

JACK GOSUK

IBLA 76-36

Decided November 24, 1975

Appeal from a decision by the Alaska State Office, Bureau of Land Management, rejecting Alaska Native allotment application AA 7411.

Affirmed.

1. Alaska: Native Allotments

The requirement of use and occupancy by an applicant under the Alaska Native Allotment Act contemplates possession at least potentially to the exclusion of all others and not mere intermittent use. The burden to present clear and credible evidence to establish entitlement is upon the applicant.

2. Alaska: Native Allotments

The requirement of "substantially continuous use and occupancy of the land for a period of 5 years" applies to all allotments under the Alaska Native Allotment Act, regardless of where the land is situated.

3. Alaska: Native Allotments

An applicant under the Alaska Native Allotment Act does not have a due process right under the Constitution to a hearing before an Administrative Law Judge on the rejection of his application.

APPEARANCES: Henry W. Cavallera, Esq., and Frederick Torrissi, Esq., Alaska Legal Services Corp., Dillingham, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Jack Gosuk has appealed from a May 27, 1975, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting his Native allotment application filed pursuant to 43 U.S.C. §§ 270-1 through 270-3 (1970), and 43 CFR Subpart 2561. The decision found that appellant had not presented clear and credible evidence of his entitlement to an allotment as he has not occupied the land as contemplated by the Native Allotment Act.

Appellant claimed use of the land for hunting, trapping and fishing during the month of May each year from 1954 to the present. He stated: "I have used this land in the past for hunting, trapping and fishing and plan to use it in the future as in the past to provide me livelihood subsistence." He also claimed improvements constructed in 1954 consisting of a campsite valued at \$100 and a tent frame valued at \$75. His home is in the Native village of Togiak, which is about 5 or 6 air miles northeast of the subject land.

A field examination was made on August 1, 1973, by a BLM Realty Specialist. An extensive aerial search by helicopter and subsequent ground investigation found one corner marker with no identification on it and a small trail which crossed through the allotment along the shore of Togiak Bay. The trail, showing minimal use, has been used in the past for general travel along the beach by the residents of Togiak. Appellant's claimed campsite and tent frame were not found nor was any other physical evidence of use or occupancy of the land. The examiner concluded that any use the appellant is making of the land is very intermittent in nature, and was not to the potential exclusion of others. The examiner made no personal contact with appellant but he did contact Bob Nanalook, Togiak Village Council Vice President, who reiterated appellant's use, but knew of no improvements on the parcel.

Appellant was advised of the field report and given an opportunity to submit convincing evidence of his "substantial use and occupancy" of the land. Otherwise, an adverse decision would be issued. Appellant submitted a statement signed by 18 village residents in which they certified that he has used and occupied all the lands in the allotment in the traditional Native subsistence manner. Subsequently, appellant was permitted an additional 60 days in which to submit additional proof to demonstrate his use and occupancy of the land. He did not respond.

Accompanying the appeal were statement of witness forms executed by two Togiak residents who alleged that appellant had used the land since 1954 and 1955. However, they were at variance with appellant's claimed use of the land and with each other. One indicated that appellant used the land for hunting in the spring and winter months, for berrypicking in the summer and fall months, and for trapping in the fall and winter months. The other indicated that he had used it for hunting in the spring and winter months and for berrypicking in the fall months, and that it is used by the villagers of Togiak in the fall for picking berries. Appellant's claimed use was for hunting, trapping and fishing during the month of May.

Appellant argues that his claim of use and occupancy has been verified by one Togiak resident, as well as by the two friends whose statements were attached to his Statement of Reasons for Appeal, and that none of the persons on the list submitted by him was ever contacted. We disagree with any contention that appellant has proved his use and occupancy of the land as required by the Act and the regulations.

[1] The Allotment Act requires an applicant to make satisfactory proof of "substantially continuous use and occupancy of the land for a period of 5 years." Regulation 43 CFR 2561.0-5(a) defines --

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.

Furthermore, it is not the duty of the BLM to search out the persons named in the list submitted by appellant. On the contrary, the burden to present clear and credible evidence to establish entitlement is upon the applicant. Gregory Anelon, Sr., 21 IBLA 230 (1975); Maxie Wassillie, 17 IBLA 416 (1974); John Nanalook, 17 IBLA 353 (1974).

We find that appellant has not presented clear and credible evidence of his entitlement to an allotment, although he has been given adequate opportunity to produce such evidence. Appellant's proof, *i.e.*, the statement of William Snyder, shows that the land was used by villagers of Togiak. The improvements claimed by appellant were not found nor was any other physical evidence of use and occupancy. We are compelled to conclude that he has not used the land

to the exclusion of other persons but has only used it intermittently in the same manner as any other fisherman or hunter who returns to a particularly favorite site during the course of a season. This is not the manner of use and occupancy contemplated by the regulations. See Gregory Anelon, Sr., supra; Serafina Anelon, 22 IBLA 104 (1975).

[2] Appellant next contends that 5 years of use and occupancy need not be shown for allotment applications for land that is not within a national forest. The same contention has been rejected by this Board in holding that the 5 years of substantially continuous use and occupancy must be shown for all Native allotment applications, regardless of where the land is situated. Heldina Eluska, 21 IBLA 292 (1975); Warner Bergman, 21 IBLA 173 (1975). This point, however, is academic in this case as appellant has failed to prove any substantially continuous use and occupancy of the land.

[3] Lastly, appellant contends that to deny an allotment application without an evidentiary hearing is a violation of his due process rights under the Constitution. The Board has held that there is no right to a hearing on the rejection of a Native allotment application. Heldina Eluska, supra, citing Pence v. Morton, Civil No. A 74-138 (D. Alas. April 8, 1975), appeal pending. Appellant's request for a hearing 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.

Anne Poindexter Lewis
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Joseph W. Goss
Administrative Judge

