

ANDREW EVAN, ET AL.

IBLA 2002-419, et al.

Decided November 18, 2004

Appeals from decisions of the Alaska State Office, Bureau of Land Management, rejecting various Alaska Native Veteran Allotment applications. AA-83585, et al.

Affirmed.

1. Alaska: Alaska Native Veteran Allotment: Generally

The Alaska Native Veterans Allotment Act, as amended, 43 U.S.C. § 1629g (2000), allows certain Alaska Natives who were on active military duty during a specific period of time to apply for an allotment of not more than two parcels of Federal land totaling 160 acres or less under the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), as that Act was in effect before December 18, 1971. However, the lands applied for must be currently owned by the Federal government. If they are not at the time the application is filed, the application is properly rejected.

APPEARANCES: Andrew Evan, Red Devil, Alaska, William G. Albecker, Ugashik, Alaska, Elmer J. Nicholson, Jr., Anchorage, Alaska, Henry J. Roehl, Palmer, Alaska, Davis A. R. Nashalook, Anchorage, Alaska, Norman L. Smith, Jr., Haines, Alaska, Nicholai E. Lekanoff, Unalaska, Alaska, John C. Breseman, Pelican, Alaska, Fredrick J. Anderson, Naknek, Alaska, all pro se; Dennis J. Hopewell, Esq., Deputy Regional Solicitor, Office of the Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Between January 7, and February 6, 2002, Andrew Evan and eight others filed Alaska Native Veteran Allotment applications with the Alaska State Office, Bureau of Land Management (BLM), pursuant to the Alaska Native Veterans Allotment Act

(ANVAA), as amended, 43 U.S.C. § 1629g (2000).^{1/} Between July 2, 2002, and January 29, 2004, BLM issued decisions rejecting each of the applications at issue because of a “legal defect,” specifically, the fact that the lands claimed by the applicant were not “currently owned” by the United States, as required by 43 CFR 2568.90, at the time the applicant filed his allotment application and thereafter.

ANVAA allows certain Alaska Natives who were on active military duty during a specific period of time to apply for an allotment of not more than two parcels of Federal land, totaling 160 acres or less, under the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), as that Act was in effect before December 18, 1971.^{2/} 43 U.S.C. § 1629g(a)(1) and (b)(1) (2000). ANVAA applications were required to be filed within the 18-month period following promulgation by the Department of implementing regulations, which occurred on July 31, 2000. 43 U.S.C. § 1629g(a)(1) (2000); see 65 FR 40953, 40954 (June 30, 2000). All original and amended applications in this case were timely filed.

Appellants do not dispute BLM’s determination that claimed lands were not owned by the Federal government at the time they filed their allotment applications, because they had been conveyed to the State of Alaska or a Native corporation by patent, interim conveyance (IC), or tentative approval (TA).^{3/} Rather, for the most

^{1/} Appendix A, attached to this Order, lists the names of applicants, the serial number of their applications, the application filing dates, the years set forth in the application that use and occupancy was initiated, the dates of patent or other conveyance of the claimed lands, and the dates of the BLM decisions at issue here. Because all nine appeals, for the most part, arise from similar facts and raise the same dispositive legal issue, we hereby consolidate them for final disposition by the Board.

^{2/} The 1906 Act provided for the allotment of up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska that had been subject to substantially continuous use and occupancy by an Alaska Native applicant for a period of five years. It was 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) (2000).

^{3/} The surface and subsurface estates of some lands had been patented to Native village and regional corporations, respectively, pursuant to sections 14(a) and (f) of ANCSA, 43 U.S.C. §§ 1613(a) and (f) (2000). In one case (Lekanoff’s Parcel B), only the surface estate had been patented. The surface and subsurface estates of other lands had been the subject of ICs to Native village and regional corporations, pursuant to section 22(j) of ANCSA, as amended, 43 U.S.C. § 1621(j) (2000). Such ICs have the effect of patents. Wassilie Roberts, 153 IBLA 1, 4 (2000). Other lands were patented to the State of Alaska, pursuant to the Act of July 7, 1958, Pub. L.

(continued...)

part, appellants raise other concerns.^{4/} Albecker argues that he made a good faith effort to identify available lands, relying on the “maps provided by the BLM.” Smith also argues that he made a good faith effort to identify available lands, and indicates that, if the lands were not available, the “onus” was on BLM to identify other available lands. In addition, Anderson argues that he would not knowingly have applied for lands that had previously been conveyed to Native corporations. He attributes the “error” to the lack of assistance from Bristol Bay Native Association, his “service provider.” He states that “[o]ut of frustration with my service provider and with the final deadline approaching I made the best selection I could with the information I had been provided.” Roehl and Lekanoff argue that BLM was not justified in rejecting their applications because the subject lands were still in Federal ownership at the time they initiated use and occupancy and qualifying use and occupancy was completed under the 1906 Act prior to its December 18, 1971, repeal.

[1] ANVAA authorizes the Secretary of the Interior to allot Federal land claimed by an Alaska Native veteran allotment applicant under the Act of May 17, 1906, as such Act was in effect before December 18, 1971, where the applicant establishes his eligibility under the 1906 Act, and otherwise satisfies the requirements of ANVAA. 43 U.S.C. § 1629g(a)(1) (2000). Thus, under ANVAA, the Secretary may only allot Federal lands to a qualified veteran. The implementing regulations at 43 CFR 2568.90(a)(1) provide that an applicant may only receive title to land that “[i]s currently owned by the Federal government * * *.”^{5/} In addition,

^{3/} (...continued)

No. 85-508, 72 Stat. 339, as amended. Finally, in one case there had been a TA of a State selection application, filed pursuant to the Act of July 7, 1958, as amended. A TA has the same effect as a patent; all right, title, and interest of the United States vests in the State of Alaska. See 43 U.S.C. § 1635(c)(4) (2000); Jennie A. Wasey, 92 IBLA 228, 229-30 (1986); Elizabeth G. Cook, 90 IBLA 152, 156 (1985). Appendix B, attached to this Order, specifies the lands claimed by appellants and the relevant patents, ICs, and TA.

^{4/} Nashalook asserts that he has a verbal agreement with the Unalakleet Native Corporation (UNC), the corporation that acquired the surface estate of the land sought by him, to “trade this land with Federally owned land so that I could receive title to the land I applied for.” That agreement is not part of the record in this case, but it does not alter the fact that the land sought is no longer Federally-owned and, thus, not available for allotment.

^{5/} BLM explained, in the preamble to its proposed rulemaking:

“The Alaska Native Veterans law allows eligible veterans only to receive allotments of land that are currently owned by the Federal government. BLM has no authority to convey land to you that is not now owned by the Federal government, even if it was Federal land when you first began to use and occupy it. If you apply for this type of land BLM must reject your application.” [Emphasis added.] 65 FR 6259, 6262 (Feb. 8, 2000).

43 CFR 2568.50 states that in order to qualify for an allotment, the applicant must: “(b) Establish that * * * the land is still owned by the Federal government * * *.”

In each case before us (with one exception, see n.7, infra), all the lands claimed had been conveyed out of Federal ownership prior to the filing of the allotment application. Thus, none of the lands sought is currently owned by the United States, and the applications were properly rejected. The fact that one or more of the applicants may have used and occupied claimed lands prior to conveyance does not change the result. The ANVAA regulations specifically state that in order to qualify for an allotment, an applicant must show, inter alia, that he or she “used the land in accordance with the regulation in effect before December 18, 1971,” and “that the land is still owned by the Federal government * * *.” 43 CFR 2568.50 (b); see n.5, supra.

Moreover, we are aware of the “Stipulated Procedures for Implementation of Order,” approved by the court in settlement of Aguilar v. United States, No. A76-271 (D. Alaska Feb. 9, 1983). Those procedures allow BLM to investigate Native allotment applications filed prior to December 18, 1971, for lands which are no longer Federally-owned to determine if qualifying use and occupancy predated patent or other conveyance of the lands from the United States, and, if so, to pursue recovery of the lands, pursuant to the exercise of its fiduciary responsibility, so that any rights under the 1906 Act may be satisfied. See, e.g., Harrison v. Hickel, 6 F.3d 1347, 1353 (9th Cir. 1993) (citing Terry L. Wilson, 85 IBLA 206, 218, 92 I.D. 109, 116 (1985)); State of Alaska v. 13.90 Acres of Land, 625 F. Supp. 1315, 1319 (D. Alaska 1985), aff’d sub nom., Etalook v. Exxon Pipeline Co., 831 F.2d 1440 (9th Cir. 1987).

However, those procedures are not available to ANVAA applicants, and, in fact, the ANVAA regulations clearly preclude such an arrangement for ANVAA applicants. Those regulations state at 43 CFR 2568.95 that ANVAA “does not give BLM the authority to reacquire former Federal land in order to convey it to a Native veteran.” In fact, ANVAA expressly states at 43 U.S.C. § 1629g(a)(3)(E) (2000), that the Secretary may not convey allotments containing “acquired lands.” As BLM explained in the preamble to the final rulemaking, it would not reacquire lands because, even if they were reacquired, the allotment of acquired lands is “prohibited” by ANVAA. 65 FR at 40957.

To the extent that appellants have raised other arguments in this case, they have been considered and rejected, as contrary to the facts or law, or immaterial.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

H. Barry Holt
Chief Administrative Judge

APPENDIX A

IBLA No.	ANVAA Applicant	ANVAA Application	Date Application Filed	Use & Occupancy Initiated	Date of Patent or Conveyance	Date of BLM Decision
2002-419	Andrew Evan	AA-83585	1/18/02	1964	6/21/93	7/2/02
2003-287	William G. Albecker	AA-83569	1/16/02 (amended 2/6/02)	1956	7/20/64	5/27/03
2003-292	Elmer J. Nicholson, Jr.	AA-83634	1/28/02	1963	1/12/79	6/13/03
2003-293	Henry J. Roehl	AA- 83679-A	1/29/02	1955	9/14/93 & 9/16/86	6/4/03
2003-345	Davis A.R. Nashalook	AA-84028	2/1/02	1963	11/6/91	8/11/03
2003-362	Norman L. Smith, Jr.	AA-83525	1/7/02 (amended 2/4/02)	1962	2/4/81	8/13/03
2003-363	Nicholai E. Lekanoff	AA-83762- A&B	1/29/02	1961	9/26/90	8/14/03
2004-49	John C. Breseman	AA-84012	2/1/02	1954	1/14/93	10/15/0 3
2004-178	Fredrick J. Anderson	AA-83912	2/6/02	1959	11/27/79	1/29/04

APPENDIX B

ANVAA Applicant	ANVAA Application	Lands Claimed (by section) ^{6/}	Patent or Conveyance
Andrew Evan	AA-83585	Sec. 34, T. 20 N., R. 45 W., Seward Meridian	Patent (Surface Estate) 50-93-0299 to The Kuskokwim Corp. Patent (Subsurface Estate) 50-93-0300 to Calista Corp.
William G. Albecker	AA-83569	Sec. 1, T. 29 S., R. 55 E., Copper River Meridian (replotted by BLM)	Patent 50-65-0019 to the State of Alaska
Elmer J. Nicholson, Jr.	AA-83634	Sec. 4, T. 8 N., R. 72 W., Seward Meridian	Interim Conveyance (Surface Estate) 142 to Bethel Native Corp. Interim Conveyance (Subsurface Estate) 143 to Calista Corp.
Henry J. Roehl	AA-83679-A	Secs. 31 & 32, T. 13 S., R. 50 W., Seward Meridian (replotted by BLM)	Patent (Surface Estate) 50-93-0519 to Choggiung Limited (Sec. 31) Patent (Subsurface Estate) 50-93-0520 to Bristol Bay Native Corp. (Sec. 31) Patent (Surface Estate) 50-86-0629 to Choggiung Limited (Sec. 32) Patent (Subsurface Estate) 50-86-0630 to Bristol Bay Native Corp. (Sec. 32)
Davis A.R. Nashalook	AA-84028	Secs. 11 & 14, T. 18 S., R. 10 W., Kateel River Meridian	Interim Conveyance (Surface Estate) 1527 to Unalakleet Native Corp. Interim Conveyance (Subsurface Estate) 1528 to Bering Straits Native Corp.
Norman L. Smith, Jr.	AA-83525	Sec. 4, T. 29 S., R. 59 E., Copper River Meridian	Tentative Approval, by BLM Decision, of State Selection Application A-063034

^{6/} In each case, the applicant sought 160 acres within the section or sections noted. In the case of Albecker and Smith, they filed ANVAA applications which were later amended to encompass different lands. BLM adjudicated the applications as amended, although in Smith's case, it noted the land, as originally described, also was not currently owned by the United States. BLM adjudicated the lands claimed by Albecker, Roehl, and Breseman, as reflected on the maps supplied with their allotment applications, even though those lands differed from the legal description in the applications. This accords with 43 CFR 2568.74(d), which states that "[i]f there is a discrepancy between the map and the legal description, the map will control."

Nicholai E. Lekanoff	AA-83762-A &B	Secs. 13 & 24, T. 72 S., R. 118 W., Seward Meridian (Parcel A) Secs. 19 & 20, T. 73 S., R. 118 W., Seward Meridian (Parcel B)	Patent (Surface Estate) 50-90-0651 to Ounalashka Corp. (Parcel A) Patent (Subsurface Estate) 50-90-0652 to The Aleut Corp. (Parcel A) Patent (Surface Estate) 50-90-0651 to Ounalashka Corp. (Parcel B)
John C. Breseman	AA-84012	Secs. 2, 3 & 11, T. 46 S., R. 57 E., Copper River Meridian (replotted by BLM)	Patent 50-93-0087 to the State of Alaska (Sec. 3) ^{7/} -
Fredrick J. Anderson	AA-83912	Sec. 25, T. 17 S., R. 44 W., Seward Meridian	Patent (Surface Estate) 50-80-0017 to Paug-Vik Incorporated, Limited Patent (Subsurface Estate) 50-80-0018 to Bristol Bay Native Corp.

^{7/} ANVAA provides that “[a]llotments may be selected only from lands that were vacant, unappropriated, and unreserved on the date when the person eligible for the allotment first used and occupied those lands.” 43 U.S.C. § 1629g(a)(2) (2000); see 43 CFR 2568.90. BLM rejected Breseman’s application to the extent it encompassed lands in secs. 2 and 11, T. 46 S., R. 57 E., Copper River Meridian, Alaska, because those lands had been reserved from entry under the public land laws as part of The Alexander Archipelago Forest Reserve (later renamed the Tongass National Forest) on Aug. 20, 1902, by Proclamation No. 37 of President Theodore Roosevelt. Breseman argues that the fact that the lands were reserved at the time he initiated use and occupancy is not disqualifying because his ancestors used and occupied the lands prior to the 1902 reservation. We rejected such an argument in Larry M. Evanoff, 162 IBLA 62, 69-70 (2004). Thus, to the extent BLM rejected Breseman’s application because his use and occupancy was initiated at a time when the lands were reserved, its decision is affirmed.