

MABLE MELOVEDOFF

IBLA 76-132

Decided March 25, 1977

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA-7381.

Affirmed.

1. Alaska: Native Allotments

An allotment application must be rejected where the Native has not completed a 5-year period of substantial use and occupancy prior to the withdrawal of the land. The substantial use and occupancy required must be achieved by the Native as an independent citizen for himself (or as head of a family), at least potentially exclusive of others, and not as a minor, dependent child occupying or using the land in the company of his parents or ancestors.

2. Alaska: Native Allotments

An allotment right is personal to one who has fully complied with the law and the regulations and an applicant for a Native allotment may not tack on ancestral use and occupancy of the land to establish the right.

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

A request for a hearing on a Native allotment application will be denied where an evidentiary hearing is not necessary because there are no facts in dispute and the sole question is a legal issue.

APPEARANCES: Matthew D. Jamin, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Mable Melovedoff has appealed from a decision of June 18, 1975, by the Alaska State Office, Bureau of Land Management (BLM), rejecting her Native allotment application for two parcels of land filed pursuant to the Alaska Native Allotment Act of May 17, 1906, as amended, 43 U.S.C §§ 270-1 to 270-3 (1970). ^{1/} The application was rejected on the grounds that she had not completed the requisite 5-year period of use and occupancy prior to the effective date of withdrawal of the lands. The decision pointed out that the applicant was only 15 years old at the time the lands were withdrawn and she did not assert 5 years of independent control and use of the lands prior to that time.

The applicant alleged that her use and occupancy of the lands began in May 1957. The lands were withdrawn from appropriation under the public land laws and reserved as the Kodiak National Wildlife Refuge on May 10, 1958, by Public Land Order No. 1634 (22 F.R. 3350). The applicant was born on September 9, 1943.

By notice of April 26, 1974, BLM allowed the applicant 30 days from receipt thereof within which to supply additional information. She did not respond. Again on August 15, 1974, the applicant was permitted an additional 60 days by BLM in which to demonstrate that she had completed 5 years of substantial use and occupancy prior to the withdrawal of the lands. This notice, sent to her address of record, was returned "Unclaimed."

With her Statement of Reasons for appeal, appellant attached affidavits executed by Lawrence Ashouwak and by her husband Victor Melovedoff purporting to indicate that, though she began using the land in 1957, her ancestors were using the land long before the withdrawal effected by Public Land Order No. 1634. She contends that the ancestral use and occupancy can be tacked on to avoid any segregative effect of the withdrawal order, and incorporates by reference the arguments set out in Section I of the brief filed in Herman Haakanson, 23 IBLA 54 (1975). She also contends that there is no requirement that she demonstrate 5 years of use and occupancy prior

^{1/} The Alaska Native Allotment Act was repealed by section 18 of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. § 1617 (Supp. III, 1973), subject to applications pending before the Department on December 18, 1971.

to the 1958 withdrawal, incorporating arguments advanced in the Statement of Reasons filed in Herman Joseph, IBLA 75-195, in support thereof.

[1] The regulation governing the Alaska Native Allotment Act relates only to vacant, unappropriated and unreserved public lands in Alaska. 43 CFR 2561.0-3. We have held that where a Native has not completed a 5-year period of substantial use and occupancy prior to the effective date of withdrawal of the lands, the allotment application must be rejected. Sarah F. Lindgren, 23 IBLA 174 (1975); Catherine Angaiak, 23 IBLA 91 (1975).

The 5-year period of substantial use and occupancy required must be achieved by the Native as an independent citizen for himself (or as head of a family) and not as a minor, dependent child occupying or using the land in the company of his parents or ancestors. This does not mean that a minor may not establish qualifying use and occupancy, but it must be achieved by an independent citizen in his own right and it must be at least potentially exclusive of others. Sarah F. Lindgren, supra at 177, and cases cited; 43 CFR 2561.0-5(a).

[2] We have also consistently held that an allotment right is personal to one who has fully complied with the law and the regulations and that an applicant for a Native allotment may not tack on ancestral use and occupancy of the land to establish the right. Sarah F. Lindgren, supra at 177; Susie Ondola, 17 IBLA 359, 361 (1974).

Based on appellant's own admissions in the case record, including her Statement of Reasons for appeal, the decision of the Alaska State Office is correct on these legal grounds.

[3] Appellant requests a hearing to show her ancestral use and possession, to demonstrate her own use, and to demonstrate generally that the BLM decision rejecting her application was erroneous. There are no disputed facts here, and the introduction of evidence to show ancestral use and occupancy presents a legal question. The Department has consistently held that where there are no facts in dispute and the sole question is a legal issue an evidentiary hearing is not necessary. Sarah F. Lindgren,

supra at 178; Ann McNoise, 20 IBLA 169 (1975). The request for a hearing is, therefore, denied. 2/

In Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), it was held that an Alaskan Native allotment applicant has a sufficient property interest to warrant due process protection, including an oral hearing, if requested. The Board, in a similar case, determined that if a hearing was required, the Bureau of Land Management would bring a contest complaint, pursuant to 43 CFR 4.451 et seq. Donald Peters, 26 IBLA 235, 83 I.D. 308 (1976), (On Reconsideration), 28 IBLA 153, 83 I.D. 564 (1976). However, as the Board noted in Peters, at 241, this procedure does not change the rule that a hearing is not necessary if no facts are in dispute:

* * * * *

Pursuant to the procedures and departmental decisions, where BLM determines a claim or application must be rejected as a matter of law, assuming the truth of all relevant matters stated in the claim or application, it may reject the claim or application without a hearing. See Brace C. Curtiss, 11 IBLA 30 (1973); W. J. M. Mining and Development Company,

2/ W. Gellhorn and C. Byse, Administrative Law, 499 (5th ed. 1970) comments:

"(4) A hearing to take evidence as is done in a trial at law is an obviously silly waste of time if facts are not in dispute. The courts, in their own proceedings, rule on motions to dismiss (or whatever may be the local equivalent of a demurrer); when they do so, they assume a set of facts, without receiving and passing upon evidence, and then decide whether the assumed facts add up to something or to nothing. The courts also enter summary judgments when the factual allegations of a party have not been materially controverted by his opponent. Trial hearings may permissibly be omitted in administrative proceedings at least as readily as in their judicial counterparts, when the only things to be determined are the legal consequences of uncontested facts. See, e.g., Persian Gulf Outward Freight Conference v. Federal Maritime Commission, 375 F.2d 335 (D.C. Cir. 1967); Birkenfield v. United States, 369 F.2d 491 (3d Cir. 1966); Railway Express Agency, Inc. v. Civil Aeronautics Board, 345 F.2d 445 (D.C. Cir. 1965), cert. denied, 382 U.S. 879 (1965); National Labor Relations Board v. Simplot Co., 322 F.2d 170 (9th Cir. 1963); Joe L. Smith, Jr., Inc., 1 F.C.C.2d 666 (1965); but cf. Kirby v. Shaw, 358 F.2d 446 (9th Cir. 1966)."

10 IBLA 1 (1973); Norman A. Whittaker, 8 IBLA 17 (1972). The aggrieved claimant or applicant may appeal such decision to this Board. 43 CFR 4.400 et seq. If, however, BLM determines such a claim or application is invalid because the facts are not as stated therein, it must serve a contest complaint upon the claimant or applicant alleging wherein the claim or application is deficient. If the claimant or applicant answers within 30 days and thereby raises a disputed issue of material fact, the procedures outlined infra apply.

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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:

Frederick Fishman
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

