotment Application should have been reopened in 1980, and if so, its status at that time.

Appellant argues that his application correctly was reinstated in March 1980 as a result of the class actions in the Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976) and Joseph v. United States, No. F76-20 (D. Alaska) cases, the latter having terminated in a stipulated order as a result of enactment of ANILCA. (Statement of Reasons at 3, 7.) He argues that he is entitled to a hearing and that ANILCA required the reinstatement of his application because it was pending on December 18, 1971.

In its Answer, BLM reasons as follows: the rejection of Appellant's Native Allotment Application on the ground that it described land that was not available for settlement was correct, and therefore constitutes a legal defect as a matter of law; a legal defect required no hearing before rejecting the application; Appellant failed to appeal the 1972 Decision after receiving it; pursuant to the doctrine of administrative finality, and absent compelling legal or equitable reasons not here presented, the 1972 Decision remains valid; thus it was an error to have reopened the case.

To support this analysis, BLM cites numerous decisions of this Board and attempts to recast our decision in Franklin Silas, 117 IBLA 358 (1991), as an application of the doctrine of administrative finality, notwithstanding our express statement to the contrary in Franklin Silas (On Judicial Remand), 129 IBLA 15 (1994), aff'd Silas v. Babbitt, 96 F.3d 355 (9th Cir. 1996). This argument misses the mark. Our decision in that case was grounded on the fact that Silas had attempted to create an issue of fact by claiming that a statement he made in his Native Allotment Application was false. We expressly concluded that "BLM properly rejected his petition

because he had not submitted sufficient evidence of an error in his application. * * * Administrative finality was not a basis for affirming BLM's decision." Silas (On Judicial Remand), supra, at 16. In this case, the tract was surveyed, and BLM amended the Native Allotment Application to conform with the survey. As surveyed, the land description did not conform with the legal description in John's original application, and, as amended, it would not be deemed null and void on its face. This fact alone constitutes sufficient evidence of an error in John's original Native Allotment Application.

In addition, BLM contends that neither Pence nor Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), requires the reopening of Appellant's case. Clearly, Aguilar is not applicable to the instant case because the land sought by Appellant, though once conveyed out of Federal control, was relinquished. With respect to its other arguments, BLM asserts that John's Native Allotment Application does not meet the requirements of section 905(a)(1), in that it was neither pending on December 18, 1971, nor describes land that was unreserved on December 13, 1968, or within Naval Petroleum Reserve No. 4. It is argued that the subsection "does not apply retroactively to require reopening of applications which had been properly adjudicated between December 18, 1971, and December 2, 1980. Unless there exists another reason for reopening, case files that were properly adjudicated should remain closed." (Answer at 6.)

[1] It is undisputed that John's Native Allotment Application was pending before the Department on or before December 18, 1971, within the meaning of section 905(a)(1) of ANILCA; the Decision rejecting the application was not made until December 1972. See Donald Peter, 107 IBLA 272, 274 (1989); Frederick Howard, 67 IBLA 157, 159-60 (1982). As will be shown below, the Native Allotment Application described land that in part was unreserved on December 13, 1968. According to BLM, however, even given that an application was pending before the Department on December 18, 1971, if it was finally decided before section 905 was enacted on December 2, 1980, there was no application to which ANILCA could pertain. No such limitation is stated in section 905, and we find nothing in the statute that suggests or supports the interpretation urged by BLM. The arguments to the contrary therefore are rejected, and we hold that John's Native Allotment Application was properly reinstated pursuant to ANILCA.

[2] Moreover, even if the application had not been pending on December 18, 1971, BLM would have been required to reinstate any Native allotment application that was rejected by the Department without notice and an opportunity for a hearing on a disputed question of fact. Pence v. Kleppe, supra, establishes the principle that before rejecting an allotment application as to which there are disputed issues of fact, procedural due process requires BLM to afford the applicant notice and an opportunity for a hearing. Even when the applicant receives notice of the rejection and fails to act, as Appellant did, reinstatement is required because lack

of compliance with Pence vitiates the administrative finality that otherwise attends the rejection. Forest Service, U.S. Department of Agriculture (Heirs of Archie Lawrence), 128 IBLA 393, 396 (1994); Heirs of George Titus, 124 IBLA 1, 4 (1992).

The BLM refers to our decision in Franklin Silas, supra, at 364, in which we held that "[n]o Pence v. Kleppe hearing is required if, when taking the factual averments of the application as true, the application is insufficient on its face, as a matter of law, and thus affords no relief under the Alaska Native Allotment Act." (Footnote omitted.) In an effort to extend this statement from Silas, BLM argues that the December 1972 Decision rejected John's application on the ground that when he submitted his Native Allotment Application in March 1971, the land he sought had been withdrawn for power purposes prior to the commencement of his use and occupancy in 1964, and as that Decision reflects the law as it existed at the time the application was filed, it was rejected on the basis of a "legal defect," such that reinstatement is not required by Pence, and thus the Decision is administratively final.

The BLM's argument advances a construction of ANILCA with which we cannot agree. The crucial question is whether BLM is correct in concluding that Appellant's Native Allotment Application was invalid on its face because it described land that was withdrawn from entry at the time he commenced his occupancy and use in 1964. In our view, John's Native Allotment Application was not invalid. The land Appellant staked as the land he intended to claim was found to be within secs. 1 and 12, T. 10 N., R. 16 E. and secs. 6 and 7, T. 10 N., R. 17 E. Survey 9710 was officially filed and Appellant's Native Allotment Application was amended by BLM to conform to the survey without objection. As Appellant's amended Native Allotment Application described land that was not subject to PLO No. 3520, as well as land that was, it cannot now be said that the application on its face revealed a legal defect which, as a matter of law, required the rejection thereof. We accordingly hold that because Appellant's Native Allotment Application in part described land that was outside the power site withdrawal, it did not require rejection as a matter of law, and thus Franklin Silas, supra, does not control the disposition of this appeal.

Having determined that it was not invalid, and as a result of the State's protest, John's Native Allotment Application should have proceeded to adjudication under the Native Allotment Act, as required by sections 905(a) and (d).

The State has stated its willingness to withdraw its protest, presumably to remove the impediment to legislative approval. To do so, however, the State was required to act within the 180 days following the enactment of ANILCA, and accordingly, it cannot now withdraw its protest so as to achieve legislative approval of the application. Angeline Galbraith, 134 IBLA 75, 91-96 (1995). Appellant's Native Allotment Application,

excluding sec. 12, therefore must be adjudicated pursuant to the Native Allotment Act.
3/

We perceive no further barrier to favorably acting on John's Native Allotment Application as it relates to secs. 1, 6, and 7. With respect to sec. 12, BLM questions whether John commenced use and occupancy in 1958 and not in 1964 as stated in his Native Allotment Application. As we have said, 1958 first appears in BLM's 1983 Field Report, but it is otherwise unclear whether John embraces 1958 as the year his use and occupancy commenced. Accordingly, John shall be afforded notice and a hearing to present testimony and evidence on this issue of fact regarding sec. 12. The decision that follows shall be appealable to this Board.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the March 7, 1994, Decision appealed from is reversed as it relates to secs. 1, 6, and 7, and set aside and remanded for a hearing on sec. 12.

T. Britt Price
Administrative Judge

I concur.

R.W. Mullen
Administrative Judge

3/ Although the State's withdrawal of its protest cannot operate to permit legislative approval of John's Native Allotment Application, if the protest was abandoned, the application for secs. 1, 6, and 7 could be approved without a hearing.