

**Editor's note: Reconsideration granted; decision vacated -- See Daniel Johansen (On reconsideration), 54 IBLA 295 (April 29, 1981)**

DANIEL JOHANSEN

IBLA 75-603

Decided January 12, 1976

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA 7759.

Affirmed.

1. Alaska: Land Grants and Selections: Generally--Alaska: Native Allotments

A selection filed by the State of Alaska segregates the land from all appropriations when the State files its application to select. A Native allotment application is properly rejected where applicant fails to show substantial use and occupancy of the land prior to the filing of a State selection application independently for himself or as the head of a family, and not as a minor child occupying or using the land in company with his parents or ancestors.

2. Alaska: Native Allotments

The burden to present clear and credible evidence to establish entitlement to a Native allotment is upon the applicant.

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

#### OPINION BY ADMINISTRATIVE JUDGE LEWIS

Daniel Johansen filed Alaska Native allotment application AA 7759 with the Alaska State Office, Bureau of Land Management (BLM), on April 17, 1972, for three parcels of land designated Parcels A, B, and C, pursuant to the Alaska Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970). He alleged seasonal use of the land for fishing and hunting from May to December each year from 1964 to the present.

By decision of April 16, 1973, BLM rejected the application pursuant to 43 CFR 2627.4(b) because the three parcels of land were segregated from settlement and appropriation at the time of his alleged commencement of occupancy in 1964 by three Alaska State selections filed on various dates in 1961.

Johansen appealed the April 16, 1973, decision to this Board, alleging, inter alia, that he "has used these lands in the traditional Native manner since 1950, first alongside his parents, then later on his own for hunting and fishing. The date 1964 in the application was an error in preparation of the application. Appellant furnished witness statements certifying his many years use of the lands for subsistence purposes (attached hereto as Exhibits). Hence on May 2, July 26, and May 1, 1961, the dates of the State of Alaska selection applications, these lands were and had been used by Appellant for several years." Four witness statements on a prepared form were attached, each of which was signed by a resident of Dillingham, Alaska, and in which each one certified that he had known appellant all his lifetime, that he is acquainted with the land near Dillingham covered by his Native allotment, and that "by personal observation I know he has used and occupied said land for seasonal hunting and fishing in the traditional Native way prior to 1961 continuing up to the present time."

By Order dated November 1, 1974, docket No. IBLA 73-382, this Board remanded the case record to afford appellant a reasonable further opportunity to submit additional evidence to establish entitlement, in accordance with Assistant Secretary Horton's Instruction of October 18, 1973, and the July 30, 1974, letter from Assistant Secretary Hughes to the President, Alaska Federation of Natives, Inc.

On December 17, 1974, BLM wrote appellant that his application will have to be rejected because the lands were not unappropriated at the time he occupied them, and advised him that if he amends his application, he must give the reason for the error in the application and present convincing evidence of the actual use and occupancy which occurred at the earlier point in time. That letter also informed appellant that if he failed to respond, or if it is found that the evidence is still not satisfactory to meet the requirements of the law and regulations, adverse action would be taken on the application. He was allowed 60 days from receipt of the letter within which to submit the evidence. The certified mail return receipt evidencing service on appellant was received by BLM on December 23, 1974.

No response was made by appellant. Accordingly, on April 5, 1975--more than 4 months after appellant's receipt of the letter--BLM again rejected the application because, after adequate notice,

he had not presented clear and credible evidence of use and occupancy of the lands prior to the effective dates of the State selection applications.

[1] The regulations provide that land applied for by the State of Alaska will be segregated from all appropriations when the State files its application to select. 43 CFR 2627.4(b). Appellant's statement in his application that he began use and occupancy of the lands in 1964 and his subsequent failure to show that he used and occupied the lands prior to the State selection requires that his application be rejected. Martha Isaac, 22 IBLA 224 (1975); Natalia Wassilliey, 17 IBLA 348 (1974); Helen F. Smith, 15 IBLA 301 (1974).

The allegations in the Statement of Reasons for his prior appeal that the 1964 date in the application was in error and that he has used the lands since 1950, first alongside his parents, and later on his own, including the four witness statements attached thereto, are very general statements. They furnish no concrete information as to when appellant first began use and occupancy of the lands on his own and exclusive of his parents and/or siblings. Thus, there is no convincing evidence that he began use and occupancy of the lands as contemplated by law prior to the filing of the State selections. Furthermore, appellant has not shown that at any time he has made substantially continuous use and occupancy of the lands, at least potentially exclusive of others, and not merely intermittent use. 43 CFR 2561.0-5(a).

This Board has consistently held that the substantial use and occupancy, as contemplated by the Alaska Native Allotment Act, must be by the Native independently for himself or as the head of a family, and not as a minor child occupying or using the land in company with his parents or ancestors. Paul Koyukuk, 22 IBLA 247 (1975); Emma Moses, 21 IBLA 264 (1975); Lula J. Young, 21 IBLA 207 (1975); Ann McNoise, 20 IBLA 169 (1975); Arthur C. Nelson (On Reconsideration), 15 IBLA 76 (1974); Larry W. Dirks, Sr., 14 IBLA 401 (1974).

[2] Appellant also contended in his Statement of Reasons for his prior appeal that the BLM is under an affirmative duty to investigate the validity of use and occupancy of public lands claimed by Natives. This is not so. On the contrary, we have held that the burden to present clear and credible evidence to establish entitlement is upon the appellant. Gregory Anelon, Sr., 21 IBLA 230 (1975); Maxie Wassillie, 17 IBLA 416 (1974); John Nanalook, 17 IBLA 353 (1974).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is affirmed.

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Anne Poindexter Lewis  
Administrative Judge

We concur:

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Martin Ritvo  
Administrative Judge

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Edward W. Stuebing  
Administrative Judge

