

UNITED STATES

v.

NORMA E. RICHARDS

IBLA 92! 152

Decided March 21, 1996

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer, rejecting Native allotment application F! 13112-B.

Affirmed.

1. Alaska: Native Allotments! -Contests and Protests: Government Contests–Evidence: Prima Facie Case! -Rules of Practice: Appeals: Burden of Proof

A Government contest of a Native allotment application on the basis of a failure to meet the requirements of the Native Allotment Act and implementing regulations is subject to dismissal if the Government fails to present sufficient evidence at the contest hearing to establish a prima facie case to support its complaint. However, when the Administrative Law Judge denies the motion to dismiss and applicant goes forward and presents evidence, all the evidence will be considered to determine whether a preponderance of that evidence establishes that the statutory and regulatory use and occupancy requirements were met.

2. Alaska: Native Allotments

Under the Native Allotment Act of 1906 and implementing regulations, an allotment applicant must show substantially continuous use and occupancy, potentially exclusive of others, for a period of 5 years.

3. Alaska: Native Allotments! -Words and Phrases

"Potentially exclusive of others." As used in 43 CFR 2561.0! 5(a), the phrase "potentially exclusive of others" as applied to use of lands means that the nature of the use must be such that any person on

the land, under normal circumstances, knew or should have known that the land was subject to the claim of another. Under this standard, when the claimant used the land on the same basis as and in common with other area residents for weekend hunting, trapping, fishing, berrypicking, and camping, with no general recognition or acknowledgment of her claim and in a way not adequate to put anyone on notice of her claim, her use was not potentially exclusive and therefore cannot establish a right to a Native allotment.

APPEARANCES: Andy Harrington, Esq., Alaska Legal Services Corporation, Fairbanks, Alaska, for appellant; Regina L. Sleater, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management; John T. Baker, Esq., Assistant Attorney General, Anchorage, Alaska, for the State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Norma E. Richards has appealed from a decision by Administrative Law Judge Harvey C. Sweitzer, rejecting her Native allotment application F! 13112-B, to the extent that it sought the eastern half of Parcel B, situated approximately 7 miles from the village of Livengood, Alaska (U.S. Exh. 9; Tr. 71).

Richards filed her allotment application for Parcel B on March 12, 1971, claiming summer use of the land for hunting, fishing, and berrypicking beginning in June 1965. The application was filed pursuant to the Native Allotment Act of 1906, as amended, 43 U.S.C. §§ 270 through 270! 3 (1970). 1/

Parcel B, comprising approximately 80 acres, is situated immediately south of the Livengood-Manley Hot Springs Highway (now the Elliot Highway) on Brown Lake, also known as "Kuck" Lake. 2/ It covers 2.5 acres of lands on the shore of the lake, encompassing a boat launching ramp and a nearby small camping area, that were subject to Recreation and Public Purposes (R&PP) Classification Order No. 65! 8, issued by the Bureau of Land Management (BLM) on November 3, 1964 (Exh. AK-5 at 14-15). The order was intended to protect public access to the lake. It expired by its terms in May 1966 but was not removed from BLM's official records until January 1969 (Exh. AK! 5 at 15; Tr. 127).

1/ The Native Allotment Act was repealed on Dec. 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C.

§ 1617(a) (1988), but applications pending before the Department as of the date of repeal were allowed to proceed to patent.

2/ The parcel has been surveyed as U.S. Survey No. 9253, Alaska, officially filed Dec. 28, 1988 (U.S. Exh. 9).

In 1975, BLM conducted a field examination of Parcel B. The BLM examiner determined that, although Richards appeared to have exclusive use of most of the parcel, the boat launch and small camping area were also being used by the public. He concluded in his report that her use of the eastern half (which encompasses the boat launch and small camping area) was nonexclusive, but recommended that she be granted the western 40 acres of the parcel.

Section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(1) (1988), legislatively approved all allotment applications pending before the Department on or before December 18, 1971, on the 180th day following December 2, 1980. Section 905(a)(5) provided, however, that allotment applications would not be legislatively approved and would instead be adjudicated under the Native Allotment Act if the State or other interested entity filed a timely protest against approval of the allotment application. 43 U.S.C. § 1634(a)(5) (1988). Both the State of Alaska (State) (U.S. Exh. 7) and Alyeska Pipeline Service Company (Alyeska) (U.S. Exh. 6) filed timely protests of Richards' application.

On August 1, 1988, BLM filed a contest complaint charging that Richards "did not maintain substantial actual possession and use of the eastern half of the lands within Parcel B of her application to the potential exclusion of others." The complaint also stated that, since two "valid" protests were timely filed, the allotment must be adjudicated. Richards filed an answer denying the allegations and requesting a hearing.

On July 6, 1990, Judge Sweitzer granted the State's motion to intervene, and on July 16-18, 1990, he conducted an evidentiary hearing in Fairbanks, Alaska. At the conclusion of BLM's case, counsel for Richards moved to dismiss the contest on the ground that BLM had failed to present a prima facie case. The Judge denied the motion and further evidence was presented on behalf of Richards and the State. In his decision, Judge Sweitzer rejected her application, concluding that the preponderance of the evidence failed to show that Richards' use of the lands was potentially exclusive of others. Richards appealed.

[1] Appellant argues that Judge Sweitzer improperly denied her motion to dismiss the contest for failure to establish a prima facie case. In general terms "prima facie evidence" is evidence which is sufficient in law to sustain a finding in favor of an assertion, but which may be contradicted. American Security Council Education Foundation v. FCC, 607 F.2d 438 (D.C. Cir. 1979). A prima facie case is made when evidence is presented that is adequate to support the Government's contest of the claim and no further proof is needed to nullify the claim. United States v. Estabrook, 94 IBLA 38, 43, 45 (1986), and cases cited.

If the Government fails to present a prima facie case, a contestee by timely motion may move to have the case dismissed and then rest. If

the Administrative Law Judge denies the motion because a prima facie case was made, that ruling is subject to review on appeal. United States v. Anderson, 83 IBLA 170, 178 (1984), aff'd, 645 F. Supp. 3 (E.D. Cal. 1985). If, however, a contestee goes forward after filing a motion to dismiss, and presents evidence, the Administrative Law Judge and this Board may consider that evidence as part of the entire evidentiary record. Thus, even when the Government fails to present a satisfactory prima facie case, evidence presented by the contestee which supports the Government's case may be used against the contestee, regardless of defects in the Government's case. United States v. Taylor, 19 IBLA 9, 23-24, 82 I.D. 68, 73 (1975).

At the hearing BLM relied chiefly on its May 30, 1975, field report (U.S. Exh. 3). Under a section entitled "Land Use And Occupancy," the report states:

The applicant stated that she had started to use the land May 30, 1966, and that she has used the land every year from 1966 to the present date of this report including the year she filed. However, the applicant stated the boat launching area was used by other people prior to and during her usage. The applicant has used the land from May through November for approximately 3 weekends per month. The type of use was berry picking and hunting throughout the parcel and fishing along the shoreline and on the lake as shown on the map.

* * * * *

The applicant appears to have exclusive use of most of the parcel. However, the boat launch and a small camping area * * * appear to have a degree of public use. There were no witnesses to interview that could address this matter of public use, but the applicant stated that such use is taking place but she does not know any of the individuals involved in the use.

* * * * *

Berry bushes, cut stumps, and camping areas were present on the various subdivisions. One portion has been cleared by the pipeline [company], but the witness stated she had picked berries on that portion of the land also. Applicant and witness both state that the whole [parcel has been used for berry picking and hunting]. One portion of the land, i.e. the boat launch, appears to have some degree of public use * * *. The amount of vegetative damage and the ruts are indicative of the use which would appear to be from public use, not from the amount of use claimed by the applicant.

Id. at 4-6. The report states further that there were no improvements present on the land, but that there were several fire barrels and firewood

cuttings. Id. at 5. The examiner also noted "[t]wo old cat trails, now used as jeep trails, [transverse] the parcel." Id. at 7.

In the conclusion of his report, the examiner wrote:

I feel that the applicant has exclusive use on only 40 acres. The applicant has used the 80 acres applied for. However, by the applicant's own statement other persons have used the boat ramp and the larger of the two camping areas before and during her occupancy.

* * * * *

In summary, I feel the applicant has exclusive use of the Western half. The remaining Eastern half appear[s] to be nonexclusive by the applicant's own statement. In conclusion I feel the applicant has complied with the Native Allotment Act of 1906, for 40 acres of the 80 acres applied for.

Id. at 8.

At the time of the hearing, the field examiner was no longer employed by BLM and did not testify (Tr. 50). BLM showed that, since the field report indicated that the applicant's use was not potentially exclusive, it had sent applicant a notice (U.S. Exh. 5) on May 21, 1976, requesting additional evidence as to whether she used the parcel to the potential exclusion of others. BLM received no response to this notice (Tr. 145). Heather A. Coats, a BLM adjudicator, testified that her review of the field report led her to conclude that appellant did not have exclusive use of the eastern 40 acres and prompted her decision to institute the contest as to that portion of the parcel (Tr. 126).

At the conclusion of BLM's presentation of its case, appellant moved for dismissal for failure to establish a prima facie case. The Judge denied the motion ruling that "although extremely weak, a prima facie case has been made" (Tr. 197). We agree with that assessment and therefore hold that Judge Sweitzer correctly denied the motion to dismiss the contest complaint. BLM's evidence was sufficient to demonstrate that appellant had failed to use the eastern half of Parcel B along the shoreline to the potential exclusion of others, and thus established noncompliance with the requirements of the Native Allotment Act. See 43 CFR 2561.0-5(a). Accordingly, we reject appellant's argument that this ruling was in error.

We also reject appellant's assertion that Judge Sweitzer's ruling denying her motion to dismiss was erroneous because the record at the time the motion was made "did not contain information sufficient to validate the facially invalid protest of either the State or Alyeska" (Statement of Reasons (SOR) at 11). Appellant asserts that since BLM alleged the existence of valid protests in its complaint, it was required to establish a prima facie case of the validity of those protests at the hearing.

BLM's contest complaint stated that adjudication was required since valid protests were filed. In order to establish that its contest was properly brought as a matter of procedure, BLM chose to demonstrate that a valid protest against the Native allotment had been timely filed under section 905(a)(5) of ANILCA, 43 U.S.C. § 1634(a)(5) (1988). This is because a legally sufficient protest precludes legislative approval of the allotment and requires its adjudication, and because BLM cannot generally reject a Native allotment except by contest. See State of Alaska (Elliot R. Lind) (On Reconsideration), 104 IBLA 12 (1988).

BLM entered the State's protest as an exhibit, so that there is no doubt that it was in evidence and was part of BLM's prima facie case. ^{3/} A protest under section 905 must include three affirmative statements: (1) a statement that the land described in the allotment application is "necessary for access" to certain public (State or Federal) lands, resources or bodies of water as enumerated in the statute; (2) a statement setting forth with specificity the facts upon which the conclusions concerning access are based; and (3) a statement that "no reasonable alternatives for access exist." State of Alaska, 95 IBLA 196, 200 (1987). Affirmative statements in the words of the statute satisfy the first and third requirements. Id. A State protest will be considered sufficiently specific if it specifies the nature of any use of the lands subject to a Native allotment application for purposes of gaining access to any public lands, resources, or bodies of water, which could be jeopardized by conveying the land out of public ownership. Id. at 201.

The State's protest (U.S. Exh. 7) specifically lists Native allotment application F! 13112 and the township in which it is located (T. 7 N., R. 6 W., Fairbanks Meridian), alleging (1) that the allotment is in conflict with an existing highway, trail, and public access route to Federal land and to a public body of water; (2) that the land is used for a highway and trail; (3) that no reasonable alternatives for access exist; and (4) that there is on the land a constructed public access route, transportation facility or corridor. We conclude that the State's protest was legally sufficient to preclude legislative approval of the allotment and to require its adjudication. See State of Alaska (Elliot R. Lind) (On Reconsideration), supra. ^{4/} By bringing the State's protest into evidence, BLM properly established the procedural basis for bringing the contest complaint. Judge Sweitzer had no basis to dismiss the contest complaint on account of any lack of proof concerning the protests filed by the State or Alyeska.

^{3/} Even if it had not been presented as an exhibit, Judge Sweitzer could have taken official notice of it, as it appears in BLM's public records. See 43 CFR 4.24(b).

^{4/} In view of this holding, it is unnecessary to consider whether Alyeska's protest was also sufficient to trigger adjudication under section 905(a)(5) of ANILCA.

Nor can we agree that the State's protest was somehow rendered invalid by evidence presented at the hearing. The allegations that the land in Parcel B is necessary for access were generally confirmed. Alan Townsend, a biologist with the Alaska Department of Fish and Game, testified that he fished Brown Lake and took visitors there, accessing the lake through Parcel B at the boat ramp area (U.S. Exh. 2; Tr. 200-03). Elsie McConnell, a resident of the Livengood area, also testified as to the use by members of the public of the boat ramp area (Tr. 239-40, 258-59, 263-64). ^{5/} In any event, it was not necessary that the State's protest be corroborated in order for it to be legally sufficient under section 905(a)(5)(B) of ANILCA to trigger adjudication. See State of Alaska, 95 IBLA at 201.

The burden of proof shifted to appellant to establish her entitlement under the Native Allotment Act by a preponderance of the evidence. United States v. The Heirs of David F. Berry, 127 IBLA 196, 205 (1993). The salient issue is whether the evidence as a whole demonstrates that appellant used the land to the potential exclusion of others. We turn now to that issue.

[2, 3] The Act granted the Secretary of the Interior authority to allot up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Indian, Aleut, or Eskimo of full or mixed blood who resides in Alaska and is the head of a family or 21 years of age. 43 U.S.C. § 270-1 (1970). Under the Act and implementing regulations, entitlement to an allotment was dependent upon satisfactory proof of substantially continuous use and occupancy of the land for a 5! year period. 43 U.S.C. § 270-3 (1970). Departmental regulation 43 CFR 2561.05(a) defines the phrase "substantially continuous use and occupancy" as follows:

The term "substantially continuous use and occupancy" contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

To establish such use and occupancy, an applicant need not have barred the use of his land by others. Rather, his use must be shown to have been potentially exclusive of others, meaning that his use has (or should have) resulted in a public awareness and acknowledgement of his superior right to the land, even in circumstances where others used it. United States v. Heirs of Berry, 127 IBLA at 209; United States v. Estabrook, 94 IBLA at 53. Generally, when a use is merely intermittent, it will not be potentially

^{5/} As discussed above, it is of no moment that this evidence was presented by appellant, as we may examine the record as a whole in determining whether the protest was valid.

exclusive of others. Moreover, it is possible that even where a use is substantial, it may lack requisite potential exclusivity. ^{6/}

Appellant argues that Judge Sweitzer improperly evaluated the evidence in deciding that she did not show potentially exclusive use. He found that there was very little evidence of appellant's use of the land, and that it was indistinguishable from evidence of use demonstrated by the many fishermen, hunters, or others that had used the land:

The record * * * does not reflect by a preponderance of the evidence that contestee's claimed use of any of the eastern half of Parcel B was potentially exclusive, and it is indisputable here that area residents never recognized said land as her land. As a result, she has not met her burden of proof and her application cannot be approved. [Emphasis in original.]

(Decision at 13).

Appellant testified that she went to the parcel two times in the fall of 1965 and returned in the spring of 1966 (Tr. 405-06). The parcel contained "upper" and "lower" jeep trails running roughly parallel to the shore off of the highway. She described the land as muddy and weedy, with difficult access to vehicular traffic along the trails, which were filled or narrowed by brush (Tr. 406-07). She improved the lower trail by cutting down overhanging limbs and cleared a campsite (Tr. 409-11). She stated that no boat ramp or small camping area existed in late 1965 (Tr. 408, 414). Between 1965 and 1971 she was living in Fairbanks and would go to the allotment most weekends from early spring to late fall (Tr. 414). She would hunt, trap, fish, pick berries and "Judan tea," and go boating (Tr. 414-16). Her camping was limited to the 2.5 acres once covered by the R&PP order where she had built a rock lined fire pit, drying racks for meat and fish, two forked willow sticks, firewood, a cleaning screen for berries (consisting of a piece of aluminum screening), and two barrels (Tr. 410, 417, 418-19, 451-58). She sometimes put up a 3-person tent, depending on the weather, which was left up until the following weekend (Tr. 416-17, 452-53).

On the remaining 37.5 acres, appellant hunted grouse and rabbit as she walked the upper jeep trail and placed a rabbit snare on the trail (Tr. 415). In this area, she marked two trees near corner Nos. 1 and 2 with yellow surveyor's tape in 1967 and left the snare in a tree when not on the land (Tr. 415-16, 418, 427-32, 470-71).

^{6/} In *Angeline Galbraith (On Reconsideration)*, 105 IBLA 333, 338-39 (1988), we gave the example of a Native claiming daily use of a trail as necessarily giving rise to a finding of substantial use. However, if the record established that many Natives used the trail on the same basis as and in common with the applicant, the allotment would be rejected due to the applicant's failure to show that his use was, at least, potentially exclusive of others.

When she went to the area with the field examiner in 1975 she described the site as "improved tremendously" in that the lower jeep trail had been widened and graveled, a large area had been cleared by Alyeska for an intended waste disposal site, and a boat ramp had been constructed with gravel (Tr. 421-23). Since 1971, there were definitely more people going on the land, but she was "generous" and did not post any notices on her claim, allowing them to go across the land to fish in the lake (Tr. 423-25). She did, however, erect a log barrier on the lower trail to discourage the use of her allotment land after the field examination (Tr. 424-26). Finding the log had been removed she would replace it when she returned on ensuing weekends, but after several such incidents she no longer placed a barrier (Tr. 462-63).

Richard J. Sitton, a longtime friend of appellant and her husband, testified that he had stayed overnight on the parcel with them in either 1969 or 1970 (Tr. 354-55). On another occasion, he stopped at the parcel with appellant's husband to have lunch (Tr. 355). He was informed that appellant and her husband used the land as a "fishing area," but admitted that he saw no corner locations, such as tags or ribbons, indicating that anyone was claiming the land (Tr. 355, 358).

Elsie McConnell, who lives one mile east of Brown Lake, testified that she went to the lake hundreds of times between 1961 and 1990 (Tr. 234-35). Between 1961 and 1968, she would go every weekend for fishing, hunting, berry-picking, and recreational purposes (Tr. 235-37). She continued to go after 1968, when she and her husband opened a store (Tr. 236, 258). She often encountered other people from Livengood using the area for similar purposes (Tr. 239), including camping in the small camping area (Tr. 238-40, 258-59). Livengood has a year-round population of 25, increasing to 50 in the summer (Tr. 240). She stated that in the late 1960's there was a cleared area for camping near the boat ramp, and that people would clear their own areas nearby (Tr. 263-64). She observed only one barrel, used by locals for garbage (Tr. 267). She admitted that there was little or no vehicular access to the lake in the period between 1961 and 1971, and that the boat ramp did not exist (Tr. 254-55). She first became aware of appellant's allotment claim in 1986 (Tr. 241). With the aid of a map (U.S. Exh. 2), she identified trails used by people frequenting the allotment area (Tr. 252).

Elsie McConnell's husband David testified that he hunted bear and moose in the general vicinity of the lake between 1967 and 1970, traversing the trails shown crossing appellant's allotment (Tr. 283-84). He stated that he and his wife went to the area for recreation an average of once a week in the summertime, and although he saw local people there also using the land for recreational purposes, he never saw appellant or was aware of her claim (Tr. 285-86, 293-95).

Fred McMillan, who from 1961 through 1978 resided in Livengood during the winter and visited there at other times (staying with the McConnells) testified that he also traversed trails crossing appellant's allotment to reach nearby areas used for trapping, hunting, and fishing (including Brown

Lake) (Tr. 365-75). He never saw signs or restrictions posted (Tr. 375). He and his family put in a trail between 1962 and 1964 (Tr. 386). On U.S. Exhibit 2, he depicted that trail running from near the boat ramp area and following the eastern shore of Brown Lake. He used the trail "[o]ff and on * * * probably every year" beginning about 1964 to reach his hunting area (Tr. 386). From 1965 to 1971, he saw many people using the lake, but never saw appellant or was aware of her claim (Tr. 375-76, 388-89).

Although most of those using the land testified to seeing others on it, appellant stated that, even though she visited the area virtually every weekend, she saw only one man, other than her husband or accompanying friends, at Brown Lake between 1967 and 1971 (Tr. 417, 449). In view of the obvious inconsistency with other testimony, Judge Sweitzer evidently discounted her testimony, and we will not disturb that finding. United States v. Chartrand, 11 IBLA 194, 212, 80 I.D. 408, 417-18 (1973).

The evidence shows that the land was used by many individuals for a variety of recreational purposes even as of the time of the initiation of appellant's use and occupancy in 1965. In particular, it is clear that shortly after that time a small camping area was created and used by members of the local populace in conjunction with their recreational use of the lake and surrounding areas. Appellant does not refute that evidence. This is not surprising, as the land was very desirable as lake access, very close to a major highway, and crossed by trails.

Also, there is no evidence of any awareness or acknowledgement by individuals of appellant's Native claim to the land. Nor did she establish that the nature of her use would have put anyone on notice of her claim. Her visible use was confined to the small camping area, and thus would not have stood apart from others' use. Appellant's occasional placement of a rabbit snare, surveyor's tape on two trees, and a log barrier were not sufficient to create a public awareness of her particular interest, in view of the high level and frequency of public use. We hold that Judge Sweitzer correctly concluded that appellant did not demonstrate that her use was potentially exclusive of others.

Appellant argues that, although the record shows public use of the 2.5 acres embraced by the R&PP order, the remaining 37.5 acres in the eastern half of Parcel B were not subject to public use, and the applicant's own use of that area is "substantially unrefuted" (SOR at 33).

As Judge Sweitzer observed in his decision, the physical evidence of appellant's use was concentrated in the 2.5 acres once covered by the R&PP order, *i.e.*, the area adjacent to the lake and boat landing. On the other hand, public use was shown to extend to the 37.5-acre portion (Decision at 11). Judge Sweitzer cited the testimony of McMillan and David McConnell indicating that they traversed the entire parcel and never encountered any signs of appellant's use in this area (Decision at 12). The testimony of these witnesses amply supports that conclusion. As the Judge noted, it is not the degree of public use which must be proven, but that the applicant's use was such that third parties were, or should have been, put on notice

of her claim (Decision at 11). As appellant failed to make such proof, we hold that Judge Sweitzer properly rejected her application for the entire eastern half of Parcel B.

To the extent not discussed herein, appellant's remaining arguments have been considered and rejected.

Therefore, 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.

David L. Hughes
Administrative Judge

I concur.

R. W. Mullen
Administrative Judge

