

ARTHUR R. MARTIN ET AL.

IBLA 76-381, etc.

Decided June 27, 1979

Consolidated appeals from decisions of the Alaska State Office, Bureau of Land Management, rejecting Alaska Native Allotment applications.

Affirmed.

1. Alaska: Native Allotments

The Alaska Native Allotment Act authorizes a nonalienable, nontransferable, and non-inheritable right of selection which terminates upon death. Only when an allotment selection has been made by the filing of an acceptable application for public land open to such application and the applicant had used and occupied the land for not less than 5 years in his lifetime is the preference right to an allotment earned and an inheritable right established. A Native who applies for withdrawn lands must show that he himself complied with the law prior to the date of withdrawal. No Native may avail himself of any period of use and occupancy by his ancestors to establish a right to an allotment. Where a Native was born after lands were withdrawn, the application must be rejected.

APPEARANCES: Donald E. Clocksin, Esq., John Bosshard III, Esq., James Grandjean, Esq., John Silko, Esq., Margaret W. Berck, Esq., Alaska Legal Services Corporation, Juneau, Alaska, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

The cases set forth in the Appendix are appeals from various decisions of the Alaska State Office, Bureau of Land Management (BLM), rejecting Native allotment applications filed pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1, -2, and -3 (1970) (repealed subject to pending applications by section 18(a) of the

Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. § 1617 (1976)), and the implementing regulations in 43 CFR Subpart 2561. BLM rejected these applications on two grounds:

1. The applicants had not shown the requisite use and occupancy of the subject lands prior to their withdrawal for the Tongass National Forest; and
2. The subject lands were found to be not chiefly valuable for agricultural or grazing purposes.

The applications here at issue were each filed by a person born after the withdrawal of the land described in each for the Tongass National Forest. The Tongass National Forest was established and enlarged by Presidential Proclamations of August 20, 1902; July 20, 1907; September 10, 1907; February 16, 1909; April 1, 1924; and June 10, 1925. All lands within the exterior boundaries of the forest were closed to settlement, entry, or sale under the agricultural land laws, including the Native Allotment Act, and set apart as a Public Reserve.

The statutes, 43 U.S.C. §§ 270-1, -2, and -3 (1970), supra, under which these applications were made, provide that the Secretary of the Interior is authorized, in his discretion and under such rules as he may prescribe, to allot not to exceed 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Indian, Aleut, or Eskimo of full or mixed blood who resides in and is a native of Alaska, and who is the head of a family, or is 21 years of age. Allotments may be made within national forests if founded on occupancy of the land prior to the establishment of the national forest or if the Secretary of Agriculture certifies that the land in the application for allotment is chiefly valuable for agricultural or grazing purposes. No allotment shall be made to any person until satisfactory proof of substantially continuous use and occupancy of the land for a period of 5 years has been made to the satisfaction of the Secretary of the Interior.

In each application before us here, there is a certification by the Supervisor of the Tongass National Forest, Forest Service, U.S. Department of Agriculture, that none of the land in the application is chiefly valuable for agricultural or grazing purposes.

As each applicant was born after the withdrawal of the land for the Tongass National Forest, each has attempted to tack on the prior use and occupancy of one or more of the applicant's ancestors to establish use and occupancy prior to the establishment of the Tongass. Each application contains allegations of use of the land for such things as hunting, fishing, or berry picking, or a combination of

these activities since "time immemorial." The argument that an applicant can tack on the prior use and occupancy of an ancestor was put to rest in Larry W. Dirks, 14 IBLA 401 (1974), and Louis P. Simpson, 20 IBLA 387 (1975). All of appellants' arguments in the present appeals were also made in the Simpson appeal. These arguments were discussed at some length therein, and we adhere to those conclusions in the cases now before us.

By order dated October 30, 1975, this Board denied a request for reconsideration of the Simpson decision and offered further support for our holding that the possessory right of an Alaska Native is not an inheritable right which survives the death of the Native in possession. A copy of the order is attached hereto.

[1] In Dirks, *supra*, and thereafter in Simpson, we held that the Alaska Native Allotment Act authorizes a nonalienable, nontransferable, and noninheritable right of selection which terminates upon death. Only when an allotment selection has been made by the filing of an acceptable application for public land open to such application and the applicant has used and occupied the land for not less than 5 years in his lifetime is the preference right to an allotment earned and an inheritable right established. A Native who applies for withdrawn lands must show that he himself complied with the law prior to the date of withdrawal. No Native may avail himself of any period of use and occupancy by his ancestors to establish a right to an allotment. See also Sarah F. Lindgren, 23 IBLA 174 (1975); Lula J. Young, 21 IBLA 207 (1975); Christian G. Anderson, 16 IBLA 56 (1974); and Georgianna A. Fischer, 15 IBLA 79 (1974). A fortiori, where an applicant was born after the land was withdrawn, the application must be rejected.

Appellants have requested hearings pursuant to 43 CFR 4.415 on the value of the lands sought for agriculture or grazing. The requests are denied for the reason that the decisive issue in each case rests upon the undisputed facts shown of record, chiefly that each applicant was born after the land sought had been withdrawn for the Tongass National Forest. A request for hearing will be denied where there is no dispute involving a material fact and there is no chance of development of further material facts which would require a different decision. Cabax Mills, 32 IBLA 225 (1977). Hearings under the rule enunciated in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), are required only where there is a factual dispute. Moreover, the determination whether lands, sought for an Indian allotment, are "chiefly valuable for agricultural or grazing purposes" is committed to the Secretary of Agriculture. 43 U.S.C. § 207-2 (1970). Therefore, this Department must accept that Department's findings in that regard.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Douglas E. Henriques  
Administrative Judge

We concur:

Joan B. Thompson  
Administrative Judge

Frederick Fishman  
Administrative Judge

## Appendix

76-381      AA 7889 Martin, Arthur R.  
76-386      AA 7873 Demmert, Arthur J., Jr.  
            AA 7815 Gardner, Patrick W.  
            AA 6575 George, Gabriel D.  
            AA 7867 Jackson, Norman  
            AA 7868 Jackson, Tommy, Jr.  
            AA 6604 Howard, Roger L., Sr.  
            AA 7728 Jack, Johnny, Sr.  
            AA 7733 Jack, Willy, Sr.  
            AA 7629 James, Franklin R.  
            AA 8001 Jim, Andrew  
            AA 7995 Jim, Charlie, Jr.  
            AA 7999 Jim, Frank  
            AA 8156 Jim, Mrs. Jenny  
            AA 7887 Jim, Joseph B.  
            AA 7886 Johnson, Martin  
                  AA 7734 Johnson, Moses  
            AA 7897 Adams, Stella Brown  
                  AA 7890 Samato, William H., Sr.  
            AA 7864 Jackson, Mike  
            AA 7727 Laws, Claudine M.  
76-388      AA 7632 Ware, Pat C.  
            AA 7916 Morrison, Woodrow W.  
            AA 7631 James, Melvin L.  
            AA 7893 Demmert, William G., Sr.  
76-416      AA 7957 Brown, Fanny D.  
76-507      AA 7730 Nelson, George W., Jr.  
76-508      AA 8013 White, Jacob, Sr.  
76-534      AA 6071 Kadake, Benson  
78-21      AA 8283 Cheney, Della M. J.  
78-22      AA 6605 Howard, Eli J.  
78-70      AA 7955 Johnson, Elsie M.  
78-141      AA 5710 Johnson, William S.  
78-416      AA 7931 Wilson, Joan E.  
78-583      AA 7750 Williams, Bessie Rose  
76-428      AA 8017 Johnson, Mrs. Mary B.  
            AA 7731 Walker, Amy G.  
            AA 7749 James, Paul F., Sr.  
            AA 6549 Sheakley, Warren, Sr.

OCT 30,1975

IBLA 75-38 ) AA 6568, etc.  
 )  
LOUIS P. SIMPSON, ET AL. ) Alaska Native Allotments  
 )  
Decision of June 16, 1975, ) Petition for Reconsideration  
20 IBLA 387 )  
 ) Denied

ORDER

Appellants, by their attorney, Alaska Legal Services Corporation, request reconsideration of the Board's decision in the above-captioned matter. They assert that (1) the Board failed to consider appellant's argument of denial of equal protection and (2) misunderstood the nature of the rights claimed by appellants.

The first argument, that the Board, in effect, denied equal protection, seems to be generated by an erroneous assumption that the Department previously recognized "tacking" of ancestral use to establish allotment rights. To this effect, appellants assert that a Departmental decision, Charles G. Benson of August 24, 1961, and the John Littlefield decision of April 28, 1961, are precedent. Appellants err. Those decisions were rendered by the Juneau Land Office Manager. In any event, the decision fail to show whether the applicants based their claims of use and occupancy commencing prior to the inclusion of the land within the forest or whether the lands were classified by the Forest Service as suitable for entry. Those decisions were not reviewed by the Director, Bureau of Land Management. The possible erroneous adjudication of individual cases by Land Office personnel cannot bind the Department to perpetuate error. The Jack Gamble decision cited by appellants, Anchorage 017456, August 10, 1951, was a Bureau of Land Management decision signed by the then Director. Gamble was not reviewed in the Department nor can it serve as a precedent; it merely allowed the applicant to make other or further proof concerning entitlement. Furthermore, the Bureau decision did not direct the issuance of an allotment, it merely directed that the Native applicant will not be disturbed in possession and that his possession was protected under section 8 of the Act of May 17, 1884, 23 Stat. 24, 26.

41 IBLA 229

Turning to appellants second ground, we find it without merit. Our original decision considered the arguments appellants urge anew and found them unpersuasive.

The petitions for reconsideration are denied and the Board adheres to its decision, Louis P. Simpson, 20 IBLA 387 of June 16, 1975.

Martin Ritvo  
Administrative Judge

I concur:

Douglas E. Henriques  
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON CONCURRING:

I join in the denial of this request for reconsideration. Appellants' attorneys argue that this Board failed to consider previous arguments concerning individual Native statutory occupancy rights and the effect such occupancy had upon the forest withdrawal. They assert the withdrawal was not operative because of occupancy by individual Natives (but not the applicants). Contrary to these assertions, these arguments were considered and we have rejected them and continue to reject the notion that an individual Native who, himself, did not occupy the land prior to the forest withdrawal is entitled to a Native allotment of such lands where the Secretary of Agriculture has not classified the lands for allotment. Other assertions made this brief implying unfairness and lack of equal rights are unworthy of comment except to suggest they reflect a zealotry in advocacy unrelated to the facts and law.

Joan B. Thompson  
Administrative Judge

