

PAUL KOYUKUK

IBLA 75-420

Decided October 22, 1975

Appeal from decision of the Fairbanks District Office, Bureau of Land Management, rejecting Alaska Native allotment application F-17644.

Affirmed.

1. Alaska: Native Allotments

The Alaska Native Allotment Act, as amended and supplemented, requires that an applicant must use and occupy the land claimed for at least five years, whether or not the land is part of the national forest system or is part of the unreserved public domain. Even if the Act were to be construed as not expressly requiring five year use and occupancy prior to issuance of an allotment for unreserved public domain lands, Departmental regulations promulgated pursuant to the authority and discretion of the Secretary of the Interior impose such a requirement.

2. Alaska: Native Allotments

The preference right created under the Alaska Native Allotment Act is not a property right protected by the Fifth or Fourteenth Amendments to the United States Constitution, and consequently, a Native allotment applicant has no constitutional right to a hearing. While the applicant is not entitled to a hearing as a matter of right, one may be held at the discretion of the Secretary of the

Interior, but when the applicant fails to allege any facts which would justify a hearing and the sole issues presented are legal in nature, an evidentiary hearing is not required.

3. 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.

APPEARANCES: William B. Schendel, Esq., Alaska Legal Services Corporation, Fairbanks, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Paul Koyukuk has appealed from a decision of the Fairbanks District Office, Bureau of Land Management (BLM), dated February 4, 1975, rejecting his Alaska Native allotment application filed pursuant to the Act of May 17, 1906, as amended and supplemented, 43 U.S.C. § 270-1 through § 270-3 (1970).

Appellant filed his application with the Bureau of Indian Affairs on November 22, 1971, 1/ for a 160-acre parcel of land determined to be the NE 1/4 of section 19, T. 17 N., R. 20 W., F.M., Alaska. The application was filed with the BLM on April 3, 1972. In his application, appellant alleged that he had occupied and resided on the parcel seasonally since 1950 and had used the land for hunting and trapping purposes. A tent frame built in 1960 was claimed as an improvement.

A field report was developed in response to appellant's application. In his report the field examiner stated that appellant was born on June 26, 1948, and is presently living with his parents in the village of Allakaket, Alaska. Following a preliminary examination on June 5, 1973, a complete land investigation was conducted on September 24, 1973, in the company of appellant, and another Native, Simon Ned, who was familiar with the area. 2/ The other

1/ The Alaska Native 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 allotment applications pending in the Department at that time could be processed.

2/ Contrary to counsel's allegation, the identity of the Native who accompanied appellant and the field examiner was disclosed

Native informed the examiner that the parcel had once been a camp of Grafton Koyukuk, appellant's father. The appellant informed the examiner that while his father had used the site many years ago, he himself had never used it, and the only time he had ever been on the parcel was during the Government's field examinations in 1973.

The examiner found an old porcelain dinner plate and a tobacco can lying within a decayed tent frame. The logs that were part of the frame were aged and rotted. There was also a freshly cut tree stump in the area.

Based on his field investigation, the examiner concluded the following:

Evidence at the campsite, the applicant's lack of knowledge about the newer cut stump, and the applicant's personal statements, all clearly indicate that he has never used and most likely never been on this parcel. The more freshly cut stump would indicate that others have been using this parcel, possibly to trap in the lake as birch are quite often cut for beaver bait in lakes such as this one.

The applicant, Paul Koyukuk, clearly, has not met the criteria for use and occupancy as set forth in 43 CFR 2561, the Native Allotment Act of 1906, and policy guidelines * * *. He has attempted to substantiate a claim to a parcel based upon his father's use.

Further, any claim to exclusive use is doubtful as there are signs of use, i.e. the cut stump on the lake in the southeastern quadrant of the parcel that the applicant had no knowledge of. These signs of use would tend to indicate others are using this area for trapping.

For the above reasons, the examiner recommended that appellant's application be rejected.

By letter dated May 28, 1974, the BLM informed appellant that Departmental regulations 43 CFR 2561.0-5(a) and (b) provide that to qualify for a Native allotment, an applicant must show 5 years of substantially continuous use and occupancy, at least partially

fn. 2 (continued)

in the field report which was available for inspection by appellant.

exclusive of use of the land by others, ^{3/} and that a review of the field report showed that appellant had not satisfied the use and occupancy requirements set forth in the regulations because he had never, in his own right, used and occupied the claim. By letter dated September 30, 1974, appellant was given 60 days to submit additional evidence in support of his allotment claim. Nothing further was submitted by appellant.

Thereafter, by decision dated February 4, 1975, the BLM held that substantial use and occupancy, as contemplated by the Alaska Native Allotment Act, must be by a 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, citing Arthur C. Nelson (On Reconsideration), 15 IBLA 76 (1974). Accordingly, appellant's application was rejected and the claim canceled.

In his statement of reasons on appeal, appellant argues that: (a) the Act of May 17, 1906, as amended and supplemented, requires the showing of 5-years use and occupancy only if the Native allotment application is filed for lands within a national forest; and (b) if appellant is required to show five years use and occupancy, he is entitled to and requests a hearing to present his case prior to any final termination of his preference right.

[1] In his first argument, appellant maintains that the five year use and occupancy requirement is limited to allotment applications for lands within national forests. Since appellant does not request an allotment for national forest lands, he argues that he is not required to show 5-years use and occupancy of the land. We find this argument to be without merit. Neither the language of the Act nor the legislative history support appellant's position. Heldina Eluska, 21 IBLA 294 (1975). In any case, the Act as originally passed by Congress in 1906 and as amended and supplemented in 1956, authorizes the Secretary of the Interior to make allotments "in his discretion and under such rules as he may prescribe." 34 Stat. 197 (1906). The requirement of use and occupancy for 5 years has been such a "rule" at least since 1935. Allotments of

^{3/} 43 CFR 2561.0-5(a) provides that,

"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."

43 CFR 2561.0-5(b) defines "Allotment" to mean, "an allocation to a Native of land of which he has made substantially continuous use and occupancy for a period of five years * * *" (Emphasis added.)

Public Lands in Alaska to Indians and Eskimos, 55 I.D. 282, 285 (1935); see also 43 CFR 67.13 (1938 ed.). This regulation has been continued in substantially the same form until the present, 43 CFR 2561.2, although amended from time to time. The regulation and its successors clearly apply to all lands for which Alaska Native allotment applications were made. Therefore, even if the Act were to be construed as not expressly requiring 5-year use and occupancy prior to issuance of an allotment for unreserved public domain lands, valid regulations of the Department do impose such requirement. Heldina Eluska, supra.

In his second argument, appellant maintains that his preference right to a Native allotment is a protected property interest under the Fifth Amendment to the United States Constitution which he can not be deprived of without due process of law, namely, a hearing on the merits of his case. Appellant also urges that he is being denied equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution because other types of public land claimants are given a right to a hearing while no such right is given to Native allotment applicants. Appellant maintains that this allegedly unconstitutional conduct by the Department violates its trustee obligation owed to appellant as an Alaska Native.

[2] All of appellant's arguments were recently rejected by the District Court of Alaska in Pence v. Morton, Civ. No. A74-138 (D. Alaska April 8, 1975), appeal pending, in which the court held that an Alaska Native's preference right to an allotment was not a property right protected under the Due Process Clause, and consequently, no constitutional right to a hearing existed. The court also found the equal protection argument advanced by the plaintiff to be without merit. See also United States v. Walker, 409 F.2d 477, 481 (9th Cir. 1969); Ferry v. Udall, 336 F.2d 706, 714 (9th Cir. 1964); Anna Opheim, 20 IBLA 290, 291 (1975); Ann McNoise, 20 IBLA 169, 171 (1975).

While appellant is not entitled to a hearing as a matter of right, one may be held at the discretion of the Department. Appellant had ample opportunity to respond to the field examiner's statements and to provide sufficient evidence to support his allotment application. Appellant, however, has failed to allege any additional facts which would justify initiation of a hearing. Accordingly, appellant's request for a hearing is denied. Anna Opheim, supra.

[3] We hold that the decision below was proper as appellant failed to establish that he satisfied the 5-year requirement of substantially continuous use and occupancy in his own right. Arthur C. Nelson (On Reconsideration), supra; Larry W. Dirks, Sr., 14 IBLA 401, 402 (1974).

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

Martin Ritvo
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

I concur in the result:

Joseph W. Goss
Administrative Judge

