

Editor's note: Reconsideration granted; decision vacated -- See Wayne C. Williams (On Reconsideration), 61 IBLA 181 (Jan. 26, 1982)

WAYNE C. WILLIAMS

IBLA 76-71

Decided December 16, 1975

Appeal from decision of Fairbanks, Alaska, District Office, Bureau of Land Management, rejecting Native allotment application F-14049.

Affirmed.

1. Alaska: Native Allotments--Withdrawals and Reservations: Power Sites

An Alaska Native allotment application is properly rejected where the applicant fails to demonstrate completion of 5 years of substantially continuous use and occupancy prior to an application for withdrawal of the land for power purposes.

APPEARANCES: E. John Athens, Jr., Esq., Alaska Legal Services Corp., Fairbanks, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Wayne C. Williams appeals from the July 3, 1975, decision of the Fairbanks, Alaska, District Office, Bureau of Land Management (BLM), which rejected his application for a Native allotment because he had commenced use and occupancy of the land less than 5 years prior to withdrawal of the land from disposition. Appellant stated to the field examiner that he had begun his use and occupancy in September 1962. An application for withdrawal of land for the Rampart Canyon Power Project was filed on January 9, 1963. Public Land Order 3520 of January 5, 1965, formally classified those lands as "Powersite Classification No. 445." It is clear that appellant had completed less than 5 months of use and occupancy when the lands were segregated from disposition by the application of January 9, 1963. Appellant argues in part that the 5-year requirement is contrary to the intent of 43 U.S.C. § 270-3 (1970).

[1] We have held in other cases that the requirement of 5 years of use and occupancy must be completed prior to the date of the application for withdrawal of the land for a power project. Heirs of Charles E. Frank, 21 IBLA 248 (1975); Herman Joseph, 21 IBLA 199 (1975). Serafina Anelon, 22 IBLA 104 (1975).

The reasoning in the cited cases was premised on 43 CFR 2091.2-5(a), which provides that an application to withdraw land will segregate it from further entry or disposal to the extent that the proposed withdrawal would. Because of that regulation, we have held that one must have completed the required 5 years of use and occupancy prior to the application for withdrawal. Appellant has submitted no arguments which would persuade us to change our previous rulings.

Appellant also challenges the decisions based on the October 18, 1973, memorandum from the Assistant Secretary for Land and Water Resources to the Director, BLM. The guidelines in that memorandum provided, *inter alia*, that Natives must have completed 5 years of use and occupancy prior to a withdrawal before an allotment may be approved. Appellant attacks that statement as "rulemaking" which was not done in accord with the rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. § 553 (1970). As we have noted in other cases, the Department is exempt from these provisions of the APA. James S. Picnalook, Sr., 22 IBLA 191 (1975); Heirs of Dorothy Gordon, 22 IBLA 213 (1975); Herman Joseph (On Reconsideration), 22 IBLA 266 (1975). Appellant also attacks the memorandum as retroactive application of new rules. But, as we noted in Herman Joseph (On Reconsideration), *supra*, appellant has no "right" protected from such action, which, in any event, is within the discretion of the Secretary.

Finally, appellant argues the 5-year use and occupancy requirement only applies to land within national forests. As we noted in Elsie Bergman, 22 IBLA 233 (1975), the Native Allotment Act requires 5 years of use and occupancy, whether or not the land is within a national forest.

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:

Anne Poindexter Lewis
Administrative Judge

Joseph W. Goss
Administrative Judge

