

UNITED STATES v. FRANK R. PETERSON

IBLA 2004-263

Decided September 27, 2006

Appeal from decision by Administrative Law Judge James H. Heffernan rejecting Native allotment application AA-7328.

Motion to dismiss denied; decision affirmed.

1. Alaska--Native Allotments

Section 3 of the Native Allotment Act requires that, in order to qualify for an allotment of up to 160 acres of land, a Native applicant must submit satisfactory proof that he has engaged in “substantially continuous use and occupancy of the land for a period of five years.” 43 U.S.C. § 270-3 (1970). The Departmental regulation at 43 CFR 2561.0-5(a) states that such 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.” When land is withdrawn from appropriation under the Act, an applicant is required to show he initiated qualifying use and occupancy prior to the withdrawal.

2. Alaska--Native Allotments

In order to demonstrate that the land was used and occupied to the potential exclusion of others as required by 43 CFR 2561.0-5(a), a Native allotment applicant must show that others knew or should have known that the applicant asserted a superior right to the land because he actually used or occupied the land and/or left behind

physical evidence of such use or occupancy, sufficient to put others on notice of the assertion of such a right, or because others acknowledged that assertion in some way. The Native Allotment Act was not intended to allow individual Natives to acquire lands used in common.

APPEARANCES: Cecilia M. LaCara, Esq., Anchorage, Alaska, for Appellant; Kenneth M. Lord, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management; Alan L. Schmitt, Esq., Anchorage Alaska, for Old Harbor Native Corporation.

#### OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Frank R. Peterson has appealed from the April 26, 2004, decision by Administrative Law Judge James H. Heffernan rejecting Native allotment application AA-7328. On June 11, 1971, Peterson executed a Native allotment application 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> for a 160-acre parcel of land on the south side of Kiliuda Bay on Kodiak Island, described as the E $\frac{1}{2}$ NW $\frac{1}{4}$  and the E $\frac{1}{2}$ SW $\frac{1}{4}$  sec. 30, T. 33 S., R. 23 W., Seward Meridian, Alaska. (Ex. A.) The application claimed use and occupancy for hunting and gathering berries from 1956, two years before the land was withdrawn by Public Land Order No. (PLO) 1634 for the Kodiak National Wildlife Refuge. <sup>2/</sup> In 1974 BLM received a relinquishment, purportedly by Peterson, and closed the application file. (Ex. I.) On March 8, 1979, BLM issued Interim Conveyance No. 165 to Old Harbor Native Corporation (OHNC), pursuant to sections 14(a) and 22(j) of ANCSA, 43 U.S.C. §§ 1613(a) and 1621(j) (2000), that included all of section 30. (Ex. J.) In 1981, BLM reinstated Peterson's application

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<sup>1/</sup> The Native Allotment Act was repealed effective Dec. 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (2000), subject to pending applications.

<sup>2/</sup> As BLM pointed out in paragraph 4 of its complaint, the land was temporarily withdrawn from entry on Feb. 10, 1940, by Executive Order (EO) No. 8344 for classification and in aid of legislation. (Ex. E.) On Aug. 19, 1941, EO No. 8857 superceded EO 8344 and included the land within the boundaries of the Kodiak Island National Wildlife Refuge but left a one-mile strip along the coastline (including the land now subject to appellant's application) open to settlement. (Ex. F.) On May 9, 1958, PLO 1634 was issued. (Ex. G.) This PLO redefined the Kodiak National Wildlife Refuge, revoked EO No. 8857, and withdrew the land for which Peterson applied. See Old Harbor Native Corporation, 144 IBLA 222, 223 n.2 (1998).

because the signatures on the application and relinquishment appeared to be different. (Ex. K.)

In 1989, BLM filed the official plat of survey of Peterson's allotment, U.S. Survey No. 9245, Lots 1 and 3, depicting 160 acres of land within sections 30 and 31, T. 33 S., R. 23 W., Seward Meridian. In 1991, BLM issued a decision notifying Peterson and OHNC of the reinstatement of the application. (Ex. P, Tab 8.) The decision also stated that because title to the lands within section 30 (approximately 155 acres) had been conveyed out of Federal ownership to OHNC, that portion of Peterson's application would be adjudicated pursuant to the Stipulated Procedures for Implementation of Order in Aguilar v. United States (Aguilar), 474 F. Supp. 840 (D. Alaska 1979), under which the validity of a Native allotment is investigated in order for the Department to determine whether to seek reconveyance of the land. See generally United States v. Hobson (Hobson), 142 IBLA 7, 9-10 (1997).

After attempts at settlement, Peterson and OHNC were unable to resolve the conflict concerning Peterson's allotment, and in Old Harbor Native Corporation, 144 IBLA 222 (1998), this Board remanded the case to BLM to proceed with processing Peterson's application under the Aguilar stipulations. On April 29, 1999, BLM issued a complaint alleging, inter alia, that Peterson "did not make substantially continuous use and occupancy of the claimed allotment land that was at least potentially exclusive of others." The complaint identified not only the approximately 155 acres of land in section 30 that was conveyed to OHNC, but also the 5 acres of land in section 31 that remained in Federal ownership. Our jurisdiction extends only to the 5 acres in section 31 that remain in Federal ownership.<sup>3/</sup>

OHNC, an intervenor below on the basis of its ownership of the land subject to Peterson's application that did not remain in Federal ownership, has filed a motion to dismiss the appeal because Peterson failed to serve OHNC with a copy of his Statement of Reasons (SOR) as required by 43 CFR 4.413. Although failure to serve

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<sup>3/</sup> When the Department conveyed legal title to the land in section 30, it effectively lost jurisdiction to adjudicate conflicting interests in the lands so conveyed. Germania Iron Co. v. United States, 165 U.S. 379, 383 (1897); Hobson, 142 IBLA at 9. The Department may nevertheless consider whether to seek reconveyance of the land in an administrative proceeding, and in settlement of the Aguilar litigation, the Department adopted procedures that require a hearing before a BLM hearing officer, whose decision, when issued, is final for the Department and not appealable to this Board. However, in cases such as this, where the parcel in part describes lands conveyed out of U.S. ownership and a hearing on the entire parcel is required, Government contest proceedings are to be used. Id. This Board may consider an appeal with respect to the acreage that remains in Federal ownership. See id.

an SOR may cause an appeal to be subject to summary dismissal under 43 CFR 4.413(b), the Board avoids procedural dismissals if there has been no showing that a procedural deficiency has prejudiced an adverse party. James C. Mackey, 96 IBLA 356, 359, 94 I.D. 132, 134 (1987). In his Reply to BLM's Answer and Opposition to Old Harbor's Motion to Dismiss, Peterson correctly observes that Old Harbor has no interest in the 5-acre parcel remaining in Federal ownership that is the subject of this appeal. Accordingly, OHNC's motion to dismiss is denied.

[1] Section 3 of the Native Allotment Act requires that, in order to qualify for an allotment of up to 160 acres of land, a Native applicant must submit satisfactory proof that he has engaged in "substantially continuous use and occupancy of the land for a period of five years." 43 U.S.C. § 270-3 (1970). The Departmental regulation at 43 CFR 2561.0-5(a) states that such 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." (Emphasis added.) Furthermore, Peterson was required to show he initiated qualifying use and occupancy prior to May 9, 1958, when the land for which he applied was withdrawn by PLO 1634 for inclusion in the Kodiak National Wildlife Refuge. Trygve M. Olsen, 138 IBLA 321, 322 (1997).<sup>4/</sup>

[2] The issue in this appeal focuses on whether Peterson's claimed use of the parcel was "potentially exclusive of others" as required by 43 CFR 2561.0-5(a). In order to demonstrate that the land was used and occupied to the potential exclusion of others, an applicant must show that others knew or should have known that the applicant asserted a superior right to the land because he actually used or occupied

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<sup>4/</sup> In that case, the Board stated:

"An applicant acquires no rights against the United States capable of defeating a withdrawal until he has initiated qualifying use and occupancy under the statute. To be valid, any claim of such use and occupancy must have been initiated prior to any withdrawal of the land. See Andrew Gordon McKinley (On Reconsideration), 61 IBLA 282, 285 (1982). If it can be shown that the rights he claims were properly initiated prior to withdrawal the applicant can perfect his application by continued qualifying use and occupancy for the required 5-year period, with the remainder of the period of use and occupancy being completed after the withdrawal. See United States v. Bennett, 92 IBLA 174, 175 (1986). If, however, qualifying use and occupancy was not initiated before withdrawal, the withdrawal will attach. Thereafter, use and occupancy cannot be initiated, and an applicant can gain no rights. See Akootchook v. U.S. Department of the Interior, 747 F.2d 1316, 1320, cert. denied, 471 U.S. 1116 (1985); Heirs of Doreen Itta, 97 IBLA 261, 266 (1987)." 138 IBLA at 322.

the land and/or left behind physical evidence of such use or occupancy, sufficient to put others on notice of the assertion of such a right, or because others acknowledged that assertion in some way. United States v. Pestrikoff, 167 IBLA 361, 379 (2006); United States v. Pestrikoff, 134 IBLA 277, 288-89 (1995). As we said in United States v. Heirs of Jake Yaquam, 139 IBLA 376, 384 (1997): “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 acknowledgment of his superior right to the land, even in circumstances where others used it.” See also United States v. Richards, 135 IBLA 101, 107 (1996).

In this case, it is necessary to emphasize that the Native Allotment Act was not intended to allow individual Natives to acquire lands used in common. “The entire focus of the Allotment Acts, regardless of their wisdom, was to ‘civilize’ the Native inhabitants by breaking up the traditional communal society through individual allotments which would be utilized as homesteads.” Andrew Petla, 43 IBLA 186, 200 (1979) (Burski, A.J., concurring).<sup>5/</sup> The Board has noted: “[T]he Act and its implementing regulations are generally inimical to communal use by Alaskan Natives.” United States v. Akootchook, 123 IBLA 6, 9 (1992), aff’d, Akootchook v. United States, 271 F.3d 1160 (9th Cir. 2001). We found that the requirements for “[s]ubstantial actual possession and use to the potential exclusion of others runs contrary to the cultural proclivity for Native communal use of land.” 123 IBLA at 10.

Peterson testified that his use of the land commenced in 1956, but Judge Heffernan found, on the basis of Peterson’s own testimony, that his use was “intermittent and virtually random over the years.” (Decision at 3.) From 1956 until 1960 when he began service with the Marines, he visited the land for subsistence purposes when commercially fishing with his brother, who testified that the land was used on an occasional basis during the summer and fall months, but not every year. He testified: “The land was not used every year because we didn’t fish there every year.” (Tr. 154.) Peterson’s own testimony shows that others used the land as he did (Tr. 186), and he described the use as “communal.” (Tr. 201.) At the hearing, Peterson confirmed the statement in his affidavit (Ex. 13) that the parcel for which he applied was selected by lottery. (Tr. 146, 147.) He was not sure when the lottery occurred, but it occurred after Peterson began “helping people out with [N]ative

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<sup>5/</sup> In a footnote, Judge Burski explained: “That the Governmental policy of the time was inimical to traditional Native and Indian ways of life is made clear by the fact that the Indian tribes almost universally opposed the adoption of the original General Allotment Act of 1887. See generally D. S. Otis, “History of the Allotment Policy,” In Readjustment of Indian Affairs, Hearings on H.R. No. 7902 before the Committee on Indian Affairs, 73d Cong., 2d Sess., part 9 at 428 et seq. (1934), reprinted in, M. Price, Law and the American Indian at 544-51 (1973).” 43 IBLA at 200 n.3

allotment applications” (Tr. 167)<sup>6/</sup> and before the repeal of the Native Allotment Act in 1971. (Tr. 169.) He explained that because people from Old Harbor used land throughout the area, the tribal council or the village council suggested a lottery system. (Tr. 166.) Neither Peterson nor the other 45 applicants knew where their selections were to be until their lots were picked out of a hat. (Tr. 170.)<sup>7/</sup>

Judge Heffernan found:

The record makes clear that the Contestee’s application for the land did not result from his routine, historic use of said land, but rather, along with several other applicants, this particular parcel was randomly selected during a lottery of community-use lands conducted by the village of Old Harbor. Tr. 170-171. The lottery was conducted because of the pendency in 1971 of the Alaska Native Claims Settlement Act, which served ultimately to repeal the provisions of the 1906 Act. In an effort to have Native lands claims filed before the legislative repeal of the 1906 Act, the village of Old Harbor conducted a lottery, which served to assign historically community-use tracts to the lottery winners, including Contestee, who, in turn, filed applications with the Bureau of Indian Affairs (BIA) for their randomly assigned tracts.

Tr. 169.

(Decision at 4.) Judge Heffernan found that the Government had established a prima facie case that appellant’s use was “never, during any relevant period of time, potentially exclusive of the use of other members of the regional community.” (Decision at 5.) He found that Peterson’s “own testimony acknowledging the ongoing communal use of his claimed land served to legally corroborate the government’s case with respect to the legal issue of potentially exclusive use.” (Decision at 6.)

Judge Heffernan referred to this Board’s decision in United States v. Richards, 135 IBLA at 107, where we stated that to satisfy the requirement that his use was potentially exclusive of others, a Native allotment applicant must show “that his use

<sup>6/</sup> An Aug. 8, 1995, letter from Peterson to BLM’s State Director indicates that Peterson became aware of the Act in 1968 when he was working for Rural Alaska Community Action Program which made a statewide effort to assist Alaska Natives in applying for allotments.

<sup>7/</sup> It appears that like Peterson’s application, the other 45 applications may have included land that was conveyed to Old Harbor. In Old Harbor, 144 IBLA at 224, we noted that the village had executed 46 settlement and release agreements that had been signed by 45 applicants, but not Peterson.

has (or should have) resulted in a public awareness and acknowledgment of his superior right to the land, even in circumstances where others used it.” Judge Heffernan found that Peterson’s “own testimony clearly demonstrates that his use of the land was episodic and intermittent and that others in the community used the claimed land for subsistence gathering throughout the entire period of [his] claimed use.” (Decision at 6.) He found that Peterson provided no evidence that members of the community were aware of his exclusive claim and that his “intermittent use of the land over a period of years was insufficient to put any members of the regional community on notice of his purported claim.” *Id.* We find it difficult to see how appellant in 1956 could have initiated substantial use and occupancy of the parcel to the potential exclusion of others when none of those using the land, including appellant himself, would have recognized it as appellant’s until after the lottery.

In his SOR, Peterson contends that Judge Heffernan ignored evidence supporting Peterson’s use and occupancy of the land including affidavits of Nick Inga, Paul Kahutak, Betty Jane Wilson, Paul Swenning, and Mike and Polly Tunohun. (SOR at 8.) We have reviewed those affidavits and find that they support Judge Heffernan’s conclusions.

Although Nick Inga states that Peterson first used the land in 1955 or 1956 for fishing and berrypicking during the summer months when he fished in Kiliuda Bay, “it wasn’t every month or every year. Lots of times, we fished in different places \* \* \* and didn’t go to Kiluda Bay for a long time.” (Ex. 14 ¶ 6.) More significantly, he states: “All the lands around Old Harbor were used by everybody in the village \* \* \* for hunting, fishing, and berrypicking. We didn’t own the lands ourselves. I never knew who owned the lands. We just used them when we needed to, for hunting, fishing, and berrypicking.” *Id.* ¶ 8.

Paul Kahatak states that he is “not sure if Peterson used the land he is getting.” (Ex. 16 ¶ 5.) Paul Swenning and Betty Jane Wilson refer to Peterson’s use of the land in the 1960’s and provide no evidence that Peterson had initiated qualifying use and occupancy prior to the 1958 withdrawal. (Ex. 23, ¶ 3; Ex. 26, ¶ 3.) Although Mike and Polly Tunohun state that Peterson used the land from 1956 to 1960, their affidavits do not support a finding that his use was potentially exclusive of others. (Ex. 24, ¶ 3; Ex. 25, ¶ 3.) Swenning’s affidavit, however, supports Judge Heffernan’s conclusion that Peterson used the land in common with others and not in a manner that was potentially exclusive: “The lands which Frank Peterson is claiming were used by other Alaska Natives from Old Harbor, just as he used lands claimed by others from Old Harbor, under the customs and traditions of our people.” (Ex. 23, ¶ 4.)

While the affidavits may provide some support for appellant’s argument that he used the land for which he applied, they do not support a finding that he had

initiated qualifying use and occupancy that was potentially exclusive of others prior to the withdrawal of the land in 1958. Rather, they confirm Judge Heffernan's finding that Natives in Old Harbor used land in the area, including Peterson's parcel, in common prior to the lottery in which separate parcels were assigned to individual Natives. In his SOR, appellant explains the lottery process:

This was done so that people submitting Native allotment applications would not come into conflict with each others' claims. The tribal council listed all of the claimants and the parcels that people wanted and they put those in hats. People chose the land that they actually used. [Tr. 166, 167.] At that point Mr. Peterson segregated the land he claimed in his native allotment application from community use and used it as his own in subsequent years. Mr. Peterson personally used the land before it was withdrawn in 1958. Mr. Peterson's application established that he [ ] still used the allotment land on the day he filed his application on June 11, 1972 and continued to use the land until [the] 1980s. [Ex. 4; Tr. 126.] Therefore, ALJ Heffernan erred in mischaracterizing the lottery system used in Old Harbor to avoid conflicting claims as proof that Mr. Peterson did not substantially continuously use his land exclusive of others.

(SOR at 16-17 (emphasis added).) In making this argument, appellant apparently fails to understand that his use of the land subsequent to the lottery is not sufficient to establish his entitlement to an allotment. Because the land was withdrawn in 1958, he must establish by a preponderance of the evidence that he initiated qualifying use and occupancy at least potentially exclusive of others prior to the withdrawal. Trygve M. Olsen, 138 IBLA at 322. His statement that it was "at that point" after the lottery when his parcel "was segregated from community use" shows that he failed to initiate qualifying use and occupancy prior to that time.

To the extent not expressly addressed herein, this Board has carefully and fully considered any other arguments advanced by the parties and concluded that they provide no basis for reversing the decision under appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, OHNC's motion to dismiss is denied and the decision appealed from is affirmed.

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Christina S. Kalavritinos  
Administrative Judge

I concur:

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James F. Roberts  
Administrative Judge