

ARCHIE WHEELER

IBLA 70-13

Decided December 7, 1970

Alaska: Indian and Native Affairs -- Alaska: Land Grants and  
Selections: Generally

Where an application for a native allotment under the act of May 17, 1906, as amended, describes land, which at the time of filing is included in a State of Alaska selection application that had been tentatively approved to the State, and alleges occupancy from a date prior to the filing of the State selection, and where evidence of the applicant's occupancy has not been developed, the rejection of the allotment application will be set aside and the case remanded for further investigation of the alleged occupancy.

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: Native allotment  
: application rejected: Set aside and  
remanded

## DECISION

Archie Wheeler has appealed to the Secretary of the Interior from a decision of August 28, 1968, by the Office of Appeals and Hearings, Bureau of Land Management, which affirmed, with modification, a decision of the Bureau's Alaska State Office rejecting Wheeler's native allotment application AA-311. Wheeler's allotment application was filed September 29, 1966, pursuant to the act of May 17, 1906, as amended, 48 U.S.C. § 357 (1958), for approximately 160 acres of Kalgin Island in Ts. 4 and 5 N., R. 15 W., Seward Meridian, Alaska.

The Bureau's Alaska State Office rejected the allotment application for the reason that land applied for was among the lands described in the State of Alaska selection application Anchorage 058734 filed February 18, 1963, which lands were tentatively approved to the State of Alaska on September 18, 1963, when they became segregated from further appropriation.

In affirming the rejection of Wheeler's application, the Office of Appeals and Hearings, Bureau of Land Management, did not rely primarily on the conclusion in the decision below. that Office pointed out that Wheeler had previously filed an allotment application for land about a mile to the east of the land presently applied for and subsequently relinquished it for reasons not important in this appeal. In both applications he claimed occupancy of the tracts since May 1957. At no stage in these proceedings has appellant presented any positive or substantial evidence showing his occupancy of the land since 1957, or at any time prior to the filing and tentative approval of the State's selection application in 1963. The Office then concluded that in the absence of proof of occupancy of the land before 1963, appellant's allotment application attempted to take land already appropriated by the State's selection application and the Office affirmed the rejection of the allotment application.

Native Alaskans qualify for allotments under the act of May 17, 1906, as amended, in an amount not to exceed 160 acres and in tracts of not less than 40 acres, where the rectangular survey pattern is appropriate, upon a showing of substantially continuous use and occupancy of the land for a period of five years in terms of native custom and mode of living, climate and character of the land, and customary seasonal occupancy. Carl A. Charles, et al., A-29766, etc. (January 10, 1964).

On appeal to the Secretary, it is urged by appellant that he be afforded an opportunity to establish his allegation of occupancy and use by any of the several suggested methods, including waiting for such evidence to be filed within six years after filing of the allotment application, as provided in 43 CFR 2561.2, 35 F.R. 9598, formerly 43 CFR 2212.9-4.

In regard to the suggestion of waiting six years for producing evidence of occupancy, the provision of the regulations is not applicable here in view of the State's selection application having been filed and tentatively approved more than three years prior to the filing of the allotment application. In these circumstances, in order for an allotment applicant to have a pre-existing right, it must be shown by probative substantial evidence that his occupancy of the land commenced prior to the filing of the selection application and has continued. Where the evidence shows that the applicant substantially occupied the land sought prior to the filing of the State's selection application and thereafter, the native's right will be preserved until the statutory requirement of five years of continuous occupancy has been satisfied. 43 CFR 2561.2, 35 F.R. 9598, formerly 43 CFR 2212.9-4.

Here appellant's allotment application AA-311 on its face alleges that the applicant occupied the land since May 1957, which pre-dates the filing of the State of Alaska selection application. We feel the case should be remanded to the Bureau of Land Management for the purpose of affording appellant an opportunity to produce probative substantial evidence relating to his occupancy and use of the land. In the event the evidence establishes that substantial occupancy commenced prior to the filing of the State's selection and has already continued for five years, no certificate of allotment should be issued until after the termination of Public Land Order 4582 (34 F.R. 1025, January 27, 1969). Cf. Memorandum of the Associate Solicitor, Division of Public Lands, dated May 14, 1970. On the other hand, if it is shown that the initiation of occupancy and use of the land by Wheeler began after the date of filing of the State's selection application, his allotment application will be rejected.

It appears from the record that the Kenaitze Indian Association and the Nondalton-Lime Hills Native Group filed claims for an area of land, including that covered by Wheeler's native allotment application, based upon aboriginal rights and use and occupancy from time immemorial and they object to the alienation of any of the land claimed.

In the event there is recognition of Wheeler's occupancy prior to the filing of the State of Alaska's selection application, the decision herein would not in any way purport to pass on the merits of the native group protests.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is set aside and the case is remanded to the Bureau of Land Management for further action consistent with this decision.

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Francis Mayhue, Member

I concur:

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Martin Ritvo, Member

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Anne Poindexter Lewis, Member

