

Editor's note: Reconsideration granted; decision modified -- See Warner Bergman (On Reconsideration), 31 IBLA 21 (June 20, 1977); Reconsideration granted; decision vacated -- See Warner Bergman (On Reconsideration), 60 IBLA 214 (Nov. 27, 1981)

WARNER BERGMAN

IBLA 75-388

Decided July 25, 1975

Appeal from decision of Fairbanks, Alaska, District Office, Bureau of Land Management, rejecting native allotment application F-17109.

Affirmed.

1. Alaska: Native Allotments

Substantial use and occupancy, as contemplated by the Native Allotment Act, must be by the native as an independent citizen for himself or as head of a family, and not as a minor child occupying or using the land in company with his parents.

2. Alaska: Native Allotments

The Native Allotment Act, as amended, requires that an applicant must occupy the land he claims for at least five years, without distinction as to whether or not the land is part of the national forest system or is part of the unreserved public domain. Even if that requirement of the Act were interpreted to apply only to national forest land, occupancy for five years is still required on unreserved public domain by regulations promulgated pursuant to the authority and discretion of the Secretary of the Interior.

3. Alaska: Native Allotments -- Alaska Native Claims Settlement Act: Generally

The requirement of five years' use and occupancy to receive an allotment under the Native Allotment Act must have occurred prior to December 18, 1971, as the Alaska Native Claims Settlement Act extinguished all such unperfected claims from that day forward.

4. Rules of Practice: Evidence -- Rules of Practice: Hearings

An evidentiary hearing will be denied where the information supplied by the applicant shows, as a matter of law, that the requirements of the statute have not been met.

APPEARANCES: William B. Schendel, Esq., Alaska Legal Services Corp., Fairbanks, Alaska.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Warner Bergman appeals from the February 5, 1975, decision of the Fairbanks, Alaska, District Office, Bureau of Land Management (BLM), rejecting appellant's Native allotment application on the basis that he had never used and occupied the land as required by the Native Allotment Act, 34 Stat. 197, as amended, 43 U.S.C. §§ 270-1 to § 270-3 (1970), repealed by § 18 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (Supp. III, 1973). Bergman applied for four separate parcels of land, parcels A, B, C and D. Parcels A, B and C were examined on September 22, 1973. Parcel D was examined on September 19, 1973, and on April 3, 1974. Appellant stated to the field examiner with respect to parcel A that he "had never been here before." All signs of occupancy with respect to parcel B were traceable to applicant's use of the parcel in August, 1973. Appellant stated to the field examiner that he had never used parcel C. The field examination of parcel D revealed that all signs of use were many years old.

[1] We note that appellant was born in 1950, and, according to the field report, is unmarried and still lives with his parents. In Arthur C. Nelson (On Reconsideration), 15 IBLA 76 (1974), we held that substantial use and occupancy as contemplated by the Native Allotment Act must be by the native independently for himself or

as head of a family, and not as a minor child occupying or using the land in company with his parents. ^{1/} We note also that two of the three affidavits in support of appellant's application state that his occupancy did not begin until 1968.

[2] Appellant argues that regulations requiring five years of use and occupancy by natives is contrary to the legislative history of the 1956 amendment to the original statute. The original act, 34 Stat. 197, did not require five years of use and occupancy by the native. Appellant cites the following portion of the legislative history in support of his argument:

Subsection (3) [which included what later became verbatim Sections 270-1 and 270-3 inclusive] of the enclosed substitute bill contains the subcommittee recommendations that are designed to safeguard the national forests. 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. 1956 U.S. Code Congressional and Administrative News, p. 4204.

Appellant's brief at 3.

That portion of the legislative history does seem to support appellant's argument. However, as noted in the legislative history, the

^{1/} One of the reports of field examination involved claims of other relatives of the appellant, as well as appellant's Parcel D. All of the relatives' claims, including those of appellant's mother and grandmother were found to have been used extensively and were recommended for patent. Only very old signs of use were found on Parcel D. The examiner reported that appellant participates with his parents in their subsistence activities, and that when he does so he uses the fish camp on his mother's claim.

1956 amendment enacted into law the Department's regulations on the subject. For many years prior to the 1956 amendment, the Department required five years of use and occupancy of any land claimed under the Act. See, e.g., Allotments of Public Lands in Alaska to Indians and Eskimos, 55 I.D. 282, 285 (1935); 43 CFR 67.13 (1938); 43 CFR 67.10 (1954). Therefore, occupancy and use for five years is required by the statute and its amendments. Even if the statute were to be interpreted in a contrary manner, it is clear that the present regulations, 43 CFR Subpart 2561, are the result of a valid exercise of the Secretary's authority. The original act authorizes the Secretary of the Interior to make allotments "in his discretion and under such rules as he may prescribe." 34 Stat. 197. It is eminently reasonable to require at least five years use and occupancy prior to the issuance of patent. Therefore, even if the Native Allotment Act does not expressly require five years use and occupancy prior to the issuance of patent, valid regulations of the Secretary of the Interior do.

[3] All five of those years must have been completed prior to December 18, 1971, the date of enactment of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 et seq. (Supp. III, 1973). Section 4 of that Act, 43 U.S.C. § 1603(c) (Supp. III, 1973), provides that:

All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

While section 18 of the Act, 43 U.S.C. § 1617 (Supp. III, 1973) preserves claims based on the Native Allotment Act which are pending on December 18, 1971, it is clear that no rights whatever can be gained by attempted compliance after that date. Therefore, appellant's independent use, if any, must have been initiated by 1966. We note that two of the three affidavits in support of his application state that his occupancy began in 1968.

Appellant's request for a hearing must be denied. His alleged occupancy cannot be considered to have begun before 1968. Since that occupancy was less than five years on December 18, 1971, as a

matter of law, his application must be denied. Since an evidentiary hearing would serve no purpose, it is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Frederick Fishman
Administrative Judge

