

Editor's note: Reconsideration granted in part; remanded to BLM by order dated Dec. 10, 1980 -- See 22 IBLA 201A th D below.

JAMES S. PICNALOOK, SR.
MABEL BULLARD

IBLA 75-112

Decided October 15, 1975

Appeals from decisions of the Fairbanks District Office, Bureau of Land Management, rejecting Native allotment applications F-12561 and F-18179.

Affirmed.

1. Alaska: Native Allotments

Lands withdrawn from appropriation under the non-mineral public land laws are not open to the initiation of Alaska Native Allotment claims. No rights may be initiated under the Alaska Native Allotment Act by occupation and use of lands not open to appropriation.

2. Alaska: Native Allotments

Substantial use and occupancy, as contemplated by the Alaska 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.

3. Rules of Practice: Hearings

An evidentiary hearing will be denied where the facts are not in issue and there is no chance of development of further facts not already of record upon which a decision may be predicated.

4. Alaska: Native Allotments

An allotment right is personal to one who has fully complied with the law and regulations. A Native who applies for withdrawn lands must show that he did comply with the law prior to the effective date of withdrawal, and he may not tack on his deceased parents' use and occupancy to establish a right for himself prior to the withdrawal.

5. Alaska: Native Allotments

The Alaska Native Claims Settlement Act of December 18, 1971, extinguished all aboriginal claims and rights of the natives and terminated whatever aboriginal rights, if any, the natives may have had.

APPEARANCES: John Scott Evans, Esquire, of Alaska Legal Services Corporation, for appellants.

OPINION BY ADMINISTRATIVE JUDGE RITVO

The Fairbanks District Office, Bureau of Land Management rejected James Picnalook's and Mabel Bullard's respective Alaska allotment applications, filed pursuant to 43 U.S.C. §§ 270-1 through 270-3 (1970), because the land applied for was withdrawn on June 27, 1925, by Executive Order 4257, for lighthouse purposes and closed to all forms of appropriation under the general land laws, including the Alaska Native Allotment Act. The Picnalook decision recited that applicant was born in 1914 and could not have initiated use and occupancy at the tender age of 6 in order to have completed 5 years' use and occupancy prior to the withdrawal. The Bullard application was rejected because the land was withdrawn 10 years before she was born in 1935. The appeals of the parties are consolidated for decision purposes.

In an affidavit submitted with his brief on appeal Picnalook states that his family used the site before and after he was born, that he was orphaned in 1918 at the age of four, and that after several years in a nearby orphanage, he returned each summer since about 1921, at first with an uncle, to catch fish, and that several years ago he built a lumber house there.

[1] In order to establish a right to an allotment for land withdrawn after use and occupancy was initiated, a native must show that his use and occupancy was initiated 5 years prior to a withdrawal of the land from such appropriation. Larry W. Dirks, Sr., 14 IBLA 401 (1974). If the time between use and occupancy and withdrawal is less, an application for an allotment must be rejected. Christian G. Anderson, 16 IBLA 56 (1974).

Thus, Picnaloock would have had to establish his use and occupancy before June 27, 1920, in order to complete the 5-year period prior to the date of the withdrawal. Since he was born on August 19, 1914, he would then have been just under 6 years old.

We are not suggesting that at the commencement of occupancy and use an applicant must be 21 years old or the head of the family. However, he must be old enough to exert independent use and control of the land and must be occupying the land to the potential exclusion of all others. The criterion of 21 years or head of a family must be satisfied when the application is granted. Natalie Wassilliey, 17 IBLA 348 (1974).

[2] The contention that a child of that age could have exerted independent use and control of the land to the exclusion of others cannot be accepted. Susie Ondola, 17 IBLA 359 (1974); Helen F. Smith, 15 IBLA 301 (1974); Arthur C. Nelson, 15 IBLA 76 (1974).

Ms. Bullard, having been born 10 years after the date of withdrawal, could not have initiated her use and occupancy while the land was open to native allotment. George Ondola, 17 IBLA 363 (1974). Therefore, for these reasons the applications were properly rejected.

[3, 4, 5] Appellants further contend that the lands applied for were occupied and used by their forbears under aboriginal title and that such use should inure to their benefit. They request hearings to submit evidence of such use and otherwise present substantially similar arguments to those discussed in Ann McNoise, 20 IBLA 169 (May 7, 1975). There it was held:

1. An evidentiary hearing will be denied where the facts are not in issue and there is no chance of development of further facts not already of record upon which a decision may be predicated.
2. An allotment right is personal to one who has fully complied with the law and regulations. A Native who applies for withdrawn lands must show that he did comply with the law prior to the effective date of withdrawal, and he may not tack on his

deceased parents' use and occupancy to establish a right for himself prior to the withdrawal.

3. The Alaska Native Claims Settlement Act of December 18, 1971, extinguished all aboriginal claims and rights of the natives and terminated whatever aboriginal rights if any, the natives may have had.

These holdings are equally applicable to these appeals.

Finally appellants contend that the Secretary's guidelines requiring a native to show that his use and occupancy was initiated 5 years prior to a withdrawal of the land from appropriation violated § 4 of the Administrative Procedure Act. 5 U.S.C. § 553 (1970 ed.) This contention is without merit. The guideline is concerned with public property. Matters relating to public property are expressly excepted from the requirement of section 4 by the introductory paragraph of the section. McNeil v. Seaton, 281 F.2d 931, 936 (D.C. Cir. 1960); Duesing v. Udall, 350 F.2d 748, 752, fn. 4 (D.C. Cir. 1965), cert. denied 383 U.S. 912 (1966); Richard K. Todd, 68 I.D. 291, 300 (1961).

Therefore, pursuant to the authority delegated by the Secretary to the Board of Land Appeals, 43 CFR 4.1, the decisions are affirmed.

Martin Ritvo
Administrative Judge

I concur:

Frederick Fishman
Administrative Judge

ADMINISTRATIVE JUDGE GOSS, CONCURRING SPECIALLY:

I have reservations about the proposition that Congress intended to deprive an orphan of the opportunity to assert his own claim to property homesteaded during his lifetime with his family under the Alaska Native Allotment Act, 43 U.S.C. § 270-1 et seq. (1970). This would seem to defeat the entire purpose of the statute, i.e., to permit "the head of a family" to acquire a "homestead" for "his heirs in perpetuity."

The Department has interpreted its regulations and the statute to mean that it is not necessary for an applicant to meet the age or head of family qualification requirement until the time the allotment is granted. In his Memorandum to the Director, Bureau of Land Management, October 18, 1973, the Assistant Secretary, Land and Water Resources, listed among the qualifications of applicants:

3. Must be the head of a family or 21 years of age only at the time that the allotment is granted. Therefore, an applicant may be under 21 years of age or not the head of a family before or at the date his application was filed with the Department. (Emphasis added.)

If the head of the family lives to patent the land, then his surviving spouse and orphans would be among the heirs who enjoy ownership, protected by the presumed benevolence of the Government. Under Qualification #3, supra, it should be clear that an applicant need not have been head of a family during the crucial period. Under the majority opinion and Board decisions cited, however, if the family head dies after completing the required occupancy, a child who lived on the family homestead during the entire crucial period may not later obtain patent. The Board thus follows the Secretarial interpretation that an applicant need not have been 21 during the 5-year period, but in contradistinction thereto the Board requires that an applicant has been independent -- i.e., the head of a family of one person or more -- during the entire period. Board decisions on the point have not discussed the issue in detail. I feel that the turn taken by the Board should be reexamined -- not with regard to the prohibition against inheritance of rights from a deceased parent, but with regard to whether one who is now 21 may secure an allotment on the basis of shared use and occupation of a family homestead during his early youth.

Under the other homestead laws and regulations, ample provision is made for widows and orphans, e.g., 43 U.S.C. § 164 (1970). 1/

1/ Section 164 provides in part:

"No certificate shall be given or patent issued therefor until

The Secretary's regulations pursuant to the Alaska Native Allotment Act should be construed as according similar protection to Alaska Native surviving spouses and orphans, 2/ if this may be done without doing violence to the basic statute or the regulations.

The statutory language at issue is the amendment set forth in section 3 of Pub. L. No. 84-931 (1956), 70 Stat. 954:

Sec. 3. No allotment shall be made to any person under this Act until said 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. (Emphasis added.)

The 5-year occupancy provisions of section 3 were based on 43 CFR 67.7 (1956) and were incorporated into statute in order (1) to safeguard the national forests by preventing acquisition primarily for the purpose of future sale and (2) to indicate that occupancy must be substantially continuous, with intermittent use excluded. S.R. Rep. No. 2696 at 4 and 5, H.R. Rep. No. 2534 at 2, 84th Cong., 2nd Sess. Obviously the interest of surviving spouses and orphans can be protected without encouraging acquisition for resale and without encouraging intermittent occupancy. That Congress intended to promote the "family" interest is shown by the words "head of the family" in section 1 of the statute.

The Departmental regulation establishing the necessity for a 5-year occupancy and use was based upon the Act of May 17, 1906,

fn. 1 (continued)

the expiration of three years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry, or if he be dead his widow, or in case of her death his heirs or devisee, or in case of a widow making such entry her heirs or devisee, in case of her death, proves * * * that he, she, or they have a habitable house upon the land and have actually resided upon and cultivated the same for the term of three years * * *." (Emphasis added.)

2/ That the homestead allotment law for Alaska Natives should be construed in pari materia with other homestead provisions is shown in S.R. Rep. No. 2696, 84th Cong., 2nd Sess. at 2 (1956):

"As to permitting homestead allotments on lands valuable for coal, oil, or gas, non-Indians in Alaska may homestead such lands (act of March 8, 1922; 48 U.S.C. 376), and equity would seem to require that Indians be accorded equal opportunity. * * *." (Emphasis added.)

which Act required only that the land be "occupied" by the applicant. ^{3/} The original statute imposed no specific time during which the occupancy was required. The "occupied" requirement of the 1906 Act was apparently based on the Act of May 17, 1884, 23 Stat. 24, 26, which provided in part:

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 but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress. (Emphasis added.)

The 1884 Act was enacted as a protection for all natives -- not just heads of families or those over 21. Obviously, minor children were deemed to be protected in their "occupation" of the land in the same way as their parents.

The Allotment Act should be liberally construed in accordance with Choate v. Trapp, 224 U.S. 665, 675 (1911):

[I]n the Government's dealings with Indians the rule is exactly the contrary [to the general rule]. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years * * *.

Nowhere in the legislative history is there any indication that the 1956 amendment to the Allotment Act, or the prior Departmental regulation, was ever intended to prevent an occupancy and use from being made by or on behalf of a spouse or child. To hold otherwise is to find a Congressional intent to foreclose an entire group, which group has suffered the unfortunate occurrence of death of the family head before allotment. No public purpose would be served by denying the allotment to a surviving member of the group, who is otherwise qualified. I submit that a bill so providing would never have passed Congress; a regulation which expressly so provided would never be promulgated by the Secretary.

^{3/} The Act stated in part: "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 and sixty acres." (Emphasis added.)

While the Secretary has broad discretionary authority under the Allotment Act, his departmental regulation must be construed, if possible, as intended to be in harmony with the fiduciary duties of the Federal Government. Regulation 43 CFR 2561.0-5, which interprets the Allotment Act, has been misconstrued, and the wording of companion section 2561.0-2 has been overlooked. Those sections provide in part:

§ 2561.0-2 Objectives.

It is the program of the Secretary of the Interior to enable individual natives of Alaska to acquire title to the lands they use and occupy and to protect the lands from the encroachment of others.

* * * * *

§ 2561.0-5 Definitions.

As used in the regulations in this section,

(a) The term "substantially continuous 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.)

It seems crystal clear that "others" in section 2561.0-5 was intended to have the same meaning as "others" in 2561.0-2, i.e., those who are not members of the "family" and who might be encroaching. A wife or child who is not independent cannot encroach upon a father. See Minnie E. Wharton, 79 I.D. 6, 11 (1972), which cites Springer v. Young, 14 Ore. 280, 12 P. 400, 404 (1886). 4/

4/ In Springer, the Court states:

"Neither husband nor wife can hold, adversely to each other, premises of which they are in the joint occupancy as a family. Hendricks v. Rasson, 53 Mich. 575; S.C. 19 N.W. Rep. 192. In such case the possession of neither can be regarded as adverse to the other while they jointly reside upon and occupy such premises. * * * In such case the law will not subject either husband or wife to a loss of property because such person has not resorted to legal proceedings, but will rather hold that the possession of each was in subordination to such rights in the property as were possessed by the other party." (Emphasis added.)

The majority holds that a non-independent child does not substantially "use" and "occupy" the family homestead along with the child's parents. Presumably the holding is based on the proposition that a child's use is not potentially exclusive as to the family head, nor as to "others." There is nothing in statute or regulation, however, which accords the family head an exclusive possessory right, as against non-independent family members. See Act of May 17, 1884, *supra*. The Act of May 17, 1906, *as amended*, provides: "Any person qualified * * * shall have the preference right to secure by allotment the nonmineral land occupied by him * * *." (Emphasis added.) Under the Act, the family head is not an entryman; his interest is more inchoate. See 43 CFR 2561.1(e), (f). By the express language of section 2561.0-5 an applicant's use is for the "livelihood" and "well being" of himself and "his family." A head of the family is hardly providing for the "livelihood" and "wellbeing" of his family and "his heirs in perpetuity" 5/ if his use is "potentially exclusive" of their use. Prior to the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. § 1601 *et seq.* (Supp. III, 1973), Alaska natives (including wives and children) had coextensive possessory rights which "shall not be disturbed." Act of May 17, 1884, *supra*.

If use exclusive of other family members is required, it would seem the following would also be barred:

1. A family head who used the homestead with his spouse and children.
2. A surviving spouse who had used the homestead together with the deceased family head.
3. A 26-year old who had formerly used the family homestead together with the deceased head of the family.

Surely a non-independent person who was an adult during the 5-year period, was intended to be protected in a claim to the family homestead. If this is so, then the position of the teenager who helped work the homestead and the child of tender years come into focus. Did Congress intend that they lose the right to occupy their family homestead only if they were orphaned at a younger age?

As to the teenager or the child of tender age who uses the land for home and sustenance together with a parent, I feel that such use as well as that of the parent can be exclusive of "others," in the sense of outsiders. Implicit in our law is the concept that minors must not be discriminated against and that actions are routinely taken by parents, guardians and others on behalf of minors.

5/ 43 U.S.C. § 270-1 (1970).

Encroaching "others" are, as a matter of course, excluded for the resident minor as well as by an older or independent minor. A minor who enjoys the benefit of such exclusion in fact should also enjoy such benefit in law. Minors are persons under the Constitution, "possessed of fundamental rights which the State must respect." Tinker v. Des Moines School District, 393 U.S. 503, 511 (1969). If a homesteader may hire a hand to assist with farming or help build a house, then a minor can likewise benefit from exclusionary actions by his parent or others.

If section 2561.0-5 were construed so that use by a young child with his parent is not considered exclusive of others, then the phrase "possession and use * * * at least potentially exclusive of others" should be interpreted as intended to refer to use during a period when the applicant was temporarily under some disability -- as is the situation herein. "Potentially exclusive" use and possession by a child would become actually exclusive when the child attains his independence and majority, and survives as the head of the family.

If such is not the construction, then it would appear the concept "potentially exclusive of others" is not capable of interpretation. Such imprecise regulatory language should most certainly not be used as the sole underpinning for a construction that the Secretary intended to exercise his Congressional delegation of authority by discriminating against a class which would have benefited but for the untimely death of the family head. The Board has repeatedly ruled that where a regulation is unclear it will not be applied to adversely affect preexisting rights. See e.g. Mary T. Arata, 4 IBLA 201, 78 I.D. 397 (1971); Clark County School District, 18 IBLA 289, 313 (1975) (dissenting opinion).

To summarize, if the family head is not able to exercise his preference right to the homestead on behalf of his family and "heirs," 6/ then another member 7/ of the family (who at time of allotment meets the requirements expressed in the 1973 Secretarial interpretation, supra) should be permitted to obtain the land for the family. I submit that in the 1973 Memorandum, the Secretary has interpreted the statute to recognize the truth that heads of

6/ Section 270-1, supra.

7/ If a group of non-independent children survive the head of the family, there are additional questions as to who gets title. If both parents die and there is more than one child who has used the land for the 5-year period, then under the Secretary's broad authority over federal lands, either the allotment could be made to the group or to one of the group in his capacity as new head of the family.

families do change as time goes on. It would be unrealistic to ignore this fact of life by denying an applicant the benefit of his own earlier use and occupation.

For appellant Picnalook, however, I have reluctantly concluded that he has not made a sufficient showing of 5 years "substantially continuous use and occupancy" prior to the withdrawal. The appellant states that his family used the land "I think even before I was born." Even assuming that the family has used the property during most of the period since appellant's birth in 1914, the use was interrupted for approximately 3 years (1918-21) while appellant was in an orphanage. Appellant's use of the land upon his return and prior to the 1925 withdrawal was less than the required period of 5 years. 43 U.S.C. § 270-3 (1970).

As to appellant Bullard, I concur in the majority opinion.

Joseph W. Goss
Administrative Judge

22 IBLA 201

December 10, 1980

IBLA 75-112 : F 12561, F 18179
:
22 IBLA 191 : Alaska Native Allotments
:
JAMES S. PICNALOOK, SR. : Petition for Reconsideration
MABEL BULLARD : Granted in part; Denied in part

ORDER

In James S. Picnalook, Sr., 22 IBLA 191 (1975), the Board affirmed separate decisions of the Fairbanks District Office, Bureau of Land Management, rejecting the Native Allotment applications of James S. Picnalook, Sr., and Mabel Bullard. Both applicants petitioned for reconsideration of the Board's decision and requested an oral hearing pursuant to Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976).

By this order we grant reconsideration of our decision insofar as it affirmed the rejection of the Native Allotment application of James S. Picnalook, Sr. His application was rejected on the ground that he had not shown that he had independently used and occupied the land for 5 years prior to the withdrawal of his allotment lands from appropriation by Executive Order 4257 on June 27, 1925. The Board noted that appellant Picnalook would have had to have started his independent use of the land in 1920 at age 6, when he was in an orphanage, in order to meet the 5-year requirement and that he had indicated that he had not returned to use the land after his parents deaths until the summer of 1921.

Since the Board's decision in this case, the Secretary of the Interior by Secretarial Order No. 3040 of May 25, 1979, ruled that a Native applicant may be granted an allotment on withdrawn lands if all other requirements have been met, when the applicant has merely commenced the required use and occupancy prior to the withdrawal. See Bella Noya, 42 IBLA 59 (1979). In addition, the Board has recently ruled that Native Allotment applicants who were 8 years old and older at the date that the land was segregated from entry and who assert independent use and occupancy of the land, should be afforded notice and an opportunity for a hearing to prove the adequacy and independency of their use and occupancy rather than having the application rejected simply because of the applicant's age at the segregative date. William Bouwens, 46 IBLA 366 (1980). Appellant was almost eleven at the time of the withdrawal, and while the potential exclusivity of his use must be open to question, we feel that he should be afforded an opportunity to prove it at a hearing. Therefore we will remand this case to BLM and BLM should initiate a contest proceeding pursuant to 43 CFR 4.451.

22 IBLA 201A

As to the allotment application of Mabel Bullard, we must deny the petition for reconsideration and request for a hearing. Appellant Bullard's application was rejected because the record showed that she was born in 1935, ten years after withdrawal of the land applied for and therefore could not have initiated use and occupancy while the land was open to allotment. In the petition for reconsideration appellant Bullard urges that she is continuing to use land which was used by her forebearers. In our 1975 decision we considered and rejected appellant Bullard's claim as to ancestral use as well as other arguments presented then and again as support for the petition for reconsideration. We decline to reconsider them now. An allotment right is personal to the Native who has fully complied with the law and regulations. An applicant born after the date of withdrawal of the land in her application can not establish the required use and occupancy and her application must be rejected. Pence v. Kleppe, supra, stands for the proposition that due process requires a hearing before rejection of a Native allotment application where issues of material fact are in dispute. Where, as in this case, legal conclusions may be reached upon undisputed facts and there has been no proffer of further facts which could compel a different legal conclusion, an allotment application may be rejected as a matter of law without a hearing. Norma E. Richards, 43 IBLA 288 (1979); John Moore, 40 IBLA 321 324 n.1, 86 I.D. 279, 280 n.1 (1979); Donald Peters, 26 IBLA 235, 241 n.1, 83 I.D. 308, 311 n.1 reaffirmed, Donald Peters (On Reconsideration), 28 IBLA 153, 83 I.D. 564 (1976).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is granted in part and denied in part. The case of James S. Picnlook is remanded for appropriate action.

James L. Burski
Administrative Judge

I concur:

Bernard V. Parrette
Chief Administrative Judge

ADMINISTRATIVE JUDGE GOSS CONCURRING:

I concur regarding Mabel Bullard.

As to Picnalook, I agree the case should be remanded. Departmental requirements have been substantially liberalized since the case was decided in 1975. E.g. Secretarial Order No. 3040, May 25, 1979, under which use and occupancy after a withdrawal may qualify providing it commenced prior to the withdrawal and was substantially continuous.

In his affidavit on appeal, Picnalook stated that his allotment is on the far end of the spit and that BLM has the allotment located in the wrong place. On remand, this matter should be resolved before further consideration of the claim. No statement or certification is of course relevant unless it relates to the land concerned.

Picnalook states that he with his family have used "the land at the end of the spit, across from Teller" all of his life, except for three years when he was in an orphanage. That period commenced in 1918 when he was 4 and his parents died of the flu.

Picnalook did not abandon the rights he derived from his own occupancy along with his parents. See discussion in James S. Picnalook, Sr., 22 IBLA 191, 195-201 (1975) (Dissent). There is nothing in the record to indicate that anyone other than Picnalook has ever claimed the land. The authorized officer, Bureau of Indian Affairs, has certified to Picnalook's qualifications, occupancy, 1/ posting and that the claim does not infringe on other Native claims or community Native use. 43 CFR 2561.1(d).

Under the more liberal Departmental policy evidenced by the Secretarial Order, I would hold that on the face of the record, Picnalook's occupancy has been substantially continuous and potentially exclusive of others for the required period. I do not believe that a hearing is required unless there are problems regarding location of the land which cannot be otherwise resolved, or unless there is some other reason to question the record.

Joseph W. Goss
Administrative Judge

1/ The certification should be reviewed in connection with appellant's statement that BLM has the allotment in the wrong place.

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22 IBLA 201D

