

Editor's note: Overruled to the extent inconsistent with U.S. v. Donald E. Flynn, 53 IBLA 208, 88 I.D. 373 (March 18, 1981)

LUCY S. AHVAKANA
STATE OF ALASKA

IBLA 70-83

Decided October 22, 1971

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 is properly set aside and the case remanded for further investigation of the alleged occupancy.

3 IBLA 341

IBLA 70-83	:	Fairbanks 8595
	:	Fairbanks 031787, 031789
LUCY S. AHVAKANA	:	Native allotment application
STATE OF ALASKA	:	rejection--vacated
	:	State selections
	:	rejected in part
	:	Affirmed

DECISION

The State of Alaska has appealed to the Secretary of the Interior from a decision dated August 11, 1969, as amended by a decision of September 5, 1969, of the Office of Appeals and Hearings, Bureau of Land Management. The decisions vacated a rejection of Mrs. Lucy S. Ahvakana's native allotment application (Fairbanks 8595) by the Fairbanks district and land office and remanded the case to that office for a further determination, in light of any additional facts developed from a field investigation, whether Mrs. Ahvakana is entitled to have the requested land allotted to her. In addition, tentative approval of two Alaska State selection applications (Fairbanks 031787 and 031789) was set aside to the limited extent of the surface interest in the land to which Mrs. Ahvakana may be entitled.

The State of Alaska filed its two state selection applications January 13, 1964, under section 6(b) of the Alaska Statehood Act, 72 Stat. 339-343, to select all available lands within unsurveyed T. 13 N., Rs. 11 and 12 E., Umiat Meridian, Alaska. The selections were tentatively approved by the Bureau of Land Management in a decision of October 9, 1964. Subsequently, on October 23, 1968, Lucy S. Ahvakana filed a native allotment application under the Act of May 17, 1906, as amended, 43 U.S.C. § 357 (1958), for a tract of approximately 160 acres within the same T. 13 N., Rs. 11 and 12 E., selected by the State of Alaska. She asserted that she had established occupancy prior to the state's selection at various intervals from 1929 to 1945 with her parents, her first husband, and her children. She described improvements on the land as consisting of a two-room house with storm porch, and a two-story store building with storm porch, both valued at approximately \$3200. She also asserted that the land contained the grave sites of four members of her family and four other natives.

The Bureau of Land Management's Fairbanks district and land office rejected the Ahvakana application on its face for the stated reasons that the applicant had not submitted proof of substantially continuous use and occupancy of the lands, and the lands were previously included in state selections tentatively approved to the State of Alaska, October 9, 1964.

In vacating the land office decision and remanding the case for further examination of the native's allegations, the Office of Appeals and Hearings emphasized that no examination of the land had been made or data otherwise obtained to verify or to refute the applicant's statements as to improvements, occupancy, and the graves on the land. The decision held that since the Ahvakana claim alleges improvements and graves in existence long before the filing of the state's applications, the land included in the Ahvakana claim was not vacant, and unappropriated land, and was not subject to selection by the state (43 CFR 2222.9-4(b)(2), now 43 CFR 2627.3(b)(2)). Therefore, tentative approval of the state's application was set aside to the extent of the interest in the land to which Lucy Ahvakana may be entitled.

In this appeal the State of Alaska challenges the Bureau's determination, arguing, that the lands here in dispute were not "occupied" by the claimant as that term is defined in the regulations and hence the lands at the time of appellant's filing on May 13, 1964, were public domain lands and, as such, were vacant, unappropriated and unreserved. In answer claimant contends that native occupancy in Alaska is protected by the terms of the Alaska Statehood Act and the regulations in 43 CFR 2212.9-1 (now 43 CFR 2561). She argues that she established a prior claim of occupancy and that the United States may not grant fee title to lands tentatively approved to the state until the merits of claims for native allotments have first been determined in compliance with the law and the regulations.

This appeal raises a question as to the effect of an alleged native occupancy as claimed under the Native Allotment Act of May 17, 1906, supra, on land subsequently selected by the State of Alaska pursuant to section 6(b) of the Alaska Statehood Act, supra. Section 6(b) of the Statehood Act provides in pertinent part:

The State of Alaska . . . is hereby granted and shall be entitled to select 102,550,000 acres from the public lands of the United States in Alaska which are vacant, unappropriated and unreserved at the time of their selection: provided that nothing herein contained shall effect any valid existing claim, location, or entry. . . . (Emphasis added.)

In accordance with these limitations it is undisputed that all lands segregated from the public domain whether by reservation or valid entry, are not properly subject to state selection. In recognition of this fact where the state files a blanket-selection application, as in this case covering 16,500 acres, the application by its own language expressly excludes any prior valid rights, claims or patented lands.

Lucy Ahvakana alleged occupancy of the lands in question which predates the filing of the state selection application. Whether or not the circumstances of this alleged occupancy, together with the improvements and the grave sites amount to an appropriation of the lands is a question of fact of which there is no evidence of record. Under similar circumstances we have recently held that the Alaskan native should be given an opportunity to make the required showing to establish whether his allegation of occupancy and use has created a valid existing right exempted from the terms of a state selection. Archie Wheeler, 1 IBLA 139 (1970). As in Wheeler there is insufficient factual evidence of record upon which this Board could properly determine whether the native occupancy qualifies for an Indian allotment within the meaning of the statute and the regulations.

It has also been held that acts of Indian trapping, hunting and camping on lands selected by the State of Alaska pursuant to the Statehood Act could constitute a condition which could prevent the selected lands from being "vacant, unappropriated, and unreserved," State of Alaska v. Udall, 420 F.2d 938 (1969), cert. denied, 397 U.S. 1076 (1970). The court, in overruling the disposal of that case on a motion for summary judgment, determined that allegations of past and present native use raised genuine issues of material fact where the record showed that there had been no physical examination of the land in question. We wish to emphasize that even if the Indian allotment application is not found to be allowable, the Indian use of the land may be sufficient to bar the state selection application pro tanto.

In view of the fact that no field investigation has yet been made in this case and the native has not been requested to provide probative, substantial evidence of occupancy, we find it was proper for the Bureau to remand this case to the field office for further clarification of the nature and extent of the use and occupancy of the lands involved.

In considering the effect of the native's occupancy we emphasize that the 1906 act did not automatically allow Alaska natives the right to secure public lands in Alaska. The act provided that:

The Secretary of the Interior is authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed 160 acres of nonmineral lands in Alaska. . . .

The Department has limited its approval of Alaskan native applications to those which have been shown to be occupied and used to a substantial extent. Frank St. Clair (On Petition), 53 I.D. 194 (1930). Also, see our most recent discussion in Terza Hopson et al., 3 IBLA 134 (1971). Under the current regulations, the appellant must provide proof of substantially continuous use and occupancy of the land for a period of five years before an allotment will be made. 43 CFR 2561.2. Substantially continuous use and occupancy, as defined in the regulations, is 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).

If in fact, it is ultimately determined from the investigation that the native has established substantial occupancy prior to the time of the state selection, the land was not vacant and unappropriated and, therefore, not properly subject to a state selection. As to the charge of abandonment, whether a native has permanently abandoned occupancy of claimed land to the extent that he has forfeited any claim he may have established under the Native Allotment Act, depends upon his reason for leaving the land and the interest and relationship he thereafter maintained with the land. See Wilbur Martin, Sr., A-25862 (May 31, 1950). Here again, a native's intent in such a matter can only be determined after a thorough investigation of the facts. If, however, no positive proof is developed which establishes substantial continuous occupancy for a five-year period prior to the state selection or it is clear that the native had abandoned the land prior to the selection, the allotment will not be allowed and the application will be rejected.

It should also be noted, if it is determined that the allotment application is rejected an additional question needs to be resolved as to the possible withdrawal of the native grave sites as an Indian Cemetery. Native burial places are subject to the protection of a withdrawal by Public Land Order 2171, August 3, 1960 (25 F.R. 7538), as amended by Public Land Order No. 2288, March 6, 1961 (26 F.R. 2084). Under these orders, tracts of public land in Alaska customarily used by Indians, Eskimos or Aleuts as burial places for their dead were immediately withdrawn as native cemeteries if they were delineated upon approved and accepted plats of

survey. Other burial areas, which have not been so designated, may qualify for withdrawal upon the filing in the appropriate land office of an accepted plat of survey designating the area as a cemetery, and the notation thereon of the character of such cemetery as a native cemetery.

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 affirmed and the case is remanded to the Bureau of Land Management for further action consistent with this decision.

Francis Mayhue, Member

We concur:

Frederick Fishman, Member

Martin Ritvo, Member

