

Editor's note: Reconsideration granted; case remanded --See Natalia Kepuk 51 IBLA 170 (Nov. 26, 1980)

KATHRYN ELUSKA

IBLA 75-497D

Decided January 12, 1976

Appeal from decision of Alaska State Office, Bureau of Land Management, rejecting Alaska Native allotment application F-13949.

Affirmed.

1. Alaska: Native Allotments

Where a Native allotment applicant has had an adequate opportunity to submit credible evidence of substantially continuous use and occupancy of the land at least potentially exclusive of others, but has failed to make such a showing, the application is properly rejected.

2. Alaska: Native Allotments

A request by a Native allotment applicant for a new field examination will be denied where the applicant was given the opportunity to submit evidence in support of her claim and failed to do so.

3. Alaska: Native Allotments--Hearings--Rules of Practice: Hearings

A Native allotment applicant is not entitled to a hearing as a matter of right inasmuch as the issuance of an allotment is discretionary with the Secretary of the Interior. A hearing is not appropriate when there is no offer of proof which if established would impel a different legal conclusion.

APPEARANCES: Carmen Massey, Esq., Alaska Legal Services Corporation, for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Kathryn Eluska has appealed from a decision of the Alaska State Office, Bureau of Land Management, dated March 19, 1975, which rejected her application for Native allotment F-13949 filed pursuant to the Alaska Native Allotment Act, 43 U.S.C. @§ 270-1 through 270-3 (1970), and the pertinent regulations, 43 CFR Subpart 2561. The application was rejected because the BLM field examination revealed no evidence of the applicant's use and occupancy of the applied for land. The State Office concluded that the applicant had not occupied the land as contemplated by the Native Allotment Act.

Appellant filed her application May 20, 1971, for 40 acres of land located within protracted section 32, T. 27 S., R. 22 E., Kateel River Meridian. She alleged seasonal use of the land for trapping, fishing and hunting from 1939 to the date of application. She claimed improvements of a cabin and a fish camp which she valued at \$500.

The BLM conducted a field examination in July of 1973. The BLM field examiner was assisted by a local guide in locating the allotment area. Although they found evidence of other campsites in the area that did not belong to the applicant, they could not find visible evidence of the applicant's claimed improvements or of her use and occupancy of the tract. ^{1/} The examiner concluded that the applicant had not met the minimum use and occupancy requirements of the Native Allotment Act.

On June 11, 1974, the BLM notified appellant of the findings of the field examiner and informed her that without further information of her use and occupancy, adverse action would be taken on her application. She was allowed 30 days for submission of additional information to support her claim. Appellant responded only

^{1/} Section B of the Bureau's field report dated May 3, 1974, sets out findings that:

"This application is located along the Kuskokwim River near Medfra. The applicant currently resides in Fairbanks. The local residents stated that she has not been here to use the parcel for 25 years. These include Nick Dennis, our guide, Mr. Smith from across the river at Medfra, and Ernest Holmberg of McGrath. There was a camp of Bobby Esai and that of Ignatti Petruska on the area. The application included that of Mr. Petruska.

"As a result of the local contacts and evidence of other campsites that didn't belong to the applicant, it became apparent that what use she had in the past has since been abandoned."

with her own statement. She alleged she had used the land for moose hunting every fall, berrypicking and camping since 1939. She stated she had a tent frame to show that she had used it and listed the names of five people who knew that she used the land.

Subsequently, the period for submission of additional supporting information was extended on two more occasions. Appellant was supplied with a copy of the field examiner's report and suggested guidelines for witness statements. However, appellant did not submit any further statements from her named witnesses. The Bureau followed with its decision rejecting the application.

Appellant submits that the Bureau's decision is not supported by the record. She contends the decision is based on erroneous interpretation of the law and should be reversed. She asks that the case either be remanded for a new field examination or, in the alternative, requests a hearing to adequately present her case. We find no merit in these contentions.

[1] A Native allotment applicant is required by the Act to make satisfactory proof of "substantially continuous use and occupancy of the land for a period of five years." Such term is defined by regulation, 43 CFR 2561.0-5(a), as:

The term "substantially continuous use and occupancy" contemplated 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.

The burden to present clear and credible evidence to establish compliance with the law and the regulations is on the applicant. Mary Ayojiak, 22 IBLA 384 (1975); Gregory Anelon, Sr., 21 IBLA 230 (1975). Appellant has been afforded more than adequate opportunity to make such a showing and has failed to meet this burden. She was repeatedly invited to present any additional information to support her claim. She was also given examples of typical witness statements and advised of the possible rejection of the application if further evidence was not submitted to the Bureau. After appellant had been confronted with the Bureau's factual determinations she merely responded with her own general statement. She has failed to present any substantial evidence which would verify her own use and rebut the Bureau's findings of conflicting use of several other campsites in her allotment area. The filing of a list of possible witnesses is far less than adequate substantiation of the claimed use and occupancy potentially exclusive of others.

Accordingly, the preponderance of credible evidence indicates that the land applied for has not been used or occupied as contemplated by the law and regulations.

[2] Appellant has requested a new field investigation of the allotment area. She has already had an extended period to produce evidence in support of her claim, but has failed to do so. There is nothing in the record to indicate appellant had particular difficulties in gathering evidence to rebut the findings of the Bureau's field examination. Nor has appellant presented any credible evidence that would indicate a further field examination would serve any useful purpose. Thus, we can find no basis upon which to order a new field examination. Helinda Eluska, 21 IBLA 292 (1975).

[3] Appellant also has requested a hearing to present her case. Native allotment applicants are not entitled to a hearing as a matter of right inasmuch as the issuance of an allotment is discretionary with the Secretary of the Interior. Pence v. Morton, 391 F. Supp. 1021 (D. Alas., 1975). This Board has ruled that a hearing is not appropriate where there is no offer of proof, which if established, would impel a different legal conclusion. Alexandra Atchak, 23 IBLA 81 (1975); Arthur C. Nelson (On Reconsideration), 15 IBLA 76 (1974). In this case appellant has presented no proof of occupancy in the first instance. There is nothing of record to indicate the findings of the State Office were incorrect. Accordingly, the 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.

Martin Ritvo
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge

