ANDREW J. JOHNNIE, SR.

IBLA 99-304 Decided January 30, 2002

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA-7026.

Affirmed.

1. Alaska: Native Allotments

An applicant for a Native allotment which embraces lands previously withdrawn from application and entry must establish his occupancy of the land prior to withdrawal to support a preference right to the land. Such occupancy must be by the applicant in his own right and a decision rejecting an application will be affirmed when the application discloses the applicant was a child of three years using the land in the company of his family at the time of withdrawal.

2. Alaska: Native Allotments

A BLM decision rejecting a Native allotment application without a hearing will be affirmed when, taking the factual averments in the application as true, the application on its face is insufficient as a matter of law, and the Native has not tendered evidence of error in the original application.

APPEARANCES: Carol Yeatman, Esq., Alaska Legal Services Corporation, Anchorage, 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.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Andrew J. Johnnie, Sr., has appealed from an April 7, 1999, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting his Native allotment application (AA-7026).

On February 25, 1972, the Bureau of Indian Affairs (BIA) filed Native allotment application AA-7026 on behalf of Johnnie, pursuant to the Alaska Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1

through 270-3 (1970). 1/ In the application, which Johnnie signed on November 29, 1971, and filed with BIA on December 9, 1971, Johnnie sought approximately 160 acres of land situated in sec. 3, T. 36 S., R. 53 E., Copper River Meridian, Alaska. He indicated that he began his occupancy of the land in the summer of 1924 and had used the land seasonally from that time. Johnnie explained that he based his claim on his use of the land since shortly after his birth on March 7, 1921, when he began accompanying his parents on their trips to the land, and on the use and occupancy of the land by his adult ancestors prior to its withdrawal in 1924 for Glacier Bay National Monument. Periods of use referenced included that of his maternal grandfather (1850-1926), his mother (1926-1942), and himself (1942-present). He stated that he and his ancestors had used the land seasonally each year to gather soap berries and catch seal, that he still periodically caught seal there, and that he had picked soap berries regularly each September season through 1964 and occasionally since then. He added that he had continued to visit the land once or twice each season to camp on the beach or to stretch his legs and renew contact with the land.

By letter dated November 10, 1975, BLM advised Johnnie that the Native Allotment Act did not allow an applicant to tack on his ancestors' use and occupancy as the basis for his claim, and that he personally must have occupied the land as an independent citizen for himself or as head of a family, not as a minor child in the company of his parents or grandparents, before the land was withdrawn. Further, BLM pointed out that the land applied for had been continually withdrawn and closed to settlement under the Native Allotment Act since April 1, 1924, and had been included in Glacier Bay National Monument on April 18, 1939. Because Johnnie was born on March 7, 1921, and claimed use of the land beginning in 1924, BLM concluded that his occupancy of the land prior to the withdrawal could only have been as a minor child in the company of his parents. Hence, BLM determined that his application would have to be rejected because it did not meet the requirements of the Native Allotment Act. The letter also indicated that BLM would withhold further action on the application for 60 days to allow Johnnie an opportunity to submit additional information supporting his claim, absent which BLM would take adverse action on the application. No response to this letter appears in the case file.

On April 11, 1995, BLM issued a decision addressing Johnnie's Native allotment application. Although the application had been closed and removed from the land records on November 16, 1984, based on a notation in the record that the claim had been rejected on October 19, 1972, the official case file did not contain a copy of any rejection decision. Since there was no record of a rejection decision or of Johnnie receiving such a decision, BLM reinstated the application.

1/ Repealed effective Dec. 18, 1971, subject to pending Native allotment applications, by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1994).

By decision dated April 7, 1999, BLM rejected Johnnie's Native allotment application. Therein, BLM found that the application had not been legislatively approved pursuant to section 905(a)(4) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(4) (1994), because the land sought was located within Glacier Bay National Monument, and that, hence, the allotment application had to be adjudicated pursuant to the requirements of the Native Allotment Act. Further, BLM found that, based on its records, Johnnie had been born on March 7, 1921, and would have only been three years old when the land was first withdrawn on April 1, 1924. Citing Board precedent, BLM held that a child of three years of age was incapable of exerting the required independent use and occupancy of the land to the exclusion of others. Accordingly, BLM rejected Johnnie's application.

On appeal, counsel for Johnnie first argues that BLM erred in rejecting Johnnie's application because the law in effect when he initiated his claim did not require independent use and occupancy. Counsel contends that prior to the 1956 amendments, the original 1906 Native Allotment Act did not require that an applicant use or occupy the land to qualify for an allotment, but just show he that he was an eligible Alaska Native and that the land was non-mineral. Because he initiated his claim while the unamended Act was in effect, counsel asserts that the requirement of substantially continuous use and occupancy added in 1956 cannot constitutionally be applied retroactively to thwart Johnnie's claim.

Alternatively, counsel insists that BLM improperly rejected Johnnie's application without first providing him an opportunity for a hearing on the disputed factual issue of whether he independently used the land claimed in a qualifying manner before the land was withdrawn. While acknowledging that BLM records indicate that Johnnie was born in 1921, counsel speculates that, given the fact that Johnnie was born at home, this date might not be correct. Because the Board has held that children over five years old may establish independent use and occupancy, counsel submits that if Johnnie had actually been born three years earlier, he would have been over five years old at the time of the withdrawal. Counsel therefore maintains that Johnnie must be afforded the due process hearing outlined in Pence v. Kleppe, 529 F.2d 135, 141-42 (9th Cir. 1976), on the issues of his age and independent use at the time of the withdrawal.

In response, BLM argues that it applied the correct standard in adjudicating Johnnie's application. According to BLM, a claim to public land ripens when a person files an application and performs all the conditions necessary to qualify for the particular allotment, and the statutes and regulations existing when the claim ripens govern adjudication of the claim. Since Johnnie's claim ripened when he filed his application in 1971, BLM asserts that it properly applied the law and regulations in effect at that time. Further, BLM contends that the current use and occupancy requirements are embodied in duly promulgated regulations which are binding on the Department, including the Board, and that the Board is not the proper forum to decide whether utilization of the use and occupancy requirements violate the Constitution. Additionally, BLM submits that Johnnie's constitutional arguments rely on his erroneous assumption of when

a right to Federal land accrues, reiterating that a person does not have a right to public land until he has fulfilled all steps necessary to making a claim to the land, including, in this case, the filing of an application.

In addition, BLM denies that Johnnie is entitled to a hearing to controvert the facts presented in his application. In support, BLM points out that the application states that Johnnie was born on March 7, 1921, that the case file contains no information evincing a different birth date, and that only unsupported speculation by Johnnie's counsel questions the accuracy of that date. In this context, BLM maintains that it properly accepted the factual averments in Johnnie's application as true and contends that more than an applicant's subsequent contradictory personal statement is needed to invalidate those averments. In any event, BLM notes that Johnnie has not attempted to change the factual statement as to the date of his birth, and that it therefore was entitled to rely on the stated birth date in adjudicating the application.

[1] The Alaska Native Allotment Act of 1906, 34 Stat. 197, originally authorized the Secretary of the Interior,

> in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of nonmineral land in the district of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a native of such district, and who is the head of a family, or is twenty-one years of age * * *. Any person qualified for an allotment as aforesaid shall have the preference right to secure the nonmineral land occupied by him not exceeding one hundred and sixty acres.

Although an allotment applicant could claim almost any tract of nonmineral land not withdrawn, segregated, or subject to adverse claim, the land embraced in appellant’s application had been withdrawn in 1924. In these circumstances, the Act required a Native allotment applicant to establish occupancy in order to qualify for a preference right to the land occupied which would survive the withdrawal. United States v. Skaflestad, 155 IBLA 141, 150 (2001); United States v. Bennett, 144 IBLA 371, 376 (1998); United States v. Flynn and Orock, 53 IBLA 208, 225-26, 88 I.D. 373, 383 (1981).

The required occupancy must involve personal use of the land by the applicant and tacking of ancestral use is not allowed. An allotment right is personal to one who has fully complied with the law and the regulations. An applicant for a Native allotment may not tack on use and occupancy of the land by his ancestors to establish his right. Peter Panruk, 43 IBLA 69, 72 (1979); Floyd L. Anderson, Sr., 41 IBLA 280, 86 I.D. 345 (1979); see Betty J. (Thompson) Bonin, 151 IBLA 16, 31 (1999).

Appellant’s argument that his application should be governed by terms of the Act prior to its amendment to require five years of substantially

continuous use and occupancy is to no avail. 2/ The Board has rejected the argument that in adjudicating an allotment application in which use and occupancy predated the regulatory and statutory amendments requiring five years of substantially continuous use and occupancy, a different evidentiary standard should be used. United States v. Heirs of Jake Yaquam, 139 IBLA 376, 382-83 (1997); see United States v. Bennett, 144 IBLA at 382 n.7. Whatever inchoate preference right Johnnie may have obtained through his use and occupancy of the land in the company of his parents beginning in 1924 did not vest until he filed his application for an allotment in 1971. See United States v. Flynn and Orock, 53 IBLA at 234, 88 I.D. at 387. Therefore, we find no error in BLM's adjudication of the application pursuant to the law in existence when the application was filed and his rights vested. Consequently, we must reject appellant's constitutional challenge to application of the statute and regulations.

In any event, appellant in this case has not been prejudiced. Failure to establish occupancy as an independent person in his own right prior to withdrawal would bar him from claiming a preference right under the original statute. See GLO Circular No. 749, Instructions Relating to Allotments to Indian and Eskimos in Alaska - Act of May 17, 1906, dated April 16, 1921, 48 L.D. 70, 72 (1921), republished at 50 L.D. 48, 50 (1923). As noted above, occupancy was required to establish a preference right surviving the withdrawal. United States v. Skaflestad, 155 IBLA at 150; United States v. Bennett, 144 IBLA at 376; United States v. Flynn and Orock, 53 IBLA at 225-26, 88 I.D. at 383.

[2] We also find unpersuasive Johnnie's alternative argument that BLM erred in rejecting his application without providing him with a hearing under Pence v. Kleppe, supra. The Board has noted an exception to the Pence rule that a Native has a due process right to notice and an opportunity for a hearing prior to rejection of a Native allotment application on the ground that insufficient evidence exists in the record to establish the applicant's five years of qualifying use and occupancy. The exception is that the Pence notice and hearing requirements are not applicable where, taking the factual averments in the application as true, the application on its face is insufficient as a matter of law. See Beatrice Halkett, 150 IBLA 98, 101 (1999), and cases cited.

In this case, Johnnie's application states that he was born on March 7, 1921. Thus, he was only three years old at the time the land was withdrawn on April 1, 1924. The Board has long held that a child of five years of age is too young to engage in substantial use and occupancy. United States v. Bennett, 92 IBLA 174, 176 (1986); Floyd L. Anderson, Sr., 41 IBLA at 283, 86 I.D. at 347.

2/ As appellant points out, it was not until 1935 that the Department required the completion of five years use and occupancy as a precondition for obtaining any allotment of land, see 55 I.D. 282, 285 (1935), and it was not until 1956 that the Native Allotment Act was amended to reflect the requirement that issuance of any allotment was dependent upon a showing of

Counsel for appellant attempts to circumvent this rule by speculating that Johnnie might have actually been born in a different year, but presents nothing to substantiate that speculation, not even a statement from Johnnie contradicting the averment in his application. Such conjecture falls far short of establishing error in the original application. See, e.g., Franklin Silas, 117 IBLA 358, 364 (1991), clarified on judicial remand, Franklin Silas, 129 IBLA 15, 16 (1994), aff'd, Silas v. Babbitt, 96 F.3d 355 (9th Cir. 1996); Andrew Petla, 43 IBLA 186, 192 (1979). We therefore find no error in BLM's failure to afford Johnnie a hearing before rejecting his application. 3/

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.

C. Randall Grant, Jr.
Administrative Judge

I concur:

T. Britt Price
Administrative Judge

fn. 2 (continued)
"substantially continuous use and occupancy of the land for a period of five years." Act of Aug. 2, 1956, § 3, 70 Stat. 954, 43 U.S.C. § 270-3 (1970).

3/ Additional factual averments found in Johnnie's application also demonstrate that he is not entitled to an allotment. For example, he states that he began his occupancy of the land in the summer of 1924 which is after the Apr. 1, 1924, withdrawal of the land, and acknowledges that he first occupied and used the land in the company of parents, rather than independently. See Andrew Petla, supra.