

BUREAU OF LAND MANAGEMENT

v.

HEIRS OF JAMES RUDOLPH, SR.

IBLA 2001-111

Decided October 27, 2004

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer, rejecting Native allotment application, A-01745.

Affirmed.

1. Alaska: Native Allotments

A Native allotment applicant seeking to establish a preference right to an allotment of land withdrawn for a national forest prior to the time the allotment application was filed must establish prior use and occupancy of the land. Such qualifying occupancy and use requires “substantially continuous” use and occupancy.

APPEARANCES: Carol Yeatman, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for appellant Loretta Pittman, an heir of James Rudolph, Sr.; Lisa Del Compare, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Loretta Pittman, an heir of James Rudolph, Sr., appeals on behalf of his heirs from a decision issued by Administrative Law Judge Harvey C. Sweitzer, dated December 5, 2000, rejecting Rudolph’s Native allotment application, A-01745. The application was rejected on the ground that evidence of Rudolph’s use and occupancy was insufficient to establish substantially continuous use and occupancy necessary to establish a preference right surviving the withdrawal of the land. This decision was rendered after an evidentiary hearing conducted pursuant to a contest initiated

against the application by the Alaska State Office, Bureau of Land Management (BLM).

Rudolph, a Tlingit and therefore an Alaska Native, filed an application in January 1915 with the General Land Office (GLO), predecessor to BLM within the U.S. Department of the Interior, for a Native allotment consisting of 160 acres on the east side of Auke (now Admiralty) Cove, Young Bay, situated on Admiralty Island (near Point Young on the Stephens Passage, about 10 miles southwest of Juneau), pursuant to the Alaska Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970).<sup>1/</sup> His application (Ex. B)<sup>2/</sup> consisted of the application form, including two sworn affidavits executed by the applicant, and two corroborative affidavits. The corroborative affidavits were made by Jake Williams and William Jackson who also filed Native allotment applications concurrently (A-01746 and A-01747, respectively). The Williams allotment application was also located on the shore of Admiralty Cove, a short distance from Rudolph's allotment. (Ex. K (land report) at 4-5 (map and site plot).)

In one of Rudolph's affidavits (a form with fill-in-the-blank statements), he claimed occupancy of the land applied for "since boyhood." In the other affidavit, he declared:

That before he was born, his parents had a house on the land and after their death it became his property and that said house was removed a few years ago but it is his intention to return to the land this summer and build a new house.

That before leaving the land he raised a small garden and also used the house for smoking fish. That for the last two years he has been employed by the canneries in different parts of southeastern Alaska and has not been on the land very much.

(Ex. B at unnumbered p. 3 (Jan. 25, 1915, Affidavit as witnessed by F.A. Boyle).)

The claimed lands in secs. 35 and 36, T. 42 S., R. 66 E., Copper River Meridian, were previously withdrawn from entry in February 1909 by Presidential

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<sup>1/</sup> The Native Allotment Act was repealed by sec. 18(a) of the Alaska Native Claims Settlement Act of 1972, 43 U.S.C. § 1617(a) (2000), but with a savings clause for applications pending on Dec. 18, 1971.

<sup>2/</sup> Exhibits introduced at the hearing by contestee were identified by letters (A through Z) while exhibits introduced by contestant were identified by numbers (1 through 3).

Proclamation No. 846, 35 Stat. 2226, to be included within the Tongass National Forest. Subsequent to the allotment application, a field examination was conducted by the U.S. Forest Service (FS) in 1916, which disclosed:

[A]lthough there are in the vicinity of Applications Nos. 01746 (Jake Williams) and 01745 (James Rudolph) some old cabins and evidences of old gardens, it is evident from the conditions on the ground that there has been neither residence nor cultivation upon the tracts for many years. \* \* \* [T]he Supervisor was able to determine definitely both that the lands are not now occupied by the applicants and that there are on the tracts no evidence of continuous occupation since a time considerably prior to the Forest withdrawal. In view of the facts, this office is of the opinion that allotments under the Act of May 17, 1906, should not be approved.

(Ex. D, Jan. 22, 1916, Letter from Acting Forester, FS, to GLO, at 1-2.)

In view of the FS report, a letter was sent by the Assistant Commissioner, GLO, on March 6 to the “Register and Receiver, Juneau, Alaska,” with instruction to “notify the parties in question that if it is not shown within thirty days from receipt of notice why the said allotment applications 01745, 01746, and 01747 should not be rejected, such action will be taken.” (Ex. G at 3.) The Register and Receiver in Juneau confirmed that notice was received by Rudolph on December 15, 1916. (Ex. 3, Aug. 2, 1917, Letter to Commissioner from Register, Juneau Land Office, at 1.) His letter also indicated that the applicant had been in contact with the Superintendent of the Bureau of Education, the Governor, and the Register to discuss his claim, but that no action to make a further showing was taken by Rudolph in response to the notice. *Id.* at 1-2. The application at issue was rejected on August 28, 1917, noting the conclusion of the FS that “no continuous occupation had been had by the Indian applicant[] of any of the lands applied for prior to the forest withdrawal.” (Ex. H, Aug. 28, 1917, Decision of the Commissioner at 1.) Rudolph died on February 8, 1933, without further pursuing this allotment.

In a decision dated July 26, 1994 (Ex. I), BLM reinstated Rudolph’s application because the application had been rejected for “lack of adequate evidence to support use and occupancy” and because no hearing had been provided prior to rejection in accordance with the due process rights of the applicant. *See Pence v. Kleppe*, 529 F.2d 135, 143 (9th Cir. 1976). BLM conducted a field examination in 1997, finding no evidence of improvements or other evidence of use of the claimed lands.<sup>3/</sup>

<sup>3/</sup> The BLM Realty Specialist was accompanied on the examination by Cheri Renner,  
(continued...)

On August 18, 1997, BLM sent a letter to Rudolph's heirs (through the Central Council) informing them that the evidence in the case file was insufficient to support Rudolph's asserted use and occupancy of the land prior to withdrawal for the Tongass National Forest and asking them to submit additional information within 60 days.<sup>4/</sup> No further information was provided and a contest was initiated by BLM to provide an opportunity for a hearing. See Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

A hearing was conducted by Judge Sweitzer in Juneau, Alaska, on August 16 and 17, 2000. One witness appeared for BLM and four witnesses testified on behalf of the applicant. After the hearing, Judge Sweitzer concluded that BLM had presented evidence sufficient to constitute a prima facie case that Rudolph failed to satisfy the use and occupancy requirements for an allotment. (Decision at 12.) In making this finding, Judge Sweitzer held that the applicant's affidavit regarding his use and occupancy of the land prior to the withdrawal did not establish that it "was of sufficient frequency, duration, or extent to constitute substantially continuous use and occupancy." Id.; see 43 CFR 2561.0-5(a). Further, he found that the field examination conducted shortly after the application was filed did not substantiate the applicant's use and occupancy, revealing that there had neither been residence, cultivation, nor evidence of any continuous use and occupancy since a time considerably prior to the Forest withdrawal. (Decision at 12.) Judge Sweitzer further held that the testimony of contestee's witnesses at the hearing "failed to adequately cure the deficiencies in the evidence of record so as to establish that \* \* \* use and occupancy was of sufficient frequency, duration, and extent to qualify as substantially continuous use and occupancy." Id. at 13.

The record supports the finding of Judge Sweitzer regarding the sufficiency of the evidence of the applicant's use and occupancy. Although the applicant claimed occupancy since boyhood in his fill-in-the-blank affidavit on the application form, his more detailed affidavit sworn to on January 25, 1915, indicated that his parents had a house on the property which he inherited at their death and that the house had been "removed a few years ago but it was his intention to return to the land this summer and build a new house." (Ex. B at unnumbered p. 3.) Applicant also stated in his affidavit "[t]hat before leaving the land he raised a small garden and also used the

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<sup>3/</sup> (...continued)

a representative of the Central Council of the Tlingit and Haida Indian Tribes of Alaska (Central Council).

<sup>4/</sup> Since the land was withdrawn in 1909 and has remained withdrawn since that time, it could not be considered "unreserved on December 13, 1968." Consequently, the Rudolph application was not subject to legislative approval pursuant to section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(1) (2000). Erling Skaflestad, 155 IBLA 141, 142-43 n.2 (2001)

house for smoking fish.” *Id.* The 1916 report of the FS field examination disclosed some “old cabins and evidence of old gardens,” but found that “conditions on the ground” indicated that neither residence nor cultivation of the land had occurred for many years. (Ex. D at 1.) Thus, the FS field examination found “no evidence of any continuous occupation since a time considerably prior to the Forest withdrawal.” *Id.* at 2. When considered together, this evidence does not support a finding of substantially continuous occupancy since prior to the withdrawal. Consequently, the record supports Judge Sweitzer’s finding that BLM established a prima facie case of the invalidity of the allotment application.

At the hearing, contestee’s witness Margaret Stevens, who was 3 years old when the applicant died in 1933 and whose aunt was James Rudolph’s wife, testified that she came from Klukwan where her family lived, to Juneau to visit the Rudolphs and, on occasion, she learned that they were “off [to the allotment] to do their fish.” (Tr. 93.) Clearly these occasions occurred long after the forest withdrawal. She never went to James Rudolph’s land. (Tr. 104.) Loretta Pittman, granddaughter of the applicant, was born in 1952 (Tr. 167), years after Rudolph’s death. She testified that the applicant’s widow lived with her family from 1957 to 1964. (Tr. 167-69.) Loretta has never been to the allotment tract. (Tr. 174.) Harry Samatto, applicant’s grandson who was born in 1954 (Tr. 223) after the applicant’s death, testified that the tract at Admiralty Cove is a perfect site for a fishing camp. (Tr. 233.) Although he had conversations with his grandmother as a young boy, he testified as to general aspects of subsistence living in the area and did not provide information about applicant’s use of his allotment tract. Accordingly, we must affirm Judge Sweitzer’s finding that the contestee did not overcome the contestant’s prima facie case.

In his decision, Judge Sweitzer found contestee’s argument that the applicant was entitled to an allotment without evidence of substantial use and occupancy under the Native Allotment Act as enacted in 1906 (prior to amendment) to be immaterial in the circumstances of this case, in which the land was withdrawn prior to the time the allotment application was filed. *Id.* at 7. After reviewing the applicable standards relating to use and occupancy, he rejected the “argument that the occupancy requirement to gain a preference right under the original Act greatly differs from the substantially continuous use and occupancy requirement. There is no substantial or significant difference between the two and therefore application of the latter does not implicate concerns regarding improper retroactive application of a rule.” *Id.* at 9. Applying the substantially continuous use and occupancy benchmark to the evidence, Judge Sweitzer found that contestee’s evidence failed to establish substantially continuous use and occupancy prior to withdrawal of the land. Hence, he rejected the application. He also rejected Pittman’s argument that the application should be approved under the doctrine of equitable adjudication.

On appeal, Pittman argues that Judge Sweitzer erred by concluding that a showing of substantially continuous use and occupation is required to support a Native allotment application filed in 1915 before that regulatory requirement was promulgated, asserting that the case precedents cited by Judge Sweitzer are irrelevant. (Statement of Reasons (SOR) at 5-10.) Appellant also contends that application of the substantially continuous use and occupancy requirement to this allotment violates the due process rights of the applicant in that the rule had not been promulgated at the time. *Id.* at 10-11. Further, Pittman asks that the application be approved pursuant to the doctrine of equitable adjudication, asserting that Judge Sweitzer erred by concluding that it was not appropriate in this case. *Id.* at 17-18. In its answer, BLM argues that Judge Sweitzer's decision is consistent with the Board's approach in United States v. Heirs of Thomas Bennett, 144 IBLA 371, 382 (1998), involving a similar factual context.<sup>5/</sup>

[1] Under the terms of the Alaska Native Allotment Act of 1906, Congress provided:

That the Secretary of the Interior is hereby authorized and empowered, 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; and the land so allotted shall be deemed the homestead of the allottee, and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred and sixty acres.

34 Stat. 197. We have previously held that although an allotment applicant could claim almost any tract of nonmineral land not withdrawn, segregated, or subject to an adverse claim, the Native Allotment Act required an applicant to establish occupancy in order to qualify for a preference right to the land occupied which would survive a withdrawal of the land. United States v. Andrew Johnnie, Sr., 156 IBLA 206, 209 (2002); United States v. Skaflestad, 155 IBLA at 150; United States v. Bennett, 144 IBLA at 376; United States v. Flynn and Orock, 53 IBLA 208, 225-26, 88 I.D. 373,

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<sup>5/</sup> The application in Bennett was filed in 1909 for lands withdrawn for the Tongass National Forest earlier that year. Applying the definition of "substantially continuous use and occupancy" as found in 43 CFR 2561.0-5(a) to the facts of that case, the Board found that the contestee had not shown use "potentially exclusive of others." 144 IBLA at 382.

383 (1981). This requirement, expressly stated in the statute itself, was also found in the first guidelines established for adjudicating allotment applications. Thus, under the instructions initially published by the Department for processing Native allotment applications, the GLO provided that “if claiming under the preference right clause the date of the beginning of [the applicant’s] occupancy must be given, and its continuous nature stated.” GLO Circular (Feb. 11, 1907), 35 L.D. 437; see United States v. Flynn and Orock, 53 IBLA at 233, 88 I.D. at 387; 43 L.D. 88 (1914); GLO Circular, 37 L.D. 615, 616 (1909).

In an early appeal involving adjudication of an allotment application filed for lands withdrawn for the Tongass National Forest, the Department held that actual occupancy and continuous use of a tract of land by an Alaskan Native prior to its inclusion within a national forest confers upon the occupant a preference right to an allotment that is not affected by the withdrawal, even though the application was filed after the withdrawal. Yakutat and Southern Railway v. Harry, 48 L.D. 362 (1921). Since occupancy and continuous use predated the withdrawal in that case, the allotment application was upheld. Id. at 364.<sup>6/</sup>

As noted by appellant, 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,<sup>7/</sup> 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 “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). Appellant argues that the governing laws and rules in effect when Rudolph’s application was filed in 1915 did not require a showing of use and occupancy that was “substantially continuous,” as held by Judge Sweitzer. Appellant contends that use and occupancy only need be “reasonable,” focusing on the Department’s decision in Frank St. Clair, 52 L.D. 597 (1929), as modified, Frank St. Clair (On Petition), 53 I.D. 194 (1930). These precedents were also argued before Judge Sweitzer, who analyzed the arguments in his decision, at 9-10, concluding that while “absolute continuity is not required, the [St. Clair] decision is not inconsistent with imposition of a requirement of substantial continuity.”

As Judge Sweitzer held, the basis for applying the substantially continuous use and occupancy standard to allotment applications filed after a withdrawal or the filing

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<sup>6/</sup> “The land applied for was occupied by the Indian prior to the forest proclamation, and owing to his continuous use, it appears that he is entitled to a preference right as granted by the statute.” 48 L.D. at 364 (emphasis added).

<sup>7/</sup> Allotments of Public Lands in Alaska to Indians and Eskimos, 55 I.D. 282, 285 (1935). This requirement was codified in the regulations in 1938 at 43 CFR 67.13.

of a conflicting application, when preexisting occupancy is required to establish a preference right, is set forth in Flynn and Orock:

To the extent that prior use and occupancy by Natives, and other settlers at least until 1950, afforded specific protections absent any application to acquire title, it was essential that acts of appropriation occur which would disclose to an observer on the ground that the land was under active development or use. Such occupancy or use would serve as notice to all subsequent persons that the land was under appropriation and thus not available for the initiation of other claims. Thus, requiring that the occupancy or use be of a continuous nature was essential to the entire structure of Alaskan settlement claims, for the only notice to the world of prior occupation or use would be present occupation or use.

53 IBLA at 236-37, 88 I.D. at 389 (citation and footnote omitted).

In reviewing the St. Clair case, we find that it involved a Native allotment application filed in 1915 for lands withdrawn for the Tongass National Forest in 1909. The decision was predicated on a finding that the applicant's occupancy was initiated prior to the withdrawal for the national forest and, hence, that he had established a preference right to an allotment not affected by the withdrawal, 52 L.D. at 598, citing the Yakutat case. In this context, the First Assistant Secretary distinguished use and occupancy under the Native Allotment Act from the requirements of other statutes involving homesteads. Although there was evidence the applicant had not resided on the tract in recent years, the record disclosed the existence of improvements on the tract suitable to support a base for fishing operations, including two frame houses or shacks containing bunks and a stove, as well as fish drying racks, and this use and occupancy<sup>8/</sup> was held to qualify. 52 L.D. at 598, 600-01.<sup>9/</sup> The Department found no requirement that the Native "show continuous use or occupancy or that he has maintained residence on the land to the exclusion of a home elsewhere." Id. at 600. Thus, St. Clair stands for the requirement of substantial and continuous use and occupancy of the land to establish a preference right, although full time residence is not required. In this context, we find this precedent consistent with application of the "substantial use and occupancy" standard to ascertain a preference right. See Flynn

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<sup>8/</sup> The decision noted that the evidence of use and occupancy disclosed in the field examinations showed that use of the land had not been abandoned by the Native applicant. 52 L.D. at 598.

<sup>9/</sup> In St. Clair (On Petition) the Department limited the allotment to the acreage utilized in the fishing operations conducted on the land. 53 I.D. at 195.

and Orock, 88 I.D. at 384, 389 (Citing St. Clair for the principle that occupancy must only be “substantially continuous.”). Departmental regulations provide:

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.

43 CFR 2561.0-5(a). We find this standard to be consistent with the occupancy required to establish a preference right as set forth in the initial Departmental guidelines and in cases such as Yakutat and St. Clair. Accordingly, we must reject appellant’s assertion that the Department’s rules in 1915 with respect to preference rights under the Allotment Act did not require substantially continuous use and occupancy to establish a preference right.

Appellant also asserts that Judge Sweitzer erred in concluding that the doctrine of equitable adjudication is inapplicable to the instant case. This doctrine allows the Department, in adjudicating an entry, to excuse the failure to fully comply under certain circumstances where substantial compliance with the law has occurred, but there is a technical or procedural deficiency through mistake or inadvertence which may be satisfactorily explained, provided there is “no lawful adverse claim.” 43 CFR 1871.1-1(a). Judge Sweitzer declined to apply this doctrine to Rudolph’s application because he found Rudolph had not shown the required use and occupancy and therefore he had not substantially complied with the law. (Decision at 14.) Appellant suggests that, because Rudolph submitted the proper forms in 1915 and his application identified use and occupancy of the lands at issue, he substantially complied with all that was required at that time. This contention must be rejected and Judge Sweitzer’s decision affirmed in view of our analysis set forth above. We also find that the doctrine is properly applied only where there are no lawful adverse claims. See 43 CFR 1871.1-1. In this instance, the Tongass National Forest would constitute such an adverse claim and therefore the doctrine may not be employed in these circumstances.

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.

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C. Randall Grant, Jr.  
Administrative Judge

I concur:

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David L. Hughes  
Administrative Judge