

ANDREW PETLA

IBLA 75-645

Decided October 5, 1979

Appeal from the decision of the Alaska State Office, Bureau of Land Management, rejecting Alaska Native Allotment application AA-7719.

Affirmed.

1. Administrative Procedure: Adjudication -- Alaska: Native Allotments -- Appeals -- Evidence: Credibility

Where an application to acquire Federal land is rejected by BLM for the reason that the applicant's own declaration of material facts stated in his application demonstrate conclusively that he is not entitled to the land as a matter of law, an effort on appeal to revise, amend, or deny the facts will not be considered absent a persuasive explanation of error in the application.

2. Alaska: Native Allotments -- State Selections

Where the State of Alaska has filed an application to select certain land 2 years prior to the date when an applicant for a Native allotment declares that he first began his use and occupancy of that land, the segregative effect of the State selection will preclude allowance of the Native allotment as a matter of law.

3. Alaska: Native Allotments -- Administrative Procedure: Adjudication

The substantial use and occupancy required by the Native Allotment Act must be achieved

by the Native as an independent citizen acting for himself, and not as a dependent child visiting and using the land in the company of his parents. Where the allotment applicant admits that this was his only presence on the land prior to its segregation from the operation of public land laws, the allotment application is properly rejected.

4. Alaska: Native Allotments

Where an Alaska Native allotment application is pending in the Department on the date of repeal of the Allotment Act, an attempt to subsequently amend the application to encompass different or additional land will not be considered as timely filed, and will be rejected as a new application barred by statute, unless it can be shown that there was an error in the original description resulting from the inability to properly identify the site on the protraction diagram.

5. Alaska: Native Allotments -- State Selections

The segregative effect of a State of Alaska selection application is operative on the land for which the State has applied from the date of filing, and remains in effect until the State's application is finally disposed, during which time no new rights may be initiated. The ultimate disallowance of the State's application will neither negate the segregative effect of its filing on the land, nor validate nunc pro tunc any claim initiated during the period when the land was so segregated.

6. Alaska: Native Allotments

Although the equitable interest of any applicant who has perfected his claim to an allotment may pass by inheritance, the substantial use and occupancy required under the Allotment Act must be achieved by the applicant himself as an independent citizen, and he may not tack the use and occupancy of his ancestors to his own use, or rely on aboriginal rights to establish his personal qualification to receive an allotment.

7. Alaska: Native Allotments -- Administrative Procedure: Adjudication

Where, even if all of the allegations of material fact made by an applicant for a Native allotment are accepted as true, allowance of the application is barred as a matter of law, the rule of Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), is not applicable, and the application is properly rejected without a hearing.

APPEARANCES: James H. Holloway, Esq., Alaska Legal Services Corporation, Dillingham, Alaska, for appellant; Thomas E. Meacham and Jeffrey B. Lowenfels, Assistant Attorney Generals, Anchorage, Alaska, for State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

In 1971 Andrew Petla filed his application for allotment of fractional S 1/2, SW 1/4 sec. 14 and N 1/2, NW 1/4 sec. 23, T. 3 S., R. 51 W., Seward meridian. The application, which was filed pursuant to the Alaska Native Allotment Act of May 17, 1906, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed subject to pending applications), clearly described the land applied for and was accompanied by a topographic map of the area on which the described land was correctly and clearly outlined. On the face of the application, in box 8a, Petla stated that he had occupied the land applied for since September 1963. This information was repeated on the lower portion of the form, "Evidence of Occupancy," Part 1, where he showed "actual residence" began in September of 1963 and continued to the following May, and continued seasonally thereafter. On Part 4 of the form, under "Improvements," he indicated that there were none. At Part 5, entitled "Fishing, Trapping, and Other Uses Of The Land," he once again declared that he began using the land in 1963 from September to May, and seasonally thereafter, for hunting and trapping. The application was signed by Petla and dated February 4, 1971. 1/

1/ The application was not filed with BLM until April 17, 1972, long after the Native Allotment Act was repealed subject to adjudication of cases then pending. However, the Anchorage Agency, BIA, reported that it had been timely filed in that office, which had neglected for several months to refer it to BLM. BLM requested BIA to submit evidence of the date of its filing, but this request went unanswered. A decision was made to treat this application, and a large number of similar applications, as pending in the Department at the time of repeal of the Act.

On January 31, 1973, the Alaska State Office of the Bureau of Land Management (BLM) rejected Petla's application for the reason that he had begun his use and occupancy of the land in 1963, after the land had been applied for by the State of Alaska. The BLM decision correctly noted that the State selection applications, A-055261 and A-055262, filed on July 26, 1961, had the effect of segregating the land from all appropriations based upon an application or settlement and location, citing 43 CFR 2627.4(b). The decision held that because Petla had declared that his first use of the land was in September 1963, more than 2 years after the filing of the State selection applications, the allotment application must be rejected.

An appeal to this Board was filed on Petla's behalf by the Superintendent of the Anchorage Agency, Bureau of Indian Affairs, although this Board had previously held in Julius F. Pleasant, 5 IBLA 171 (1972), that he was not qualified to practice before the Department in such cases. In this appeal the Superintendent argued that Petla had first begun using the land in 1959, not in 1963, as Petla had declared in three separate places on his application form. The Superintendent stated that "this land had been used since 1959 by appellant first along side his parents then later on his own for traditional Native trapping and hunting" Due to this Board's inability to recognize the unauthorized appearance of the Superintendent, the Petla appeal was one of a group of such appeals which was dismissed without prejudice to the appellants' refileing either personally or by a qualified representative. Virginia Gail Atchison, et al., 13 IBLA 18 (1973).

Andrew Petla then refiled the appeal personally, repeating the allegations which had been made in the appeal filed by the Superintendent. In his statement of reasons Petla again described the same land which he had described in his application.

In response to an inquiry by this Board, we were advised that Petla was born November 24, 1948. By our order dated November 1, 1974, the BLM decision was vacated and the case was remanded with instructions to BLM to afford Petla a reasonable opportunity to submit additional evidence to establish his entitlement. The order provided that Petla would have the burden to present clear, credible, and convincing evidence demonstrating use and occupancy as well as all other elements to establish entitlement to an allotment, and that failure to make satisfactory showings within the time required would be sufficient reason for final rejection of the application.

Pursuant to this order, on December 20, 1974, BLM wrote a certified letter to Petla, which was received by him, explaining the nature of the inadequacy of his application, particularly with

respect to the date of his first commencement of use of the land in relation to the filing of the State's selection applications. The letter noted that in view of his age, he could only have been a "minor child" when the land was segregated, and explained that the Department had held that a dependent child who only occupied or used public lands in company with his parents could not establish any independent, personal entitlement to the land based on such use. The letter concluded:

You are allowed 60 days from receipt of this letter within which to inform us if the dates or any other information in your application is in error. Any written response to this letter should refer to the serial number assigned to your case, AA-7719. If you amend your application, you must give the reason for the error in the application and present convincing evidence of the actual use and occupancy which may have occurred at an earlier point in this time. If you fail to respond to this letter, or if it is found that the evidence is still not satisfactory to meet the requirements of the law and regulations, an adverse action will be taken on your application.

A copy of this letter was sent to the Anchorage Office of the Bureau of Indian Affairs. Petla made no response whatever. After waiting more than 4 months, BLM again rejected the allotment application by its decision dated May 5, 1975. The decision again referred to the segregated status of the land at the time Petla originally alleged commencement of his use and occupancy, and noted that when the segregation was effected in 1961 Petla was 12 years old. It further noted that he had been afforded the opportunity to present further evidence and had not responded. However, prior to the sending of BLM's letter of December 20, 1974, Petla had submitted four unverified "witness statements," one of which was executed by Petla himself. All four statements responded to Question 7 -- "What Year Did The Applicant Begin Using The Land?" -- by entering the year "1967." Petla's own signed "witness statement" answered this query, "1967-August." 2/ Thus, the decision held, in effect, that either Petla had made no use of the land prior to the date of its segregation, or, if he had, such use was as a minor child in the company of his parents and, as such, was nonqualifying.

An appeal was filed on Petla's behalf by Alaska Legal Services Corporation, and it is this appeal which is now before us.

2/ At the time of appeal filed by the Superintendent of the Anchorage Agency, BIA, four other "witness statements" were filed, all of which declared that Petla began his occupancy of the land in 1959.

While the appeal was pending, ^{3/} Petla wrote a letter to BLM, which was forwarded to this Board for enclosure in the case file. In this letter Petla states that the land he wants is not the land in secs. 14 and 22, as described in his application and his appeal, but rather land in sec. 19, T. 3 S., R. 51 W., Seward meridian, about 3 1/2 miles from the land applied for. He characterizes the description in the application as an "error," although he does not indicate whose error it is. He also states, "Prior to 1963, I used this portion of the land mentioned above in Section 19 with my Father and relatives." The case file contains a second letter, dated October 26, 1972, which also alleges a mistake in the land description. Apparently, BLM took no action in consequence of that letter. In 1976 he filed an affidavit in which he asserts that the land was "misdescribed" by BIA and BLM.

[1] As to the date when Petla first began use and occupancy of the land, he has alleged three different dates, *i.e.*, "September 1963," "1959," and "1967-August." At the time of BLM's initial adjudication the only date which had been given for this event was "September 1963," and this date was given three times on the application. Because the land applied for had been segregated by the filing of the State's selection applications on July 26, 1961, the date of his first use and occupancy was not only material, it was controlling and precluded the granting of the allotment as a matter of law. It was only after the application was first rejected by BLM that the allegation was made on appeal that the correct date was 1959. Although this allegation was buttressed by four unverified "witness statements," the veracity of the allegation was later put severely into doubt by the filing of four additional "witness statements," one by Petla himself, that the first date of Petla's use and occupancy was 1967. Notwithstanding the remand of this case for clarification of the discrepancy by our order of December 20, 1974, and the opportunity afforded by BLM to appellant to show error, no effort was ever made to explain why the date "September 1963" was used in the application if it was incorrect. The Secretarial Instruction of October 18, 1973, addressed this issue, stating,

Amendments which are designed to claim commencement of the use and occupancy at an earlier point in time must also be carefully examined, and the applicant must establish the reason for his error, his good faith in making the correction, and the applicant must present convincing evidence of the actual use and occupancy at the earlier point in time. [Emphasis added.]

^{3/} Our consideration of this appeal has been delayed pending decisions by the United States Court of Appeals in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), and Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

Where an application is rejected by BLM for the reason that the applicant's own declaration of material facts demonstrates conclusively that the application must be rejected as a matter of law, an effort on appeal to revise, amend, or deny such facts will not be considered by this Board absent a persuasive explanation of error in the application.

[2] The filing of the State selection applications more than 2 years prior to the date appellant initially declared that he first began use and occupancy resulted in the segregation of the land from all appropriations based upon subsequent application, settlement, or location. 43 CFR 2627.4(b). Dennis G. Quinn, 29 IBLA 307 (1977); John W. Eastland, 24 IBLA 240 (1976). A Native allotment application is properly rejected where occupation and use began after the filing of an acceptable state selection. Natalia Wassilliey, 17 IBLA 348 (1974); Helen F. Smith, 15 IBLA 301 (1974).

[3] Even assuming that appellant's allegation that he first went on the land in 1959 is correct, his own description of his presence there prior to the filing of the State's selection applications would disqualify him as a matter of law from using that experience to defeat the State's selections. In 1959 appellant was 11 years old. In every instance where he alleges that he occupied the land prior to its selection by the State, he asserts that he was in the company of his parents and other relatives. The appeal filed on Petla's behalf by the Superintendent of the Anchorage Agency states, "When contacted, appellant stated that he used this land in the traditional Native manner since 1959, first along side his parents, then later on his own for fishing and hunting." When that appeal was dismissed without prejudice and refiled by the appellant pro se, he made a similar statement. In his letter of November 7, 1975, with reference to the other land in section 19 which he wants to substitute for the land in the application, he states, "Prior to 1963, I used this land . . . with my Father and relatives." (Emphasis Added.) Finally, in his present appeal, the statement is made, "As early as 1959 Andrew Petla began use and occupancy of his allotment land. He first went to his land with his father, Blunka Petla"

Even were we to accept 1959, rather than 1963 or 1967, as the year when appellant first went to the land -- which we have declined to do -- the effect of these statements is conclusive of the fact that he was then a child of 11 accompanying his parents and other relatives on fishing and hunting trips. Such occupancy does not invest the child with any right, title, interest, or priority in the land. This Board has repeatedly and consistently held that the substantial use and occupancy required by the Native Allotment Act must be achieved as an independent citizen acting for himself, and not as a minor dependent of his parents. Nellie Boswell Beecroft, 41 IBLA 70 (1979); John Moore, 40 IBLA 321, 326 (1979); Natalia Wassilliey, supra; Arthur C. Nelson (On Reconsideration), 15 IBLA 76 (1974). It must be

accomplished as an independent individual in his own right, and it must be at least potentially exclusive of others. 43 CFR 2561.0-5(a); Nellie Boswell Beecroft, *supra*; John Nanalook, 17 IBLA 355 (1974). It would defy reason to hold that a child of 11 or 12 visiting public land in company with his parents or other relatives for the first or second time is capable of and, solely by virtue of his presence, is in fact, laying personal and independent claim of entitlement to the land and thus is invested with dominion over it to the potential exclusion of others. We hold that as a matter of law he could not have done so. See Floyd L. Anderson, 41 IBLA 280, 86 I.D. 345 (1979), and cases cited therein.

[4] Appellant's attempt to amend his application to change the land applied for in sections 14 and 23 to a subdivision in section 19 cannot be considered. Section 18 of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. § 1617 (1976), repealed the 1906 Native Allotment Act, subject to the proviso that applications then pending before the Department might be approved. An effort by an applicant to acquire different or additional lands after that date must be regarded as the filing of a new application which is barred by the statute. This Board has repeatedly held that where an Alaska Native allotment application pending in the Department on December 18, 1971, is later amended to include new or additional lands, the amendment will not be considered as timely filed and will be rejected. Annie Sopl, 22 IBLA 38 (1975); Raymond Paneak, 19 IBLA 68 (1975); George Ondola, 17 IBLA 363 (1974). The Secretarial Instruction of October 18, 1973, directs, "Amendments which result in the relocation of the allotment will not be accepted unless it appears that the original description arose from the inability to properly identify the site on protraction diagrams." (Emphasis added.) The land in Petla's application was platted on a topographic map of the area which clearly showed how the land claimed was situated with reference to the river on which it fronted and its relationship to other terrain features. No protraction diagram was used.

[5] In this appeal it is argued exhaustively that even if the State's selection applications segregated the land in 1961, and even if appellant's age at that time prevented him from using the land as an independent citizen, the use of the land by appellant's ancestors, and his own use as a dependent child, preclude the State from selecting the land, and negate the segregative effect of the filing of the State's applications. This argument is premised upon the Alaska Statehood Act of July 7, 1958 (72 Stat. 339), which provides that the State may select lands which were "vacant, unappropriated, and unreserved at the time of selection," and by reference to various judicial holdings to the effect that state selections could not be approved where right or title to the selected lands was claimed by Alaska Natives (or Indians in other states), or where the occupancy of the land by Alaska Natives is protected by 43 CFR 2091.6-3.

This argument is untenable for a number of reasons. First, it is tangential, in that it ignores the fact that it is not the acceptability of the State's selection applications which is the issue presented by this appeal, but rather the acceptability of Petla's application.

The purpose of 43 CFR 2627.4(b), which provides for the segregation of lands upon the filing of the State's application to select, is to preserve the status quo, and to prevent the initiation of any new rights or claims pending disposition of the State's application. The regulation has the force and effect of law. See United States v. New Orleans Public Service, 553 F.2d 459 (5th Cir. 1977). Under the regulation, the segregative effect is operative from the filing of the selection application. Unless terminated automatically by reason of the State's failure to publish, the segregation remains in effect until there is a final disposition of the selection application either by rejection of the application or the granting of the land to the State. Of course, any application by the State to select land is subject to the prior rights of others, and is defeasible by them, or by the United States, if the prior right is superior to that of the State, or if the land is otherwise unavailable for selection. That is why the State must file an "application" to select the land and why that application must be adjudicated. But whether the State's application is ultimately held to be "good" or "bad" has absolutely nothing whatever to do with the segregative effect imposed on the land by its filing, as the segregation only precludes the attachment of subsequent claims while the application is pending. If in this case the State's selection applications must be finally rejected for any reason, this would not "negate" their segregative effect on the land during the time that they were pending, nor would such rejection serve to validate nunc pro tunc any claims initiated while the land was so segregated.

Second, appellant's argument is hypothetical and conditional, in that it contends that we should hold that the State's applications must be rejected, and if we do, we should recognize appellant's right to initiate a claim on segregated land, the validity of which may be determined by subsequent events. This is contrary to every precept of the effect of a segregation, withdrawal or reservation with respect to every kind and class of claim throughout the long history of public land administration. If, hypothetically, the allowance of the State's applications is found to be barred by the prior rights of others, that fact is of no benefit to appellant in establishing the validity of his own claims. For example, in Harry H. Wilson, 35 IBLA 349 (1978), we said:

The Secretary of the Interior in making withdrawals "subject to valid existing rights" in PLO 5179 and PLO 5250 intended exceptions to withdrawal to apply in behalf of only those claimants who themselves held such valid rights at time of withdrawal. The Secretary did not intend

existence of another's valid rights on withdrawal date to restrain withdrawal so as to allow a topfiling claimant to enter pertinent lands after withdrawal date and independently establish rights under mining laws.

Claims initiated at a time when the land is closed to the initiation of such claims are wholly void, and the subsequent restoration of the land to such entry, location or appropriation cannot serve to infuse them with life. See, e.g., James Messano, 35 IBLA 383 (1978), where we said: "Mining claims located on land withdrawn from such entry are null and void ab initio and will not be validated by the modification or revocation of the order of withdrawal to open the land thereafter to mineral entry."

[6] Appellant argues that notwithstanding his tender age and state of dependency when he allegedly visited the land prior to its segregation in 1961, he can still prevail through reliance on ancestral use and occupancy to avoid the segregative effect of the State's selections, either by tacking their use of the land to his own, or, alternatively, as a barrier against the State's right to select.

"All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska . . ." were expressly extinguished by the Alaska Native Claims Settlement Act, 43 U.S.C. § 1603 (1976). Thus, appellant's reliance on ancestral use can avail him nothing. State of Alaska, 41 IBLA 315, 86 I.D. 361 (1979); Ann McNoise, 20 IBLA 169 (1975).

Nor, as we have so often held, can he tack the use attributed by him to his parents and other relatives prior to the segregation of the land to his own post-segregation use of that land. The allotment right ^{4/} is personal to one who has fully complied with the law and regulations. An applicant may not tack the use and occupancy of others, including relatives, to his own use in order to establish his qualification. Herman Anderson, Jr., 41 IBLA 296 (1979); Sarah F. Lindgren, 23 IBLA 174 (1975); Lula J. Young, 21 IBLA 207 (1975); Ann McNoise, *supra*. However, once an applicant has fully met all requirements for allotment, including the filing of an application, he has established an equitable interest which may be inherited although the certificate of allotment has not yet issued. See Unknown Heirs of Migley Kelly, 41 IBLA 315 (1979). But the filing of the allotment application is an essential element of this qualification, for good reason. An Alaska Native following the traditional Native way even for part of the year, might reasonably use and occupy several tracts

^{4/} The term "allotment right" is used advisedly. As the granting of an allotment is at the discretion of the Secretary, regardless of the applicant's qualification, there is no actual "right" involved. See Pence v. Kleppe, *supra*, n.3.

of public land comprising in the aggregate, hundreds or even thousands of acres. Each year he might fish in one area, hunt waterfowl in another, moose in a third, pick berries in a fourth, gather wood in a fifth, careen his boat and repair his gear in a sixth, run a trapline on a seventh, and even follow a caribou migration route for miles over the same land each season. Arguably, under the Department's liberal construction of "use and occupancy" he could establish his qualification to any of this land by alleging that it was known as "his" campsite, fishing ground, trapping area, etc., on a seasonal basis for at least 5 years. But under the law, he could not apply for all of it; he could only seek up to a maximum of 160 acres. Therefore, if he desired an allotment, he was obliged to apply for the particular acreage he most wanted. The fact that he regularly visited the remaining land in pursuit of his various subsistence activities cannot affect the legal status of that land, or make it unavailable to any other lawful applicant, nor can his use of the land be counted as qualifying his children and grandchildren who cannot qualify in their own right. Thus, where a Native has used and occupied a tract of not more than 160 acres of land which was open and available for 5 years, filed his application, and made his proof, he has established an equity in the land which may be passed by inheritance, bearing in mind that the allowance of the application is, by the terms of the statute, discretionary. However, where he has not done so, no rights in the land whatever accrue to his descendants.

In summary, we hold as matter of law that appellant's application must be rejected because: (1) the lands applied for were segregated in July 1961 from any subsequent claim, location or settlement, and appellant's application expressly declares in three places that his use and occupancy began in September 1963; (2) even were we to accept appellant's subsequent assertion that prior to the filing of the State's selection he had visited the land as a child of 11 and 12 years of age in the company of his parents and other relatives, this would not have invested him with any right, claim, or interest in the land, or any priority which could defeat the State's right to select the land; (3) his attempt to amend his application to encompass entirely different lands than those for which he applied on December 18, 1971, is barred by statute and cannot be considered; (4) the segregative effect of the State's selection applications were operative from the time of their filing regardless of whether those applications are ultimately allowed; and (5) appellant may not assert any personal claim premised upon aboriginal rights.

[7] As there are no material facts in dispute and the disposition of the case is controlled exclusively by applicable law, the case does not fall within the ambit of the rule in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), and no hearing is necessary. Herman Anderson, Jr., 41 IBLA 296 (1979).

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.

Edward W. Stuebing
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

Frederick Fishman
Administrative Judge

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING IN THE RESULT:

In his Native allotment application, dated February 4, 1971, appellant stated that he used certain lands, commencing in September 1963, on a seasonal basis for hunting and trapping. The lands were described in that application as the fractional S 1/2 SW 1/4 sec. 14, and the N 1/2 NW 1/4 sec. 23, T. 3 S., R. 51 W., Seward meridian. By letter dated October 26, 1972, appellant informed the Alaska State Office, BLM, that the description should read N 1/2 NW 1/4 sec. 19, T. 3 S., R. 51 W., Seward meridian. By decision of January 31, 1973, the Alaska State Office rejected the allotment application because all land in T. 3 S., R. 51 W., had been withdrawn pursuant to State of Alaska selection applications as of July 26, 1961, two years prior to the claimed initiation of use and occupancy. 1/ This decision was eventually vacated by an order of this Board to permit appellant to supplement his application by showing that he occupied and used the land prior to the segregative effect of the withdrawal.

Subsequent to the filing of the original application, as the majority decision notes, appellant stated that he had used the land, at least during the critical years prior to the filing of the State selection application, "with my Father and relatives." At no place in the entire record does appellant ever assert that he utilized the land prior to 1961 as an independent citizen. On the contrary, he continuously asserted that the use was with his parents and other relatives. The issue which I think is crucial to a determination of this appeal is whether, in the absence of any allegations of independent use, this Board must order the issuance of a Government contest prior to the rejection of a Native allotment application. I think the answer is clearly in the negative.

The Native Allotment Act of 1906, 34 Stat. 197, as amended 43 U.S.C. §§ 270-1 to 270-3 (1970), provided that "no allotment shall be made to any person . . . until said person has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years." 43 U.S.C. § 270-3 (1970). While the above-quoted language was added by the Act

1/ The State Office decision rejected the application as it related to the lands applied for in the original decision. Under the guidelines for Native allotment adjudication, approved October 18, 1973, by the Assistant Secretary, "amendments which are designed to claim the commencement of the use and occupancy at an earlier point in time must also be carefully examined and the applicant must establish the reason for the error, his good faith in making the correction, and the applicant must present convincing evidence of the actual use and occupancy at the earlier point in time." The controlling issue, herein, remains the same regardless of the specific land sought.

of August 2, 1956, 70 Stat. 954, the Department's regulations had required a period of 5-years use and occupancy years prior to the 1956 amendment. See Warner Bergman, 21 IBLA 173 (1975).

In 1965, the Department codified its interpretation of the phrase "substantially continuous use and occupancy" in the regulations. See 30 FR 3710 (Mar. 20, 1965), amending 43 CFR 2212.9-1(c)(1) (now 43 CFR 2561.0-5(a)). That regulation provides:

The term "substantially continuous use and occupancy" contemplates 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 requirement that the possession be "at least potentially" exclusive of others is premised upon the fact that the Native use and occupancy which can give rise to possessory rights "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." United States v. 10.95 Acres of Land in Juneau, 75 F. Supp. 841, 844 (D. Alaska 1948). 2/

The question of "potential exclusivity" is one which the Board has not heretofore addressed. Certainly, there would be a valid question whether simple use of the land for berrypicking, with nothing more, could constitute use potentially exclusive of others. In the instant case, however, appellant has affirmatively and uniformly stated that at all times during the critical period he was using and occupying the land in conjunction with others. Never once has he alleged independent use antedating the effective date of the State selection.

The fact that the individuals, in whose company he was, were familial relations is a matter of no consequence so far as appellant's

2/ While this interpretation was made under section 8 of the Act of May 17, 1884, 23 Stat. 26, providing that the Alaskan Natives "shall not be disturbed in the possession of any lands actually in their use and occupation or now claimed by them . . .," the concept is equally, if not more compellingly, applied to use and occupancy under the Native Allotment Act. Thus, the Board has held that use sufficient to prevent a State selection from attaching to land might, nevertheless, be an insufficient predicate upon which to grant a Native allotment application. See Lucy S. Ahvakana, 3 IBLA 342 (1971).

application is concerned. He does not allege that he was head of a family as of the time of his pre-1961 use. Indeed, he was only 12 years old at that time. The statutory framework clearly envisaged a scheme in which the head of a family could apply for a Native allotment to cover land which the family jointly used, and other additional family members, who are 21 years of age, could be allotted lands which they independently used. It was not designed, however, to permit additional family members to increase the amount of land to which the family, as a unit, is entitled by permitting other family members to acquire lands used in common. Nor was the Native Allotment Act intended to allow individual Natives to acquire lands used in common. The entire focus of the Allotment Acts, regardless of their wisdom, was to "civilize" the Native inhabitants by breaking up the traditional communal society through individual allotments which would be utilized as homesteads. ^{3/} It was not until the passage of the Alaska Native Claims Settlement Act (ANCSA), Act of December 18, 1971, 85 Stat. 688, 43 U.S.C. §§ 1601-1628 (1976), that this policy, as applied to Alaska, was altered by the Congress of the United States.

It is important to note that ANCSA included an express provision for the repeal of the Native Allotment Act, which can be seen as a Congressional recognition of fundamental policy conflict between the two approaches. Moreover, in permitting the processing of pending applications, Congress provided that the allotment applicant would waive his or her rights under section 14(h)(5) of ANCSA. That section provided that the Native applicant could have up to 160 acres conveyed if it was occupied as a primary place of residence. 43 U.S.C. § 1613(h)(5) (1976). I think that this provision is fairly interpreted as reflecting Congress' belief that Native allotments were available only where the land sought was a primary place of residence for the allotment applicant. ^{4/}

With this in mind, I think it clear that both the majority and minority have pursued a red herring as far as the instant case is concerned. I think that the age of the appellant, at the relevant time herein, is totally irrelevant to the result which should be reached.

^{3/} That the Governmental policy of the time was inimical to traditional Native and Indian ways of life is made clear by the fact that the Indian tribes almost universally opposed the adoption of the original General Allotment Act of 1887. See generally D. S. Otis, "History of the Allotment Policy," In Readjustment of Indian Affairs, Hearings on H.R. No. 7902 before the Committee on Indian Affairs, 73d Cong., 2d Sess., part 9 at 428 et seq. (1934), reprinted in, M. Price, Law and the American Indian at 544-51 (1973).

^{4/} The only alternative construction is that Congress felt that the section 14(h)(5) provision was a stricter standard than that in effect under the Native Allotment Act. There is no indication in the legislative history that such was the Congressional belief.

We are not concerned with the claim of an individual who has alleged independent use. On the contrary, appellant has uniformly stated that the land was always utilized jointly with other family members.

By way of illustration, if we hypothesize four unrelated individuals who are each over 21 years of age and who, owing to ties of friendship, annually use a specific parcel of land, I find it difficult to believe that this Board would grant an allotment application to one of these individuals. Indeed, such action would constitute an ouster of the other three, despite the fact that the other three were vested with the same usage as the applicant. The Native Allotment Act was simply not intended to permit the acquisition of title in such circumstances. Potential exclusivity, with the sole exception of a head of a household who utilized land with his or her family, was the key to the grant. The age of the applicant is, in these circumstances, simply not germane to the question of exclusivity.

In sum, inasmuch as the applicant has failed to allege independent use at any point to date, I agree that there exists no disputed issue of fact which necessitates a hearing. See Donald Peters, 26 IBLA 235, 241 n.1, 83 I.D. 308, 311 n.1 (1976). Accordingly, I concur in the denial of the instant appeal.

James L. Burski
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON DISSENTING:

I would grant appellant's request for a hearing in this case based upon the court ruling in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). Therefore, I disagree with the majority for this reason. The majority has ruled:

It would defy reason to hold that a child of 11 or 12 visiting public land in company with his parents or other relatives for the first or second time is capable of and, solely by virtue of his presence, is in fact, laying personal and independent claim of entitlement to the land and thus is invested with dominion over it to the potential exclusion of others. We hold that as a matter of law he could not have done so. See Floyd L. Anderson, 41 IBLA 280, 86 I.D. 345 (1979), and cases cited therein.

I concurred in the decision in Floyd L. Anderson, cited in the above quotation. We ruled in Anderson that a 5-year old could not be deemed, as a matter of law, to have exerted independent use and occupancy of the land to the exclusion of others. This ruling was based primarily upon a review of court cases dealing with the capacity of 5-year-olds in various circumstances. That case is distinguishable because there is little doubt under the law as to the capacity of a 5-year-old child. This is not true as to an 11-year-old. Since the issuance of the court's opinion in Pence, supra, we have not ruled on the capacity of minors over 5 years of age in meeting the use and occupancy requirements of the Native Allotment Act.

While the majority decision is based upon the applicant's own assertions that he was accompanied by parents or other relatives, to reach the conclusion that he could not be exerting independent dominion over the land at least potentially exclusive of others it is necessary to draw inferences from the asserted fact that others were with the child. This is reasonable, and I would agree that the facts asserted by the applicant, as well as other documentation submitted by him, are sufficient to draw such inferences. Thus, the submissions of the applicant are sufficient upon which the Government may make a prima facie case of the applicant's nonentitlement under the Act. Although ordinarily this might serve as a basis for rejecting an application, I believe the essential thrust of the Pence decision to allow a Native to have a hearing where there are some factual issues disputed compels us to order a hearing in this case, as the applicant has asserted he has met the use and occupancy requirements of the Act.

Therefore, in view of Pence I would order a hearing, stressing, however, that the Government may present a prima facie case of noncompliance with the Act by presenting the submissions of the applicant and his witnesses. Other evidence, of course, could be submitted. I would also stress that the burden is upon the applicant to show that the requirements of the Act have been satisfied. Mildred Sparks, 42 IBLA 155 (1979).

Joan B. Thompson
Administrative Judge

I concur:

Anne Poindexter Lewis
Administrative Judge

ADMINISTRATIVE JUDGE GOSS DISSENTING:

I would set aside the decision and remand the case to Bureau of Land Management, for reasons set forth hereunder.

Actual Possession and Use "Potentially Exclusive of Others"

The Native Allotment Act contemplated "substantially continuous use and occupancy" under 43 U.S.C. § 270-3 (1970), either on behalf of a nuclear family or on one's own behalf as an independent user. I submit that where there has been the required use and occupancy by a family, including the potential exclusion of others under 43 CFR 2561.0-5(a), and the family has not otherwise obtained the full family allotment, then a member of the family who survives the family head and who himself used and occupied the land for the particular period together with the family head, may obtain the family allotment or portion thereof providing he meets the other requirements of law and regulation.

The decisions in Pence v. Kleppe, 529 F.2d 135, 141-42 (9th Cir. 1976), Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664, 670-71 (D. Alaska 1977), and Secretarial Order No. 3040, May 25, 1979, all indicate that Board of Land Appeals interpretations of "potentially" exclusive use in 43 CFR 2561.0-5(a) should be reexamined.

In Secretarial Order No. 3040, the Secretary stated that his policy is "that of liberally construing acts passed for the benefit of Natives. "Under Pence, supra at 141-42, and Alaska Public Easement Defense Fund, supra, if ambiguities remain after analyzing statutory language and legislative intent, they are to be resolved in favor of Alaska Natives. The Supreme Court in 1976 reaffirmed this approach. "[S]tatutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." Bryan v. Itasca County, 426 U.S. 373, 392 (1976).

In the past, the Board has ruled that use and occupancy by a child of tender years cannot be "potentially" exclusive of "others" under 43 CFR 2561.0-5(a). E.g., James S. Picnaloock, Sr., 22 IBLA 191, 193 (1975). This construction of section 2561.0-5 conflicts with (1) the judicially mandated rules of construction, discussed supra; (2) the Secretarial policy expressed in section 2561.0-2 and Secretarial Order No. 3040; (3) the clear meaning of "others" as used in section 2561.0-2, and (4) the clear meaning of the word "potentially" in section 2561.0-5(a). The Departmental regulations provide:

§ 2561.0-2 Objectives.

It is the program of the Secretary of the Interior to enable individual natives of Alaska to acquire title to the lands they use and occupy and to protect the lands from the encroachment of others. [Emphasis added.]

* * * * *

§ 2561.0-5 Definitions.

As used in the regulations in this section.

(a) The term "substantially continuous use and occupancy" contemplates 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.

(b) "Allotment" is an allocation to a Native of land of which he has made substantially continuous use and occupancy for a period of five years and which shall be deemed the "homestead" of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable except as otherwise provided by the Congress. [Emphasis added.]

Such provisions are for the benefit of the "heirs"; the allottee may not alienate their interests. The word "others" was thus never intended to include members of the family using and occupying the land being claimed as the homestead of allottee and his "heirs." "Others" means nonfamily members. These concepts are set forth in Picalook, supra at 195-201 (dissent).

The restrictive construction of section 2561.0-5 also does violence to the meaning of "potentially" under the section. Webster's Third International Dictionary (1963) defines the word "potentially" as: "1. in a potential or possible state or condition: with a possibility or capacity for becoming actual." Clearly, a younger family member can "potentially" exclude nonfamily members, and an older member of a family can "potentially" exclude "others" on behalf of younger members who are occupying and using the land.

The "Qualifications of Applicants" are discussed in the memorandum of the Assistant Secretary, Land and Water Resources, to Director, Bureau of Land Management, "Adjudication of Pending Alaska Native Allotment Applications," October 18, 1973. That memorandum indicates no intention to establish a minimum age for use and occupancy and no intention to discriminate against the younger family members:

Qualifications of Applicants

* * * * *

3. Must be the head of a family or 21 years of age at the time that the allotment is granted. Therefore, an applicant may be under 21 years of age or not the head of a family before or at the date his application was filed with the Department. [Emphasis added.]

If surviving children cannot gain the advantage of their own use and occupancy alongside that of a deceased head of a family, then the same should apply to a widow whose deceased husband may have been head of family during the period when initiation of occupancy was permitted. Nevertheless, the Department recognizes that a surviving widow but not a surviving child can obtain the allotment, despite the fact they both "used and occupied" alongside the father.

There has been no discussion of why the Secretary, in promulgating the regulations, would have intended to exclude younger children, who for the required period have used and occupied the land with their family, from the protection afforded other Alaska Natives under the Native Allotment Act. Neither has it been explained why younger children using and occupying a Native homestead in Alaska should not be accorded the same type of protection as is provided to younger children under other homestead laws. E.g., 43 U.S.C. § 167 (1970), repealed subject to various savings provisions, P.L. 94-579, 90 Stat. 2787.

Under the Board's unnecessarily narrow construction of subsection 2561.0-5, the Secretarial objectives expressed within the same section, at 43 CFR 2561.0-2, quoted supra, cannot be fulfilled. The Board should liberally construe the statute and 43 CFR 2561.0-5(a) in accordance with the Secretarial policies expressed in 43 CFR 2561.0-2, the Assistant Secretary's memorandum, and the purpose of the statute as set forth in Pence.

As to "exclusive" use or occupancy under the Act of May 17, 1884, discussed in United States v. 10.95 Acres of Land in Juneau, cited in Judge Burski's opinion, it would seem clear that the court had no intent to establish a standard under which the head of the family and his wife are deemed to hold exclusive of all others, including their children, and the children are excluded from the benefits thereof. The "potentially exclusive of others" standard promulgated in section 2561.0-5(a) incorporates a different standard than the "exclusive" standard in the Juneau case. 1/ The regulation, in effect, properly

1/ The Juneau case also refers to "visible evidence of use." Pursuant to Secretarial policy, affidavits are authorized as evidence of use. Letter, Assistant Secretary Hughes to President, Alaska Federation of Natives, July 30, 1974. In recent BLM decisions, present visible evidence of past use has not been required.

recognizes a basic fact of Alaska Native culture -- that land in Alaska at one time was used communally. The Department requires, of course, that no other claimant have a stronger claim of actual occupancy and use pursuant to statute. 2/ The efficacy of the regulation has not been questioned by the State of Alaska herein, nor is there any indication in Pence that the court had reservations as to the "potentially exclusive" standard. The Court stated in Pence at 137:

The Secretary's regulations construe the Act to allow for customary and seasonal patterns of use and occupancy, but require that there must be actual possession and use, potentially exclusive of others, and not merely intermittent use. 43 CFR § 2561.0-5(a). Thus, an applicant can meet the required qualifications by showing seasonal use of the claimed land, potentially exclusive of others, for five consecutive years for such customary purposes as hunting, fishing, or berry picking. [Emphasis added.]

Departmental recognition of this type of use is also a recognition of the facts of life in Alaska -- such uses are essential to survival; traditional farming in most of Alaska has not been successful. 3/

The opinion in Pence incorporated the purposes of the Native Allotment Act, as set forth in the legislative history:

In the Report to the Full House of Representatives from the Committee on Public Lands which reported out the Alaska Native Allotment Act, the Committee said:

The necessity for this legislation arises from the fact that Indians in Alaska are not confined to reservations as they are in the several States and Territories of the United

2/ If an area is presently claimed by a Native community or by another Native, then Bureau of Indian Affairs must make an initial determination under 43 CFR 2561.1(d). Section 2461.1(d) provides:

"(d) An application for allotment shall be rejected unless the authorized officer of the Bureau of Indian Affairs certifies that the applicant is a native qualified to make application under the Allotment Act, that the applicant has occupied and posted the lands as stated in the application, and that the claim of the applicant does not infringe on other native claims or area of native community use."

3/ It has been estimated that of the approximately 700,000 acres patented as farming homesteads, only some 25,000 acres remain in crop production. Interview with Curtis V. McVee, Alaska State Director, Bureau of Land Management, July 19, 1979.

States, but they live in villages and small settlements along the streams where they have their little homes upon land to which they have no title, nor can they obtain title under existing laws. It does not signify that because an Alaska Indian has lived for many years in the same hut and reared a family there that he is to continue in peaceable possession of what he has always regarded his home. Some one who regards that particular spot as a desirable location for a home can file upon it for a homestead, and the Indian or Eskimo, as the case may be, is forced to move and give way to his white brother. This has in some instances already worked severe hardship upon these friendly and inoffensive natives to the shame of our own race, due more to a lack of needed legislation than to wanton disposition on the part of those who have thus dispossessed them than it has been to deprive the natives of what must be conceded to be their rights. [Emphasis by court.] H.R. Rep. No. 3295, 59th Cong., 1st Sess. (1906).

This is a clear indication that Congress intended to create or to recognize rights in Alaska Natives to the land that they occupy for the statutory period, and not, as the Secretary contends, merely a hope that the government will give them the land. An Alaska Native who meets the statutory requirements on land statutorily permitted to be allotted is entitled to an allotment of that land, and the Secretary may not arbitrarily deny such an applicant. Due process does apply.

Pence at 141-42.

Where there are questions as to whether a minor was acting in his individual capacity, the first question should be whether the minor is pressing a claim on behalf of a nuclear family. This would involve an inquiry as to whether other claims have been submitted for the family. Only if the applicant is actually putting forward an independent claim is it necessary to inquire into his independent status during the crucial period. The record here is not complete in this respect and should be supplemented on remand. If, for example, the head of the family has filed his own claim, to the maximum acreage permitted, and if BLM determines that appellant as a 12 year old did not have capacity to "potentially exclude others when the land was open for occupancy," then I agree with Judge Thompson that a hearing should be ordered as to the child's own capacity to potentially exclude others at the time of the segregation.

Error in Description of Land

As early as November 1, 1972, appellant filed a request that the description on his application be corrected to include a part of sec. 19, T. 3 S., R. 51 W., Seward meridian, rather than parts of secs. 14 and 23.

In its January 31, 1973, decision, the State Office referred only to secs. 14 and 23, without reference to the amendment request. The statement of reasons on appeal, prepared by Bureau of Indian Affairs but signed by appellant, also refers to secs. 14 and 23. The May 5, 1975, decision refers only to those sections. Appellant's letter of November 7, 1975, again referred to the error and stated that his use was in sec. 19. This description was included in the statement of reasons filed October 12, 1976, which document was the first filing submitted with assistance of legal counsel.

In a 1976 affidavit, appellant states the land was misdescribed by BIA and BLM. This affidavit has never been reviewed by BLM.

The entire township was segregated in 1961, hence this would not be a reason for any fabrication. The Secretary has authorized acceptance of relocation amendments where there was "an inability to properly identify the site on protraction diagrams." Memorandum, Assistant Secretary, Land and Water Resources, October 18, 1973, supra. I would remand to BLM for a ruling on these matters. It is not clear whether the proof presented and the Bureau of Indian Affairs certificate under 43 CFR 2561.1(d) properly related to sec. 19 or to secs. 14 and 23.

Joseph W. Goss
Administrative Judge

