

LOUIS P. SIMPSON ET AL.

IBLA 75-38 etc.

Decided June 16, 1975

Consolidated appeals from decisions of the Alaska State Office, Bureau of Land Management, rejecting Alaska Native allotment applications listed in the Appendix.

Affirmed.

1. Alaska: Native Allotments

Native allotment applications for lands in the Tongass National Forest may be allowed only if (1) the application is founded on occupancy prior to the inclusion of the lands within the forest or (2) an authorized officer of the Department of Agriculture certifies that the land in the application is chiefly valuable for agricultural or grazing purposes.

2. Alaska: Native Allotments

A Native who has applied for an allotment within a national forest must show that he personally complied with the law in establishing occupancy and use prior to the effective date of the forest withdrawal and he may not tack on his parents' or grandparents' use and occupancy to establish a right in himself commencing prior to the creation of the forest.

3. Alaska: Native Allotments

No property rights were created under the Alaska Native Allotment Act until all requirements of statute and regulation were satisfied during the lifetime of the applicant.

4. Alaska: Native Allotments--Withdrawals and Reservations: Authority to Make

The Government may withdraw lands occupied by Alaskan natives under alleged aboriginal possessory rights and thus preclude such lands from disposition under the Native Allotment Act.

APPEARANCES: John Silko, Esq., of Alaska Legal Services Corporation, for appellants; Alton G. Gaskill, Esq., Attorney in Charge, Office of General Counsel, Department of Agriculture, for respondent Forest Service.

OPINION BY ADMINISTRATIVE JUDGE RITVO

This is a consolidated appeal from substantially identical decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting Alaska Native allotment applications filed pursuant to the Act of May 17, 1906, as amended and supplemented, 43 U.S.C. §§ 271-1 through 270-3 (1970). The Allotment Act was repealed by section 18 of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. § 1617 (Supp. III, 1973), but applications pending in the Department at that time could be processed. These are such applications.

BLM rejected each application listed in the Appendix because it was not shown that any applicant had completed the five-year statutory requirement of substantial use and occupancy prior to the effective date of withdrawal of the land for forest purposes. Each decision cited and followed Larry W. Dirks, Sr., 14 IBLA 401 (1974). The decisions also stated that an authorized Forest Service officer had affirmatively determined that each of the parcels under application is not chiefly valuable for agricultural or grazing purposes.

The lands involved were withdrawn and embraced within the Tongass National Forest by Presidential Proclamations or Orders of August 20, 1902; September 10, 1907; February 16, 1909; April 1, 1924; June 10, 1925. All the lands within the exterior boundaries of the forest were closed to nonmineral entry under the public land laws, i.e., agricultural entries including those under the general homestead laws and the Native Allotment Act. The withdrawals did not

extinguish prior existing rights, nor prohibit entry under the provisions of the Forest Homestead Act of June 11, 1906. ^{1/} Allotments under the Alaska Native Allotment Act were also permitted where founded on occupancy prior to the establishment of the forest. Circular 491, 50 L.D. 27, 48 (1923). The amendatory act of August 2, 1956, 43 U.S.C. § 270-2 (1970), quoted below, gave statutory sanction to issuing allotments where use and occupancy of the land commenced prior to the establishment of the forest.

The Native Allotment Act, as amended and supplemented, in pertinent part, provides:

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 one hundred sixty acres of vacant, unappropriated, and unreserved nonmineral land in Alaska, to any Indian, Aleut, or Eskimo of full or mixed blood who resides in or is a native of Alaska, and who is the head of a family, or is twenty-one years of age * * *. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred sixty acres.

43 U.S.C. § 270-1 (1970).

^{1/} The Forest Homestead Act of June 11, 1906, 34 Stat. 233, was previously set forth in 16 U.S.C. ss 506 through 508. It was repealed on October 23, 1962, 76 Stat. 1157. The Forest Homestead Act, in pertinent part, provided as follows:

'The Secretary of Agriculture is authorized, in his discretion, upon application or otherwise, to examine and ascertain as to location and extent of land within permanent or temporary national forests * * * which are chiefly valuable for agriculture and which, in his opinion, may be occupied for agricultural purposes without injury to such national forests and which are not needed for public purposes * * *. Any settler actually occupying and in good faith claiming such land for agricultural purposes prior to January 1, 1906, and who shall not have abandoned the same, and the person, if qualified to make a homestead entry, upon whose application the land proposed to be entered was examined and listed, shall, each in the order named, have a preference right of settlement and entry * * *.'

Allotments in national forests may be made * * * if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes.

Added August 2, 1956; 43 U.S.C. § 270-2 (1970).

No allotment shall be made to any person * * * until such person has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years.

43 U.S.C. § 270-3 (1970).

Appellants argue that Dirks misapplies the law and should be reversed. They assert that section 8 of the 1884 Act, 23 Stat. 24, and section 27 of the 1900 Act, 31 Stat. 321, 330, acknowledged and protected the possessory rights of appellants' ancestors which should now be confirmed in them. They point out that the Tongass National Forest withdrawals excluded and excepted all parcels which were subject to Native possessory rights on the dates of the withdrawals. They maintain that it is not necessary that each Native in his own capacity, show five years' continual use and occupancy commencing prior to the creation of the forest. Collectively and severally they seek a hearing to disprove the classifications by the Forest Service, Department of Agriculture, that the land is not chiefly valuable for agricultural or grazing purposes.

Respondent (Forest Service, Department of Agriculture) submits that the Dirks decision is correct, that United States v. Arenas, 158 F.2d 332 (1947), and Woodbury v. United States, 170 F. 302 (1909), fully support the premise that the possessory right, which might have ripened into an allotment if all the requisites of that Act were complied with, terminates and dies with the death of the possessory right holder and that the right to possession is not alienable or inheritable. Citing Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955), respondent asserts, in effect, that all possessory rights may be cut off by Congress without right to compensation.

Remarking that appellants took issue with the requirement that land must be chiefly valuable for agricultural or grazing purposes, respondent states that:

Most of the use alleged by the appellants is gathering rather than the true meaning of agricultural husbandry. Little or no effort was claimed to have been made to plant, manage or fertilize the soil, nor did they meet the requirement of the homestead act (see p. 14).

The Forest Service is prepared to submit evidence which will support its conclusions that the land is not chiefly valuable for agriculture * * *.

[1] We note that prior to the 1956 amendment of the Alaska Native Allotment Act, supra, the Secretary had issued instructions for the processing of Native allotment applications consistent with the Forest Homestead Act. See, 49 L.D. 9 (1922). The present regulation 43 CFR 2561.0-8(c), is to the same effect and restates the 1956 amendment. It reads:

Allotments may be made in national forests if founded on occupancy of the lands prior to the establishment of the particular forest or if an authorized officer of the Department of Agriculture certifies that the land in the application for allotment is chiefly valuable for agricultural or grazing purposes.

[2, 3] In Dirks, supra, we held that the Alaska Native Allotment Act authorizes a nonalienable, non-transferable, and non-inheritable right of selection which terminates upon death. Only where an allotment selection has been made by the filing of an application and the applicant fully complies with the law and regulations and accomplishes all that is required to be done in his lifetime is the preference right to allotment earned and an inheritable right established. We pointed out that an Alaska Native Allotment may be made only upon vacant, unappropriated, unreserved public domain lands and, where all requirements were complied with prior to withdrawal, the allotment may issue. We specifically held that a Native who applies for withdrawn lands must show that he himself complied with the law prior to the date of withdrawal and that the Native may not avail himself of any period of use and occupancy by his ancestors to establish a right to allotment. Also see Christian C. Anderson, 16 IBLA 56 (1974); Georgianna A. Fischer, 15 IBLA 74 (1974); Silas Negovanna, 15 IBLA 408 (1974).

We adhere to our holding in Dirks--that an applicant for allotment must himself comply with all the requirements of law and he may not tack on the prior use period of his ancestors. We emphasize

the conclusion that the possessory right is not an inheritable property right which survives the death of the party previously in possession.

Several appellants were born prior to the withdrawal of the lands claimed by them; the great majority were born long after the lands were included within the forest. Those born prior to the inclusion of the land within the forest were of such tender age at that time that an assertion that they had commenced use and occupancy in their individual and exclusive capacities prior to withdrawal is patently unacceptable. Arthur C. Nelson, 15 IBLA 76 (1974). Nor has counsel suggested that they did. Thus for this reason, the applications must be rejected insofar as they are based upon the applicants' individual acts.

Appellants, however, also assert that their rights to allotments are derived from the activities and the possessory rights of their ancestors. Aside from the Native Allotment Act, Congress provided in section 8 of the Organic Act of May 1, 1884, supra:

That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them
* * *.

Section 27 of the Act of June 6, 1900, supra, provided that:

The Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use or occupation * *
*.

Congress alone has the power to dispose of and make all needful rules and regulations respecting the territory and properties of the United States, including the public lands. Constitution, Art. IV, sec. 3. The United States acquired the full legal title to the lands in Alaska upon purchase from Russia in 1867, 15 Stat. 539. Although Congress undertook the protection of the Natives, it did not grant them the legal title to the federal lands. The mere protection of the native in his use of land in accordance with his customs was not an appropriation of land for his benefit looking to the passage of title. Tee-Hit-Ton Indians v. United States, supra.

Tee-Hit-Ton was initiated under the special act of June 19, 1935, 49 Stat. 388, which conferred jurisdiction in the Court of Claims to examine, adjudicate, and render judgment on equitable

and other considerations, claims which the Tlingit and Haida Indians may have against the United States. Implicit was the congressional attitude that the Indians were not otherwise authorized any redress for the loss of or damage to certain lands occupied or claimed by them.

[4] Tee-Hit-Ton held that the Indians were not entitled to compensation under the Fifth Amendment for the government taking of certain lands and timber in and near the Tongass National Forest allegedly belonging to the clan. The Court made clear that neither section 8 of the Organic Act of May 1, 1884, nor section 27 of the Act of June 6, 1900, constituted a recognition by Congress of any permanent rights, *i.e.*, property rights of Indians in the lands occupied by them in Alaska. As to the protected 'permissive' occupancy, it held that Congress may extinguish that right in its own discretion and without compensation. The opinion in Edwardsen v. Morton, 369 F. Supp. 1359 (D.D.C., 1973), reiterated that the possessory right of the Alaskan Native can be terminated by the United States at will and the termination is not a taking compensable under the Fifth Amendment. Furthermore, the general occupancy of lands by natives under alleged aboriginal rights cannot serve as the basis upon which appellant may predicate a claim or right to an individual allotment. Dirks, supra. Nor is it necessary to consider whether the lands were occupied by natives in the exercise of alleged aboriginal rights or, if so occupied, whether the land was open and properly included the forest. Such questions are moot. The Alaska Native Claims Settlement Act of December 18, 1971, extinguished all aboriginal claims and rights of the natives, thus terminating whatever aboriginal rights, if any, the natives may have had. 43 U.S.C. §§ 1603, 1617 (Supp. III, 1973); Edwardsen v. Morton, supra.

We turn to appellants' argument that the Tongass National Forest withdrawals excluded and excepted all parcels which were subject to the occupancy of an individual native or to Native possessory rights existing on the date of withdrawal.

The protection of the occupancy of an individual (native) is not a tangible or inheritable property right. Dirks, supra. Thus, even if the forest withdrawals (in this case the same withdrawals for the Tongass National Forest involved in Tee-Hit-Ton) were not effective to terminate a native's protected use and occupancy, nevertheless, immediately upon death of the occupant the land would be blanketed into the withdrawal and closed to the initiation of use and occupancy by others. Starling Brokers, 6 IBLA 237 (1972); James

F. Rapp, 60 I.D. 217 (1948); Emma H. Pike, 32 L.D. 295 (1904). As we have seen, the United States has authority to withdraw lands occupied by natives under aboriginal possessory rights.

Appellants petitioned for a hearing to disprove the classifications of the Forest Service. The Secretary of Agriculture is the sole party authorized to classify lands within the forests, 16 U.S.C. § 471 et seq. (1970); no useful purpose could possibly be served by a hearing before the Department of the Interior for classification purposes. This Department has no authority to reverse or modify an agricultural classification of National Forest lands by the Department of Agriculture. Donald E. Miller, 15 IBLA 95, 81I.D. 111 (1974). The request for a hearing, therefore, is denied.

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

Martin Ritvo
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

APPENDIX

IBLA 75-38	Louis P. Simpson	AA-6568
	Hazel Marjorie Bennett	AA-6577
	Robert G. James, Sr.	AA-6581
	Cyril George	AA-6628
	Adeline M. Jim	AA-7004
	James D. Howard	AA-7007
75-404	George Dalton, Jr.	AA-6589
	Elizabeth Martin	AA-7921
	Peter Olaf Howard, Jr.	AA-7831
75-33	Lydia M. George	AA-6586
75-34	Jones G. Yeltatzie	AA-8016
75-35	Gerald Jackson, Sr.	AA-7542
75-40	Martha L. Decker	AA-7896
75-48	William E. Howard	AA-6307
	George R. Howard	AA-6319
	Louis R. Howard	AA-6320
	Frank See	AA-6527
	Kelly James	AA-6548
	Dennis Jackson	AA-6560
	Charles B. Jackson, Sr.	AA-6562
	Rollo Shaquanie, Jr.	AA-6579
	Carl Marvin, Sr.	AA-6606
	Charles Jimmie, Sr.	AA-6638
	Frederick Simpson, Sr.	AA-6749
	Richard K. Dalton, Jr.	AA-7003
	Cecelia Greenewald	AA-7023
	Florence E. Howard	AA-7027
	Rosie Edenshaw	AA-7035
	Robert W. George, Sr.	AA-7540
	Mary S. Lauth	AA-7541
	Thomas L. Morrison	AA-7545
	Woodrow F. Morrison	AA-7547
	Phillip Williams	AA-7635
	Ronald C. John, Sr.	AA-7744
	Elizabeth M. Gardner	AA-7746
	Harold R. Allard	AA-7826
	Charles M. John	AA-7828
	Henry W. Leask	AA-7870
	Harriet J. Knudson	AA-7872
	Cecil Delbert Charles	AA-7919
	Dennis H. Gray	AA-7924
	Rudolph Smith	AA-7930
	Ruby Smith	AA-7956
	Annie Turnmire	AA-7993
	Albert F. Lauth, Sr.	AA-7994

	Harvey F. Leask	AA-8008
	Nana P. Estus	AA-8021
75-78	Edward W. John	AA-7819
	Edward N. Kunz, Sr.	AA-6636
	Deborah A. Dalton	AA-6570
	Mary Willis	AA-6631
	Annabelle Peele	AA-7954
	Agnes M. Keller	AA-8309
75-96	Austin D. Hammond, Jr.	AA-7016
	Harriet P. McAllister	AA-6584
	Walter Williams	AA-6569
	Glenn G. Howard	AA-6321
	Lillian Hammond	AA-6635
	Robert R. Martin, Jr.	AA-7015
	Frank A. Young, Sr.	AA-7025
	William Jim	AA-7996
	Ester Littlefield	AA-6559
	Paul Johnny	AA-7859
	Francis D. Hanson	AA-7032
	Austin P. Hammond, Sr.	AA-6637
	Joseph C. Williams, Sr.	AA-7745
	Violet Hamilton (deceased)	AA-7034
	Carolyn L. Martin	AA-7012
75-354	Darlene T. Martin	AA-7888
75-384	William Nelson	AA-8011
	Lilly L. Demmert	AA-7882
	Albert Frank	AA-6563
	Charlie Joseph, Sr.	AA-7814
	Eddie L. Jack, Sr.	AA-7732
	Charlie Jackson, Jr.	AA-7021
	Scotty Jackson	AA-6550
	Pauline Jim	AA-8002
	Charlie Jim, Sr.	AA-8000
	Norman Edward Nelson	AA-8188
	William S. Sutton	AA-6750
	Virginia Amy Y. Demmert	AA-7874
	Frank R. Lauth, Jr.	AA-7822
	Frank Lauth, Sr.	AA-7739
	David S. Peele	AA-6587
	David Abraham	AA-6616
	Ida B. Gallagher	AA-7617
	Lawrence T. George, Sr.	AA-7926
	Charles B. Metz	AA-7817

75-397	Annie B. P. Esmino	AA-7877
75-398	Daniel P. Henry	AA-7018
75-419	George Jim, Sr.	AA-6561
75-425	Lyle T. Martin	AA-7892
75-432	Edith M. Rener	AA-6565
75-467	Sam Newman	AA-7917
75-505	Bernice George Peery	AA-7735
75-522	Willie Jackson	AA-6620
75-537	William A. James	AA-7622
75-538	Forest DeWitt, Sr.	AA-7895
75-539	Henry Katasse	AA-7630
75-576	Frank M. Williams	AA-7912

ADMINISTRATIVE JUDGE THOMPSON CONCURRING:

While in full agreement with the majority opinion, I wish to emphasize certain points. Neither section 8 of the Alaska Organic Act of 1884, 23 Stat. 24, nor section 27 of the 1900 Act, 31 Stat. 321, 330, which protected the occupancy of Alaska Natives and others at that time created the type of rights for which appellants contend in this case. They assert, in effect, that because those Acts protected Native occupancy, we are compelled to consider the occupancy of a Native's parents, grandparents, or other ancestors, in order to structure a right in an individual Native under the Alaska Native Allotment Act, which could not otherwise be recognized. While mindful of statutory rules of construction and policies favorable to Indians and Natives, we must apply the law regarding Native allotments as it appears Congress intended.

Appellants' arguments confuse concepts regarding recognition of aboriginal occupancy rights in Indian tribes in the other states with the preference right afforded to an individual Alaska Native by the Native Allotment Act. Tribal aboriginal occupancy rights are based upon the use and occupancy of the particular Indian tribes. To determine such rights, past use and occupancy of the ancestors of living tribal members is significant. Congressional enactments such as section 4 of the General Allotment Act of February 8, 1887, 25 U.S.C. ss 334 and 336 (1970), and the Native Allotment Act, however, are founded upon different considerations. Rather than a right or title for the entire group, including the ancestral group, being recognized, these Acts provide for the acquisition of title to public lands by individual Indians or Natives for their own individual use and benefit. The tribal right is considered to be obtained by and for the entire group, whereas the Allotment Acts for public land permit the individual Indian or Native to acquire a title in his own name. See discussion in Navajo Tribe of Indians v. State of Utah, 12 IBLA 1, 80 I.D. 441 (1973). The rights under both section 4 of the General Allotment Act and the Alaska Native Allotment Act are more akin to rights entitling others to acquire title to public land under such laws as the Homestead Laws and other settlement laws where only the right of the individual settler was recognized, than to aboriginal tribal occupancy rights. Id. In the absence of specific statutory authority recognizing widows, minor children, etc., after entry had been made, this Department has no authority to look to the occupancy of another, even where there is a blood or affinity tie, to establish the settlement or occupancy right of an individual seeking title under such a law. Cf. Kennecott Copper Corp., 8 IBLA 21, 79 I.D. 636 (1972).

We reject appellants' contention that the 1956 amendment to the Alaska Native Allotment Act recognized occupancy by others prior to the establishment of the national forests. The legislative history of that amendment shows that Congress intended nothing more than to ratify, in effect, existing administrative interpretations, to strengthen the requirement for actual use and occupancy by Natives, and to provide for alienation of allotment titles in certain circumstances. For example, the House Report on the provision stated:

Subsection (e) safeguards the national forests by enacting into law the substance of present regulations which prohibit homestead selections [allotments] in the national forests unless they are founded upon occupancy of the land prior to the establishment of the forest, or unless the land selected is determined by the Secretary of Agriculture to be chiefly valuable for agricultural or grazing purposes, and which require the homesteader to prove 5 years' occupancy of the land.

Under existing law, when an Indian or Eskimo is entitled to a townsite lot, he is issued a restricted deed that may be alienated with the approval of the Secretary of the Interior; therefore, there seems to be no sound reason why the same rights should not be extended to homestead allottees.

H.R. Report No. 2534, 84th Cong., 2d Sess. (June 29, 1956), p. 2.

The report also includes a letter from the Department of the Interior commenting on the proposed bill (H.R. 11696). With particular reference to the provision pertaining to the national forests, this letter stated at p. 4 of the report:

* * * Some fear was expressed during the subcommittee hearings that the authority to sell homesteads might encourage Indians and Eskimos to seek homestead allotments in the national forests for the purpose of selling them to others. This danger is effectively obviated by enacting into law the substance of the Department's present regulations on the subject which prohibit homestead selections in the national forests unless they are founded upon occupancy of the land prior to the establishment of the forest, or unless the land selected is determined by the Secretary of Agriculture to be chiefly valuable for agricultural or grazing purposes, and which require the homesteader to prove 5 years' occupancy of the land.

The fact which appellants have pointed to, that much of the Tongass National Forest had been set aside many years prior to the 1956 amendment to the Native Allotment Act, cannot serve as a vehicle to enlarge the meaning of the amendment as appellants would have us do. Their arguments would change the individual concept reflected in the allotment provisions to something never allowed. One difficulty with their argument may be illustrated by supposing a situation where a father or grandfather had used a wide area of land for his subsistence type of occupancy. Who among his children, if he had many, could claim a particular area if there were a conflict, or could choose from a possible large area what occupancy he is entitled to claim? 1/ This reflects the group or tribal type of aboriginal occupancy claim rather than an individual claim under a specific Act authorizing acquisition of title.

In any event, Congress by section 4 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1603(b) and (c) (Supp. II, 1972), has extinguished any Native aboriginal claims or Native claims of use and occupancy based upon statutes relating to Native use and occupancy. Therefore, any claims the Natives assert based upon the other Acts discussed in this decision cannot be accepted.

Joan B. Thompson
Administrative Judge

2/ Indeed, under the logic of appellants' theory one would not even have to establish a kinship relationship between the applicant and the person occupying the land prior to the forest withdrawal.

