

Editor's note: Reconsideration granted; decision vacated -- See Catherine Angaiak (On Reconsideration), 65 IBLA 317 (July 15, 1982)

CATHERINE ANGAIK

IBLA 75-579

Decided December 18, 1975

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application, F-16499.

Affirmed.

1. Alaska: Native Allotments

The right to an allotment is personal to a Native who has complied with the law and regulations. An applicant who applies for withdrawn lands must show personal compliance with the law prior to the effect of the withdrawal. Such applicant may not tack on the use and occupancy of parents or other relatives to establish her right prior to the withdrawal.

2. Alaska: Native Allotments

An allotment application must be rejected where the applicant was an infant of tender years at the time the subject land was withdrawn, and where it is obvious that because of her age she could not have exerted independent use and occupancy of the land to the exclusion of others.

APPEARANCES: Donald C. Mitchell, Esq., Alaska Legal Services Corporation, Bethel, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Catherine Angaiak has appealed from a May 5, 1975, decision by the Alaska State Office, Bureau of Land Management (BLM), rejecting her Native allotment application filed pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. § 270-1 through § 270-3 (1970).

In her application appellant claimed seasonal use for subsistence hunting, fishing and berry-picking since 1947. The BLM rejected her application stating that she had failed to show 5 years of substantially continuous use and occupancy prior to the notation of an application for a wildlife range withdrawal, F-012151, on the BLM records on January 19, 1955. Such notation was the effective date the lands were segregated. 43 CFR 2091.2-5(a). Since December 8, 1960, the lands have been within the Clarence Rhode National Wildlife Range.

On appeal appellant argues that the 5-year use and occupancy requirement is restricted only to those applications for lands within a national forest, and since her allotment is not within a national forest the requirement is not applicable. Such a theory has been advanced in previous cases. In Paul Koyukuk, 22 IBLA 247 (1975), we stated, at 250-51:

* * * 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 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.

Appellant makes other arguments relating to the fact that she was a minor at the time the land was withdrawn. Appellant states that disallowance of her occupancy and use merely because she was a minor at the time of commencement of the use is contrary to the Act. She also asserts that she should be allowed to tack the use of her ancestors on to her use to satisfy the use and occupancy requirements.

We are not persuaded by appellant's arguments. Appellant was born in 1947. At the time the land was segregated for the withdrawal in January 1955, appellant was only 7 years of age. In order to establish a right to an allotment for withdrawn land, a native

must show that his use and occupancy was initiated 5 years prior to the withdrawal of the land from such appropriation. Susie Ondola, 17 IBLA 359 (1974).

[1] The right to an allotment is personal to a Native who has complied with the law and regulations. Appellant has applied for withdrawn land and it is clear that she must show personal compliance with the law prior to the date of withdrawal, and that she may not tack on the use and occupancy of her parents and other relatives to establish her right prior to the withdrawal. Ann McNoise, 20 IBLA 169 (1975); Larry W. Dirks, Sr., 14 IBLA 401 (1974).

[2] Appellant would have had to commence her use and occupancy of the land at age 2 in order to complete the necessary 5-year period prior to the withdrawal date. It is obvious that a child of that age could not exercise independent use and occupancy of the claimed land to the exclusion of others. James S. Picnalook, Sr., 22 IBLA 191 (1975); Emma Moses, 21 IBLA 264 (1975).

Appellant has requested a hearing to show ancestral use and occupancy, to demonstrate her own use and occupancy, and to show how the BLM decision was in error. Even assuming the facts as alleged, that her parents used the land for hunting, fishing, and berrypicking, and that she, a minor child, accompanied them, the basic question involved is legal in nature. The Department has consistently held that under such circumstances an evidentiary hearing is not necessary. Ann McNoise, *supra*; Elaine S. Stickelman, 9 IBLA 327, 331 (1973). Therefore, the request for a hearing is denied.

Accordingly, 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.

Joan B. Thompson
Administrative Judge

I concur:

Anne Poindexter Lewis
Administrative Judge

ADMINISTRATIVE JUDGE GOSS DISSENTING:

I would hold that if this were the family homestead of appellant's parents, and she accompanied them in family use and occupancy of the land for the required 5 years prior to the withdrawal application, she should be able to obtain the family allotment. James S. Picnalook, Sr., 22 IBLA 191, 195-201 (1975) (special concurrence). According to the Bureau of Indian Affairs certification of March 20, 1973, there are no conflicting claims either by family members or others.

Joseph W. Goss
Administrative Judge

