

**Editor's note: Reconsideration granted; decision vacated -- See Anuska Tugatuk (on reconsideration), 59 IBLA 345 (Nov. 5, 1981)**

ANUSKA TUGATUK

IBLA 76-73

Decided January 5, 1976

Appeal from decision of Alaska State Office, Bureau of Land Management, approving in part and rejecting in part Native allotment application AA-7323.

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

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 her application in whole or in part.

APPEARANCES: Henry W. Cavallera, Esq., of Alaska Legal Services Corp., Dillingham, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Anuska Tugatuk appeals from a decision of the Alaska State Office, Bureau of Land Management, rejecting in part Native allotment application AA-7323 filed pursuant to the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970). The application

for approximately 120 acres of land included three 40-acre parcels. The State Office approved the application in regard to parcels B and C but rejected it in regard to A because appellant failed to show evidence of substantive use and occupancy as required by 43 CFR 2561.0-5.

In her application, appellant stated that she had used and occupied the land since 1960. She recited that she used the land seasonally, from April to May each year for hunting. Concerning her use of the land appellant said: "I have used this land for hunting in the past and will continue to use it in the future for it has proven essential to my subsistence way of life." Tent frames valued at \$50 were the only improvements listed.

On August 19, 1973, a field examination was conducted on parcel A. The examiner was accompanied by a helicopter pilot. No improvements or visible evidence of occupancy were found on parcel A, although two signs marked "Homesite No. 1" had been erected along the ocean. The application was discussed with several members of the Aleknagik Village Council. The examiner concluded that the use was intermittent and that the applicant had not used and occupied the land in a substantial, actual way to the potential exclusion of others as required by the regulations.

Appellant was notified by letter of the field examiner's failure to find evidence of the requisite use and occupancy and was allowed 60 days from receipt of the letter to submit additional information in support of her claim.

Statements regarding parcel B were submitted by appellant's daughter and friend. Both verified that there was a tent frame on the allotment. Hunting, berrypicking, fishing and camping were uses indicated. Both witnesses stated that relatives used the land for hunting.

On appeal, Anuska Tugatuk states that she has occupied parcel A in a manner consistent with the Native mode of living, thereby complying with the requirements for receiving a Native allotment. Appellant incorporates the statement of reasons 1/ filed in Farmer Kichok, AA-7181, IBLA 75-77B, and requests a hearing if the evidence

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1/ This statement of reasons explained the subsistence way of life of the Native and emphasized its economic importance to the Native. It showed how "improvements" are not necessarily a part of this life style.

submitted is not sufficient to sustain her claim. Accompanying the statement of reasons are the statements of two witnesses regarding parcel A. 2/

In accordance with Chief Administrative Judge Frishberg's letter of September 24, 1975, to Alaska Legal Services Corporation, these statements will not be considered. That letter stated that the Board will not give favorable consideration to new or additional evidence submitted with an appeal in the absence of a showing satisfactory to it why the evidence was not submitted to BLM within the 60-day period afforded the applicant to submit a further showing in support of the application. No such explanation was received in this case.

[1] 43 CFR 2561.0-5(a) and (b) provide that:

\* \* \* use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

\* \* \*

"Allotment" is an allocation to a Native of land of which he has made substantially continuous use and occupancy for a period of five years. \* \* \*

The field examination of parcel A revealed no evidence of use and occupancy. By contrast, the examiner located on parcel C the tent frames listed by appellant in her application. In addition, he located a well-used campsite and an old 16-foot plywood boat in damaged condition on parcel B. The State Office accepted these improvements, confirmed by the field examiner, as evidence of substantial use.

The burden to present clear and credible evidence to establish qualification is upon the applicant. Jack Gosuk, 22 IBLA 392 (1975); Heldina Eluska, 21 IBLA 292, 294 (1975). Appellant has failed to meet this burden in regard to parcel A. Her application, consisting of three separate parcels of land, is rejected as to the one parcel on which there is no evidence of use or occupancy by the appellant and for which appellant has failed to submit the required evidence within the time allowed. See Beulah Moses, 21 IBLA 157 (1975).

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2/ The witnesses were appellant's husband and daughter.

[2] Appellant requests a fact-finding hearing. She alleges that the due process clause of the Fifth Amendment to the Constitution entitles her to such a hearing. The United States Court for the District of Alaska has ruled that no such "right" exists with regard to applications under the Act of May 17, 1906, supra. Pence v. Morton, Civil No. A 74-138 (D. Alas. April 8, 1975), appeal pending, No. 75-2144 (9th Cir.). The Board has subsequently held that there is no "right" to a hearing on the rejection of a Native allotment application in whole or in part. Anatole Bogeyaktuk, supra; Heldina Eluska, supra; Beulah Moses, supra.

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.

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Edward W. Stuebing  
Administrative Judge

I concur:

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Frederick Fishman  
Administrative Judge

## ADMINISTRATIVE JUDGE RITVO CONCURRING

While I concur in the result reached by the majority, I would reach it by a different route.

The majority refuses to consider the witness statements submitted by appellant with her appeal on the ground she gave that no explanation for her failure to submit them earlier. The appellant is represented by Henry W. Cavallera, Supervising Attorney, Alaska Legal Services Corp., Dillingham, Alaska. In a letter dated October 28, 1975, Mr. Cavallera described at some length the area serviced by his organization, the difficulties of travel, the absence of any other lawyers, the sizable work load, the infrequency of visits to the isolated villages, and language problems.

In a reply, dated December 19, 1975, Chief Administrative Judge Frishberg, stated:

While we are sympathetic to the problems encountered by your office in the handling of Native allotment appeals, we are unwilling to accept such a blanket statement as a sufficient showing in any individual case. If you desire this Board to consider evidence tendered subsequent to the filing of the notice of appeal you must show how, in each individual case, factors prevented the timely submission of the evidence.

Citing, Louise Luke, 22 IBLA 389 (1975).

In the absence of a more particular explanation, presumably the late statements would not now be considered. However because of possible uncertainty as to whether such a general statement would be accepted as a justification for delay, I would in this case give them consideration.

Nevertheless, upon such consideration I do not find that they support appellant's application. In her original application, appellant alleged that she used tract A for hunting in April and May of each year. One witness, however, stated that she used the area for fishing in the "summer" months and the other that she used the area for fishing in the spring, summer, and fall months, and hunting in the fall months. Such contradictory allegations give no support to appellant's claimed

usage. Accordingly, I would find that, even considering these statements, appellant has not presented clear and credible evidence of use and occupancy of tract A sufficient to support her application.

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Martin Ritvo  
Administrative Judge

