

STATE OF ALASKA, JOHN NUSUNGINYA

IBLA 75-594 Decided November 12, 1976

Appeal from decisions of Alaska State Office, Bureau of Land Management, partially rejecting state selection application F 033712.

Affirmed in part; vacated in part; and remanded for further action.

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

Where an application for an allotment by an Alaskan Native includes land in a State of Alaska selection application that has been tentatively approved to the State, and where the Native alleges occupancy and use from a date prior to the filing of the state selection, the allotment application may be granted, if the facts alleged are ultimately proved and the application is regular in all other respects.

2. Administrative Procedure: Generally--Alaska: Land Grants and Selections: Generally--Alaska: Native Allotments--Contests and Protests: Generally--Rules of Practice: Government Contests

Where the State of Alaska has applied to select certain land and has been given tentative approval of that selection, and thereafter a conflicting native allotment application is filed which is supported

only by meager evidence of use and occupancy, it is error to allow the allotment application and to cancel the State's tentative approval and reject the selection application without notice and an opportunity for a hearing in which the State may participate.

APPEARANCES: James N. Reeves, Esq., Assistant Attorney General, State of Alaska, for appellant; Robert E. Price, Esq., Regional Solicitor, United States Department of the Interior, for the Bureau of Land Management; James P. Doogan, Jr., Esq., Gallagher, Cranston and Snow, for appellee, John Nusunginya.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The State of Alaska appeals from the March 7 and April 7, 1975, decisions of the Alaska State Office, Bureau of Land Management (BLM), approving the allotment application of one John Nusunginya and withdrawing prior tentative approval of the State of Alaska's selection application for the same land.

The first application for this land was filed by the State of Alaska on March 16, 1965. The State applied for all land in T. 9 N., R. 42 W., Umiat Meridian, Alaska, an area of approximately 1,000 acres near Point Lay, Alaska. That area included the land involved in this dispute, a 40-acre parcel on the southern tip of Solivik Island. The State's application was filed pursuant to § 6(b) of the Alaska Statehood Act of July 7, 1958, 72 Stat. 339, as amended, 73 Stat. 141, 48 U.S.C. ch. 2 (1970) (hereinafter Statehood Act). The BLM gave tentative approval to the selection on December 23, 1965. On July 3, 1971, one John Nusunginya filed an application for an allotment of land which included the 40 acres in dispute. He alleged use and occupancy of the lands as a campsite and as a hunting site dating from 1960. The BLM then arranged a field examination of the site. The field examination revealed that the entire parcel is composed principally of beach sand with an occasional tuft of grass. The only visible signs of possible use and occupancy were the remains of a seal carcass and the jawbone of a whale. However, because of an interview with the applicant and statements by a local official, the BLM's field examiner was convinced that the applicant had satisfied the requirement for substantially continuous use and occupancy of the parcel. On March 7, 1975, the BLM issued a decision which rescinded the tentative approval given to the State some 10 years earlier as to that portion in conflict, and approved Nusunginya's allotment application. On April 7, 1975, the BLM modified the decision, rejecting Alaska's selection application except for the coal, oil, and gas rights.

The State of Alaska has appealed from those decisions on a number of grounds. First, the State asserts that this land is submerged land and was granted to the State by section 6(m) of the Statehood Act and by the Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1970). Therefore, the State asserts, the United States has no authority to grant the land as the State already owns it. Second, the State argues that the State's application segregated the land from any subsequent appropriation. Moreover, because the allotment to a Native is within the discretion of the Secretary, the allotment cannot be the kind of "valid existing right" preserved by section 6(a) of the Statehood Act. The State urges that this Board overrule two of its earlier decisions which upheld the right of Natives to make application subsequent to the filing of a state selection application, where use and occupancy preceded the state selection: Archie Wheeler, 1 IBLA 139 (1970); Lucy Ahvakana, 3 IBLA 341 (1971). Third, the State argues that section 4(c) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1603(c) (Supp. IV, 1974), was a congressional confirmation of all previous tentative approvals which cannot be revoked by administrative decisions. Fourth, the State argues that the fact that a Native qualifies for an allotment does not necessarily remove the land from the category of "vacant, unappropriated, and unreserved." Finally, it should be noted that the State takes umbrage at not being informed of the Native's application until the decision rejecting its selection application. It contends that this omission denies it any opportunity to present an informed and effective protest and present its position.

[1] The central issue in this case is the nature of the State's right to the land it has selected pursuant to the Statehood Act vis-a-vis the Alaskan Native's right to an allotment pursuant to the Allotment Act. Section 8 of the Organic Act of May 17, 1884, 23 Stat. 24, 26, provided that Alaskan Natives should "not be disturbed in the possession of any lands actually in their use or occupation" until such time as Congress should legislate further. In 1906, Congress enacted the Alaska Native Allotment Act, 34 Stat. 197, which provided that the Secretary could, in his discretion, grant allotments of up to 160 acres to Alaskan Natives. That Act was amended in 1956 to require that the Native have made 5 years of substantial use and occupancy of the land. 70 Stat. 854, 43 U.S.C. § 270-1 to 270-3 (1970). Two years later Congress enacted legislation admitting the State of Alaska to the Union, 72 Stat. 339. Under that Act the State was entitled to select over 100,000,000 acres of land from the public domain that was "vacant, unappropriated, and unreserved." Upon receiving tentative approval of a selection, the State was empowered to create rights in third parties.

The Native applicant in this case asserts that he began his use and occupancy of the land in 1960, though his application was not filed until 1971. The State filed its application and received tentative approval in 1965.

In 1971, Congress enacted ANCSA. Section 4 of that Act, 43 U.S.C. § 1603 (Supp. IV, 1974), appears to do several things. First, it approves all prior tentative approvals of selections by the State and abolishes the aboriginal title to those lands. Second, it extinguished all claims of title based on use or occupancy of the lands. However, section 18 of ANCSA, 43 U.S.C. § 1617 (Supp. IV, 1974), provides that applications for Native allotments pending on the date of enactment could be processed to a conclusion.

The State asserts that all of the preceding Acts should be construed so that the Native's allotment application be considered void because the State's application in 1965 segregated the land from further disposition. The State further argues that section 4 of ANCSA confirmed title in the State by legislative ratification of prior tentative approvals.

We do not agree with the State's assertions. If Nusunginya is entitled to an allotment of this land based upon his use and occupancy thereof commencing prior to the state selection application, such land was not "vacant, unappropriated, and unreserved" as required by the Statehood Act. 43 CFR 2627.3(b)(2), formerly 43 CFR 2222.9-4(b)(2); Lucy Ahvakana, supra; Edwardsen v. Morton, 369 F. Supp. 1359, 1374 (D. D.C. 1973). Such selections of occupied land were simply void. Edwardsen v. Morton, supra at 1375. Congress did not, by enactment of ANCSA, affirm prior void tentative of state selections, where those selections conflicted with Native allotment applications. Instead, while specifically repealing the Alaskan Native Allotment Act in section 18, 43 U.S.C. § 1617 (Supp. IV, 1974), the Congress also specifically preserved those claims where the application for allotment was pending on the date of enactment of ANCSA, December 18, 1971. Moreover, it should be remembered that Native use and occupancy was protected as early as 1884 by the Organic Act until the date of enactment of ANCSA, December 18, 1971. The Statehood Act neither enlarged nor diminished any rights of Alaskan Natives based on use and occupancy of the land. 1/ Edwardsen v. Morton, supra. Therefore, Alaskan Natives were protected in their use and occupancy of the land from the effect of state selections.

1/ Among other things, section 4 of the Statehood Act, 72 Stat. 339, provides that:

"As a compact with the United States said State and its people do agree that they forever disclaim all right and title * * * to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Alcuts * * *."

The cases cited by the State to the contrary are not on point. Arthur C. Nelson, 15 IBLA 76 (1974), involved land that had been withdrawn before the initiation of use and occupancy by the Native and also before the filing of the state selection application. The same is true of Harold J. Naughton, 3 IBLA 237, 78 I.D. 300 (1971). In both of those cases the Natives were precluded from obtaining their allotments, first, because the land was not available for allotments prior to the state selection because of withdrawals, and, second, because the subsequent state selection continued the original segregative effect of the withdrawals. State of Alaska, 6 IBLA 58, 79 I.D. 391 (1972), is inapposite. The issue there was whether a homestead application should be allowed when land office records showed prima facie that the land was segregated by a state selection application. The case does not deal with the effect of rights acquired prior to a state selection application.

In addition, a recent decision of the Court of Appeals for the Ninth Circuit sheds some light on the nature of the Native's interest pursuant to the Allotment Act. While recognizing the Secretary's discretion to grant or deny allotments, the Court nevertheless held that Alaskan Natives have an interest which is protected by the Due Process Clause of the Fifth Amendment. Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). Clearly, if the Secretary cannot summarily deny an application for insufficient evidence without notice and an opportunity for a hearing, neither can the State terminate a Native's existing interest merely by the filing of a selection application.

In sum, Alaskan Native use and occupancy was protected from at least the time of the Organic Act in 1884. The Statehood Act did not change that protection; thus, that protection continued until the enactment of ANCSA in 1971, which preserved, without exception, all applications for Native Allotments pending on that date. Therefore, we adhere to our holding in Archie Wheeler, 1 IBLA 139 (1970), and Lucy Ahvakana, 3 IBLA 341 (1971), that an Alaskan Native's application for an allotment may be granted even if it was filed subsequent to a state selection, if, in fact, the applicant had substantially used and occupied the land in a manner prescribed by regulation and statute prior to the State's application.

[2] One other aspect of this case remains troublesome. As the State has pointed out, it had no notice that an application for a Native allotment had ever been filed. This case aptly illustrates the difficulties that arise when the State is not notified of the allotment application until it is too late to protest. First, the State contends that this land is actually tideland and therefore passed to it upon its admission to the Union pursuant to section 6(m) of the Statehood Act and pursuant to the Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (Supp. IV,

1974). This argument does not appear to be well-founded as high tides apparently wash over the tract only in the fall. See, e.g., Borax Consol. Ltd. v. Los Angeles, 296 U.S. 10 (1935). But because there is virtually no evidence on that point this Board is unable to determine the validity of that objection. However, it is noteworthy that this contention is inconsistent with the State's filing of a selection application for the land to which it now claims entitlement under another provision of law. Second, the State also notes that it was unable to make a meaningful "defense" in this case as it was unable to cross-examine either the applicant or his witnesses to determine the truth of their statements concerning the applicant's use and occupancy of the tract. 2/

In Natalia Wassilliey, 17 IBLA 348 (1974), the Board held that the State's interest in its selection application was adverse to that of a Native allotment applicant:

The State of Alaska by its tentatively approved selection application has an adverse interest in the

2/ The State has intimated that because there is no way it could have known of the applicant's use, that use is not sufficient to fulfill the requirements of the Native Allotment Act and, consequently, the land was, in fact, "vacant, unappropriated, and unreserved." That position has some support in law. For example, in United States v. 10.95 Acres of Land in Juneau, 75 F. Supp. 841, 844 (D. Alas. 1948), the court, speaking of Native use and occupancy under the Organic Act which would prevent other appropriation of the land, stated:

"But the use or occupancy which gives rise to such a right must be notorious, exclusive, and continuous, and of such a nature as to leave visible evidence thereof so as to put strangers upon notice that the land is in the use or occupancy of another, and the extent thereof must be reasonably apparent." (Citations omitted.) See also United States v. State of Alaska, 201 F. Supp. 796 (D. Alas. 1962); and United States v. Libby, McNeil, and Libby, 107 F. Supp. 697, 701 (D. Alas. 1952), where the court stated" * * * the statute * * * clearly require[s] a showing of actual use or occupancy sufficient to support a possessory title." (Citations omitted.)

The Ahvakana and Wheeler decisions are not to the contrary. Mrs. Ahvakana asserted that she had a house and large storage building on the property, that she had in fact occupied the land for many years and that there were several gravesites of members of her family, as well as those of other Natives, located on the claimed land. But in neither Wheeler nor Ahvakana had the evidence ever been developed to either confirm or deny the applicants assertions.

Both the evidence and legal arguments in this case should be directed to the sufficiency of use and occupancy.

land, and copies of all further documents and proofs should be served upon the State. The State should be afforded an opportunity to set forth its position on whether the occupancy of the Native would be sufficient to prevent the State's selection rights from attaching to the land.

17 IBLA at 352.

Since our holding in the Wassilley case, another case has been decided which provides further guidance. In Donald Peters, 26 IBLA 235, 83 ID. (1976), we held that if the BLM believes that a Native allotment applicant's use and occupancy has been insufficient to fulfill the requirements of the Allotment Act, the BLM should issue a contest complaint pursuant to 43 CFR 4.451 et seq. The applicant would be allowed to appear and present testimony and other evidence and cross-examine adverse witnesses.

Although the Bureau was willing to accept the whale bone and seal carcass as indicitive of Nusunginya's use and occupancy of the land, there was nothing to show that they came to be there through the hand of man, or if they did, that Nusunginya was responsible for their presence. ^{3/} Statements by the applicant and another may have tended to support the examiner's finding that for 5 consecutive years Nusunginya indeed had used and occupied the land on a substantially continuous basis to the potential exclusion of others. However, we are not satisfied that such meager physical evidence and untested statements constitute a sufficient basis on which to approve the Native allotment application, revoke the tentative approval of the state selection and summarily reject the State's prior-filed application. ^{4/}

^{3/} The BLM examiner met with Nusunginya before inspecting the land and finding the whale bone and seal carcass. At the interview, Nusunginya stated that he had not been on the land during the preceding fall hunting season. Thus, at the time of the examination he had not been there for more than a year at least. A photograph of the dead seal shows that the hide has been pulled away from the carcass and remains largely intact beside the skeleton, and there are shards of flesh still clinging to the remains. It would therefore seem that the carcass could not be over a year old, particularly in light of the fact that the sea periodically sweeps across the land. An arctic fox was seen and photographed on the tract by the examiners.

^{4/} There are other inconsistencies in the evidence which merit resolution. For example, in his application Nusunginya states only that he hunts caribou on the land, without mention of seals. At the interview he discussed only seal hunting, without reference to caribou. Also, when asked by the examiner if he always went out there for the fall hunting, he answered, "Not always, but occasionally I do."

Accordingly, the case will be remanded to the Alaska State Office, BLM, for an expedited determination as to whether the land or any portion thereof is tideland. If that determination is in the negative, contest proceedings shall be initiated to determine the entitlement of John Nusunginya to receive a patent. In that event, a copy of the contest complaint shall be served the State of Alaska, which, upon the filing of a proper motion, shall be allowed to intervene.

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 in part, vacated in part, and remanded for further action consistent with the opinions expressed herein.

Edward W. Stuebing
Administrative Judge

We concur.

Newton Frishberg
Chief Administrative Judge

Douglas E. Henriques
Administrative Judge

