

WILLIAM BOUWENS ET AL.

IBLA 75-663B, etc.

Decided April 8, 1980

Appeals from decisions of the Alaska State Office, Bureau of Land Management, rejecting Native allotment applications AA-6996, etc.

Set aside and remanded.

1. Alaska: Alaska Native Claims Settlement Act -- Alaska: Native Allotments -- Indian Lands: Aboriginal Title

Alaskan Native aboriginal occupancy claims, or claims under the Organic Act of Alaska of May 17, 1884, and the Act of June 6, 1900, were extinguished by the Alaska Native Claims Settlement Act. A Native applicant's rights under the 1906 Native Allotment Act are based upon his or her individual compliance with that Act and not upon any ancestral use of the land.

2. Alaska: Native Allotments

The requirement that a Native allotment applicant show 5 years use and occupancy is applicable to all public land and not just to national forest land.

3. Alaska: Native Allotments -- Applications and Entries: Generally -- Rules of Practice: Government Contests

Where Native allotment applicants who were 8 years and older at the date land was segregated from entry assert independent use and occupancy of the land then, the Bureau of Land Management should contest their applications, affording them notice and an

opportunity for a hearing to prove the adequacy and independence of their use and occupancy, rather than reject the applications without a hearing simply because of the applicant's age on the segregative date.

APPEARANCES: Alaska Legal Services Corp., for appellants; Office of the Attorney General, State of Alaska, for the State.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

The appeals consolidated in this decision are five Native allotment applications (see Appendix A) filed pursuant to the Act of May 17, 1906, 34 Stat. 197, as amended by the Act of August 2, 1956, 70 Stat. 954 (repealed subject to pending applications, section 18(a), Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976)), and the regulations at 43 CFR Subpart 2561. 1/ The applications were rejected in whole or in part by the Alaska State Office, Bureau of Land Management (BLM), in 1975 2/ because BLM found the use and occupancy alleged by the applicants was not as adults asserting independent control over the lands. All of the lands involved are included in conflicting selection applications by the State of Alaska.

Many issues have been raised on behalf of appellants in an attempt to show that the BLM decisions erred in resting on the minority of the applicants when the land was segregated.

[1] In briefs submitted on behalf of some of the appellants, Alaska Legal Services Corporation (ALSC), has raised some issues similar to those raised in prior cases resolved by this Board. We shall respond only briefly to some of those arguments. They contend that the applicants have rights arising from the Organic Act of Alaska, 23 Stat. 24 (May 17, 1884), and the Act of June 6, 1900, 31 Stat. 321; that these statutes preserve valid legal rights in lands occupied by Natives; and the Allotment Act merely added a preference right. ALSC also asserts that ancestral use and occupancy can be tacked to appellants' use and occupancy, that use and occupancy is only required for national forest lands, and that no age limit for initiation of use and occupancy is set by the Act or regulations.

1/ Case Nos. 75-663B, 76-226, and 76-422 were originally consolidated under the rubric Mary Klein Zimin, IBLA 76-639. On further consideration we have determined that the cases differ sufficiently to require separate treatment.

2/ Consideration of these appeals was delayed pending the outcome of litigation in the United States Court of Appeals for the Ninth Circuit in Pence v. Kleppe, 529 F.2d 135 (1976), and Pence v. Andrus, 586 F.2d 733 (1978).

The arguments concerning the 1884 and 1900 Acts and concerning ancestral use and occupancy raise claims to lands comparable in some ways to principles developed concerning Indian tribal occupancy rights in the lower 48 states. See Navajo Tribe of Indians v. State of Utah, 12 IBLA 1, 80 I.D. 441 (1973). Any aboriginal occupancy rights, or claims from the 1884 and 1900 Acts, were extinguished by the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1601 (1976). State of Alaska, 41 IBLA 315, 86 I.D. 361 (1979). Furthermore, the 1884 and 1900 Acts provided that future legislation would provide for the acquisition of vested rights. The 1906 Native Allotment Act in part served this purpose. To obtain rights under that Act, the terms and conditions of the Act must be satisfied.

Because the right to an allotment is personal to the applicant and is unrelated to aboriginal, tribal, or clan occupancy, to establish the applicant's right under the Act his or her own personal use and occupancy must be shown; ancestral use and occupancy cannot be tacked on to establish the right. Stanley P. McCormick, 23 IBLA 304 (1976); Sara F. Lindgren, 23 IBLA 174 (1975); Lula J. Young, 21 IBLA 207 (1975); Ann McNoise, 20 IBLA 169 (1975).

[2] The amendment of the 1906 Act by the Act of August 2, 1956, to require proof of substantially continuous use and occupancy for a period of 5 years by the applicant simply incorporated in the law a requirement which had long been in the regulations. See 43 CFR 2561.2 and prior regulations to the same effect. This requirement of the 5 years use and occupancy is applicable to all public land and not simply to national forest land, as argued by appellants. Stanley P. McCormick, *supra*; Medina Flynn, 23 IBLA 288 (1976); Paul Kogukuk, 22 IBLA 247 (1975).

[3] The crucial question in these cases concerns the age of the applicant as of the date the land was segregated. At that date, the appellants were variously 8, 11, 12, 13, or 15 years of age. We have ruled as a matter of law that a 5-year old is too young to have exerted independent use and occupancy of the land to the exclusion of others. Floyd L. Anderson, Sr., 41 IBLA 280, 86 I.D. 345 (1979). A majority of this Board has ruled that if a Native admits that his only presence on land prior to its segregation was as a dependent child visiting and using the land in the company of his parents there could not be the requisite independent possessory use and occupancy and a hearing is unnecessary. Andrew Petla, 43 IBLA 186 (1979). The cases before us now are not clearly within either of these precedents. The children are older than in Anderson and there are allegations that the Natives independently used and occupied the land.

For reasons to be discussed, *infra*, we find that the appellants here are entitled to notice and an opportunity for a hearing in accordance with the rulings of the United States Court of Appeals for the Ninth Circuit in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976),

and Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978). In the first Pence case the Court ruled that where facts are in dispute, before rejecting an application for a Native allotment, the applicant must be given notice of the proposed rejection and an opportunity to present favorable evidence and testimony at an oral hearing. Subsequently, the Board held that the Departmental contest procedures, 43 CFR 4.451, 4.452, would meet the due process requirements of Pence. Donald Peters, 26 IBLA 235, 83 I.D. 308 (1976), reaffirmed, Donald Peters (On Reconsideration), 28 IBLA 153, 83 I.D. 564 (1976). In the second Pence case the Court held that those procedures comply at least facially with the requirements of due process.

Other than the determination of children 5 years and younger, since issuance of the Pence Court decisions, this Department has not ruled on the capacity of minor children to meet the use and occupancy requirements of the Native Allotment Act. The Act requires that the Native be at least 21 years of age at the time of allotment; there are no other statutory or regulatory guidelines concerning the age of the applicant. Because the Act requires 5 years of use and occupancy, an argument could be made that the age of 16 (5 years before age 21) should be the earliest age a minor's occupancy can be considered as precluding the inception of rights in third persons. However, the Department has recognized that there should be a factual determination made for children younger than 16 if it is possible that a child could exercise the necessary independent possession. E.g., Nellie Boswell Beecroft, 41 IBLA 70 (1979) (age 13 at time of segregative event).

Appellants here argue that by Native customs and way of life younger children often assume independence from adults or contribute in an independent way to the family or group by work similar to that of adults. These cases are distinguishable and they raise factual issues concerning the adequacy and independence of their occupancy and use of the land while in their minority.

The law generally concerning rights of minors differs in various legal and factual contexts. Often the rights or limitations of minor children are prescribed by statute, such as their emancipation from control by parents, their capacity to be bound by contracts, and voting, drinking, and driving ages. There have been many changes in the law veering away from strict, absolute rules concerning the competency of minors as witnesses in court cases. The common law rule which gave a strict age limitation and some state statutes providing presumptions that children under 10 are deemed incompetent to be a witness are fast fading away. Where there is a presumption, it is not absolute, and a child is permitted to testify if the court is satisfied that the child has the sufficient intelligence or judgment. Courts look to the following factors: Mental capacity of the child at the time of the event about which he is to testify; whether the child can articulate adequately concerning the event; whether the child has the capacity to understand simple questions concerning the event; and whether the

child understands the obligation to speak the truth on the witness stand. Annot., Witness-Competency-Young-Child, 81 A.L.R.2d 386, 389 (1962). The Alaska Supreme Court has ruled there is no incapacity rule for children as witnesses and that determining their competency is left to the discretion of the trial judge. McMaster v. State, 512 P.2d 879 (Alaska 1973), involving a 5-year old child in a murder case. Recent Federal cases are to the same effect. E.g., United States v. Schoefield, 465 F.2d 560 (D.C. Cir. 1972), cert. denied, 409 U.S. 881.

In another context, the possession of land adversely to another, it is recognized generally that minor children can possess land adversely to others. 2 C.J.S. Adverse Possession § 128 (1972). However, on the question of whether a parent can hold adversely to a minor child, or conversely whether a child's possession can be adverse to a parent or parents, there is a presumption that the possession of the parent or child is amicable to the other so that there can be no adverse possession. This presumption can be rebutted by evidence of a clear hostile holding against the other and notice to the other. Id.

Although there are special rules and procedures dealing with juveniles accused of committing crimes, the questions of capacity and criminal intent are factual issues. Also, in determining the capacity of a minor child to commit a tort, the cases are decided on an individual basis after factual determinations of the particular child's capabilities. In most legal contexts the question of a minor child's capacity is determined after a fact-finding trial or hearing. The determinations are made on a case by case basis rather than upon absolute fixed rules. This approach should also be followed in these cases where we are concerned with the minor child's capacity and actual use and occupancy of land independently of others. Thus, rather than rejecting these applications arbitrarily because of the applicant's age as of the segregative date, the essential thrust of Pence to afford an applicant notice and an opportunity for a hearing will be followed here to allow the Natives to prove the adequacy and independence of their use and occupancy.

Accordingly, we rule that for minor children 8 years and older who assert independent use and occupancy, BLM should initiate a contest proceeding pursuant to 43 CFR 4.451 and the Board's decision in Donald Peters, supra. The State of Alaska has conflicting applications and is an interested party who should be given notice and an opportunity to participate in any contest proceeding. BLM should ascertain if there are other interested parties to whom notice should be given.

In a hearing all written and oral statements of the Native applicant relating to events in his minority should be scrutinized as carefully and weighed in the same manner as minors who are witnesses in court proceedings. Furthermore, if it is shown that parents or others

used the land, because it may reasonably be presumed and the law generally presumes that a child will not act adversely to a parent or their relative in charge, the burden of proof upon the Native applicant to rebut such a presumption and to establish the necessary independence will be great. Furthermore, because it is also reasonable to assume that the younger the applicant was at the crucial date, the less likely it is that he or she was acting in an independent capacity, the evidence must be very clear and persuasive in order to prove the requisite independent use and occupancy.

We reserve any ruling on the adequacy of the type of use and occupancy asserted by the appellants. The determination of all issues concerning their use and occupancy is best made after a hearing where all the facts relating to the issues have been presented.

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 set aside and the cases remanded for further proceedings consistent with this decision.

Joan B. Thompson
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

APPENDIX A

<u>IBLA NO.</u>	<u>NATIVE ALLOTMENT NO.</u>	<u>APPLICANT'S NAME</u>	<u>AGE AT DATE OF SEGREGATION</u>
75-663B	AA-6996	William Bouwens	12
75-663D	AA-8263	Esther Thorson	11
76-108	AA-7516	Barbara Kelly Boskofsky	16
76-258	F-13747	Jerry Lee Savela	13
76-266	F-15283	Fred Kirsteater	8

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