

BURKHER M. IVANOFF  
EVAN NICK

IBLA 2004-37, 2004-38

Decided May 23, 2006

Appeals from two decisions of the Alaska State Office, Bureau of Land Management, rejecting Native veteran allotment applications. AA-83496, AA-83489.

Cases consolidated; decisions affirmed.

1. Alaska: Alaska Native Veteran Allotment: Generally--Alaska: Native Allotments

The Alaska Native Veterans Allotment Act, as amended, 43 U.S.C. § 1629g (2000), permits Alaska Natives who are veterans who served in the U.S. military under prescribed circumstances between January 1, 1969, and December 31, 1971, an open season in which to apply for a Native allotment under the Act of May 17, 1906, the Alaska Native Allotment Act, formerly codified at 43 U.S.C. §§ 270-1 through 270-3 (1970). BLM properly rejects a Native allotment application where the applicant began use and occupancy on a date after the repeal of the Act of May 17, 1906. Allegations that use and occupancy began in 1973 or 1980 do not qualify an Alaska Native veteran to apply for land “under the Act of May 17, 1906 \* \* \* as such Act was in effect before December 18, 1971,” or make him a person who “would have been eligible for an allotment under the Act of May 17, 1906.” 43 U.S.C. § 1629g(a)(1) and (b)(1)(A) (2000).

APPEARANCES: Cecilia M. LaCara, Esq., Anchorage, Alaska, for appellants; Dennis J. Hopewell, Esq., Deputy Regional Solicitor, Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE HEMMER

Burkher M. Ivanoff and Evan Nick (appellants) separately appeal from two decisions dated October 1, 2003, issued by the Alaska State Office, Bureau of Land Management (BLM), rejecting their separately filed applications for Native allotments submitted under the Alaska Native Veterans Allotment Act (ANVAA), as amended, 43 U.S.C. § 1629g (2000). The appeals are docketed as IBLA 2004-37 (Ivanoff) and 2004-38 (Nick). The appeals raise the same issue and the Statements of Reasons (SORs), Answers, and Replies in the cases are virtually identical. Accordingly, we consolidate them sua sponte.

Appellants raise the single issue of whether the ANVAA extends the applicability of the Alaska Native Allotment Act (also known as the Act of May 17, 1906) so that, unlike other Native Alaskans, Alaska Native veterans can apply for Native allotments for lands they allege they began to use after the December 18, 1971, repeal of the Act of May 17, 1906. On December 26, 2001, Ivanoff submitted Native allotment application AA-83496, asserting that he began to use the land he was applying for in 1980. On December 6, 2001, Nick submitted Native allotment application AA-83489, asserting that he began to use the land he applied for in 1973. On October 1, 2003, BLM issued decisions rejecting both applications on grounds that 43 CFR 2568.90(a)(4) requires that “use and occupancy of land applied for under the [ANVAA] must have begun prior to December 14, 1968.”

Ivanoff and Nick appealed. They argue that 43 CFR 2568.90(a)(4) misconstrues the ANVAA because the statute “reopened the time in which [] veterans could submit Alaska Native allotment applications” and that in enacting the statute “Congress chose not to put a specific limitation” on the date use and occupancy began. (Unpaginated SORs.) Accordingly, though appellants concede that the Alaska Native Allotment Act, under which Alaska Natives could apply for allotments in the first place, was repealed effective December 18, 1971, they argue that Congress intended to abandon the requirement that use or occupancy begin prior to the repeal for the class of Alaska Natives that were qualifying veterans. We disagree.

[1] The Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), granted the Secretary of the Interior authority to allot up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Native Alaskan Indian, Aleut, or Eskimo, 21 years old or the head of a family, upon satisfactory proof of substantially continuous use and occupancy for a 5-year period. Forest Service, U.S. Department of Agriculture, 143 IBLA 175, 177-78 (1998). The Act was repealed, subject to a savings provision for pending Native allotment applications, in section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (2000), as follows:

[T]he Act of May 17, 1906 (34 Stat. 197), as amended, is repealed. Notwithstanding the foregoing provisions of this section, any application for an allotment that is pending before the Department of the Interior on December 18, 1971, may, at the option of the Native applicant, be approved and a patent issued \* \* \* .

Section 4 of ANCSA abolished any existing claims against the United States based on “aboriginal right, title, use or occupancy” and claims based on statute or treaty relating to Native use and occupancy. 43 U.S.C. § 1603(a) through (c) (2000). Thus, ANCSA extinguished all prior claims based on use and occupancy except those pending on December 18, 1971, under the Act of May 17, 1906, and preserved in section 18(a) of ANCSA, 43 U.S.C. § 1617(a) (2000), and expressly repealed the Act of May 17, 1906, to ensure that in the future no right remained to establish an allotment claim based on use or occupancy. See Joan A. (Anagick) Johnson, 159 IBLA 121, 123-24 (2003) (discussion of ANCSA). Soon after ANCSA’s passage, the Board confirmed its understanding, which has remained the law for 35 years, that a Native Alaskan “could not establish rights which would antedate the repeal of the Alaska Native Allotment Act by section 18 of the Alaska Native Claims Settlement Act of December 18, 1971 \* \* \* .” David Capjohn, 14 IBLA 330, 332 (1974).

The ANVAA was passed in 1998 to grapple with the fact that, as the almost century-long option of Native Alaskans to apply for an allotment<sup>1/</sup> was drawing to a close in the late 1960s, the Bureau of Indian Affairs (BIA) was encouraging and assisting Native Alaskans to apply for their allotments before the anticipated enactment of the legislation which became ANCSA, so as to preserve the opportunity to obtain them.<sup>2/</sup> The problem for Natives who were serving in the military between certain dates in 1969-71, was that they were outside of Alaska or even out of the country and in Vietnam during the period that other Natives had an opportunity to

<sup>1/</sup> ANCSA also prohibited Native Alaskans from obtaining allotments pursuant to general Indian allotment statutes dating back to 1887, effective Dec. 18, 1971. These statutes include the Indian Allotment Act of 1887, 25 U.S.C. § 331 (2000), and the Act of June 25, 1910, 25 U.S.C. § 337 (2000). See 43 U.S.C. § 1617(a) (2000) (“No Native covered by [ANCSA], may hereafter avail himself of an allotment under the provisions” of the 1887 and 1910 Acts).

<sup>2/</sup> BLM describes this period of time as a “major drive to file applications immediately prior to the anticipated repeal of the Allotment Act by ANCSA.” (Answer at 2.) The Board has recognized this period as generating a “flurry” of applications submitted immediately prior to the December 18, 1971, repeal of the Act of May 17, 1906.” State of Alaska (In re Irene Johnson), 133 IBLA 281, 286 (1995), citing United States v. Melgenak, 127 IBLA 224, 227-29 (1993); Nora E. Konukpeok (On Reconsideration), 60 IBLA 394, 396 n.2 (1981).

submit applications before the Native Allotment Act was repealed. These military personnel lost their chance to submit applications like those BIA was soliciting from their counterparts back home because they were serving their country elsewhere.

To resolve this problem Congress enacted the ANVAA as part of the “Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, 1999,” Pub. L. No. 105-276, 112 Stat. 2461, 2516-18 (Oct. 21, 1998). Section 432 of that Act amended ANCSA, 43 U.S.C. §§ 1601 *et seq.* (2000), by adding a new section 41. Section 41 permitted a “person described in subsection (b)” an “Open Season for Certain Alaska Native Veterans for Allotments,” during an 18-month period subsequent to its 1998 date of enactment and “following promulgation of implementing rules.” 43 U.S.C. § 1629g(a)(1) (2000). During that 18-month period, under specific circumstances, a qualifying person would be “eligible for an allotment of \* \* \* federal land totaling 160 acres or less under the Act of May 17, 1906 (chapter 2469; 34 Stat. 197), as such Act was in effect before December 18, 1971.” *Id.*

Section 41(b) identified persons eligible to select an allotment under the new provision as veterans who served between January 1, 1969, and December 31, 1971. 43 U.S.C. § 1629g(b)(1)(B) (2000). The veteran’s military service dates must have included “at least 6 months between January 1, 1969 and June 2, 1971,” or the veteran must have enlisted or been drafted into military service after June 2, 1971, but before December 3, 1971. *Id.*; *see also* 43 CFR 2568.50. Congress thus extended the opportunity to select and obtain Native allotments to veterans who were serving in the military for at least 6 months during the last 2 years of eligibility and may have missed the opportunity to apply during the last 2 years during which applications could be filed under the Native Allotment Act because they were in military service. *Larry M. Evanoff*, 162 IBLA 62, 70 (2004); *George F. Jackson*, 158 IBLA 305, 306-07 (2003). An eligible person is one who “would have been eligible for an allotment under the Act of May 17, 1906, \* \* \* as that Act was in effect before December 18, 1971.” 43 U.S.C. § 1629g(b)(1)(A).

Appellants acknowledge that “[m]any Alaska Native veterans could not apply before the Native Allotment Act of 1906 was repealed by [ANCSA], because they were serving in the Vietnam War and in the interest of fairness, Congress, in 1998, reopened the time in which these veterans could submit Alaska Native allotment applications.” (Unpaginated SOR.) They argue, though, that the ANVAA is silent as to the date use and occupancy must have begun, and that this silence reflects Congressional intent to allow qualified veterans, who were in military service between the statutory dates in 1969 and 1971, a new opportunity to begin use and occupancy of land that postdates the opportunity afforded by the Act of May 17, 1906. Thus, they ask us to reverse BLM’s decisions rejecting their applications for lands they allege that they began to use and occupy in 1973 or 1980.

Appellants' argument is based on an implausible reading of the ANVAA. We do not read Congress' failure to state a date before which a veteran must have begun his use or occupancy as silence on the topic. To the contrary, the statute clearly speaks to the issue of the qualifying time period, allowing qualifying veterans to apply, during the 18-month open season, for land "under the Act of May 17, 1906 \* \* \* as such Act was in effect before December 18, 1971." 43 U.S.C. § 1629g(a)(1) (2000). Moreover, qualifying veterans are those who "would have been eligible for an allotment under the Act of May 17, 1906, \* \* \* as that Act was in effect before December 18, 1971." 43 U.S.C. § 1629g(b)(1)(A) (2000). Sections 4 and 18 of ANCSA make clear that, after the Native Allotment Act's repeal, lands were no longer available for appropriation and entry by use and occupancy of an Alaska Native for allotment. 43 U.S.C. §§ 1603, 1617 (2000). It is well-settled that "no rights are acquired under the Alaska Native Allotment Act \* \* \* by a Native who purportedly commenced his occupation of the land at a time when the land was withdrawn from all forms of appropriation." David Capjohn, 14 IBLA at 332, citing Harold J. Naughton, 3 IBLA 237, 78 I.D. 300 (1971); see also United States v. Minnesota, 270 U.S. 181 (1926) (withdrawn or reserved lands are excepted and closed to subsequent appropriations). Further, we have held that a veteran who entered lands not open to appropriation is not entitled to apply for an allotment under the ANVAA. Bart G. Ahsogeak, 167 IBLA 148, 153 (2005).

It is simply not possible that Nick or Ivanoff began to use and occupy lands "under the Act of May 17, 1906," in 1973 or 1980, because lands in Alaska were not available for initiation of use and occupancy under that statute during those years. Any applicant under the ANVAA was required to have begun using the claimed land at the time the land was open to entry for an allotment, and this was no longer possible after the repeal of the Act of May 17, 1906, on December 18, 1971. In 1973 and 1980, the ANVAA was 25 and 18 years, respectively, in the future. There was no plausible basis in those years for either Nick or Ivanoff, or any Native Alaskan, to enter Federal land for purposes of such occupancy.

We also agree with BLM that the purpose of the ANVAA was to reopen the application period for veterans to apply for allotments they would otherwise have been entitled to apply for between specified dates in 1969 and 1971. It is not possible that Ivanoff or Nick could have lost the opportunity to apply for an allotment between 1969 and 1971 for land neither of them had begun to use or occupy.

Nothing in the ANVAA suggests that Congress meant to revisit the repeal of the Act of May 17, 1906, 43 U.S.C. § 1617(a) (2000), see also 43 U.S.C. § 1603 (2000), or reopen lands in Alaska for use and occupancy by Alaska Natives for allotments under that statute as appellants suggest. Accordingly, we affirm BLM on the ground that, under the ANVAA, appellants' allegations of use and occupancy beginning in 1973 and 1980 do not qualify them to apply for land "under the Act of May 17, 1906

\* \* \* as such Act was in effect before December 18, 1971,” or make them veterans who “would have been eligible for an allotment under the Act of May 17, 1906.” 43 U.S.C. § 1629g(a)(1) and (b)(1)(A) (2000).

We turn briefly to the regulation cited by appellants. The rule at 43 CFR 2568.90(a)(4) allows qualified veterans to apply for land that they “started using before December 14, 1968, the date when Public Land Order [(PLO)] 4582 withdrew all unreserved public lands in Alaska from all forms of appropriation and disposition under the public land laws.” Appellants acknowledge that BLM correctly noted in promulgating the rule that PLO 4582 went into effect on December 14, 1968, in anticipation of the repeal of the Act of May 17, 1906. PLO 4582 withdrew all unreserved public lands within Alaska from appropriation or selection under the public land laws, with the exception that mining claimants could locate lands for metalliferous minerals. 34 FR 1025 (Jan. 22, 1969). This PLO was extended by PLO 4962 (Dec. 11, 1970) and PLO 5081 (June 24, 1971), and continued in effect until the passage of ANCSA. Joan A. (Anagick) Johnson, 159 IBLA at 122. This precluded any Native Alaskan from entering land in Alaska for use and occupancy, for purposes of a Native allotment application, after December 14, 1968.

Appellants argue that BLM had no authority to adopt by rule the date of PLO 4582 because it was revoked by ANCSA section 17(d)(1) and thus it no longer applied after ANCSA’s passage. This argument is derivative of the assertion, rejected above, that the passage of the ANVAA somehow gave Alaska Native veterans, as defined in the ANVAA, the ability to enter lands for use and occupancy after 1971. As we have explained above, nothing in the ANVAA changed the repeal of the Act of May 17, 1906, or reopened land in Alaska to entry for allotments after December 18, 1971. PLO 4582, as extended, was repealed by section 17 of ANCSA because section 18 of ANCSA repealed the Native Allotment Act and ensured that “[n]o Native covered by the provisions of” ANCSA could avail himself of an allotment under the general Indian allotment acts or the Act of May 17, 1906, after 1971.<sup>3/</sup>

We thus reject appellants’ challenge to 43 CFR 2568.90. Even if they could challenge the date chosen by BLM in the rule (and we do not find that they have), appellants nonetheless could not explain how a date defining qualifying use and

<sup>3/</sup> We pointed out in Joan A. (Anagick) Johnson, 159 IBLA at 122, the subsequent history of the withdrawal begun by PLO 4582. As we noted there, section 17(d)(1) of ANCSA expressly revoked PLO 4582, but, at the same time, put in place a 90-day temporary withdrawal of “all unreserved public lands in Alaska from all forms of appropriation under the public land laws \* \* \*.” 43 U.S.C. § 1616(d)(1) (2000). Other withdrawals were authorized, so that the Secretary of the Interior could consider which lands to withdraw for authorized Federal purposes, and which could be selected for purposes and by entities authorized in ANCSA.

occupancy could postdate December 18, 1971. In no case could BLM apply a rule to encompass use and occupancy begun in 1973 or 1980.

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

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Lisa Hemmer  
Administrative Judge

I concur:

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Christina S. Kalavritinos  
Administrative Judge