

**Editor's note: Reconsideration denied by order dated Feb. 13, 1984; appealed -- reversed and remanded, Civ.No. A86-113 (D.Alaska April 30, 1987)**

JIMMIE A. GEORGE, SR.

IBLA 78-484

Decided November 16, 1981

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application and evidence of occupancy. AA-6580.

Affirmed.

1. Alaska: Native Allotments

Native allotment applications for lands in the Tongass National Forest may be allowed only if (1) the application is founded on occupancy prior to the inclusion of the lands within the forest or (2) an authorized officer of the Department of Agriculture certifies that the land in the application is chiefly valuable for agricultural or grazing purposes.

2. Alaska: Native Allotments

Secretarial guidelines of Oct. 18, 1973, interpreted the provisions of 43 U.S.C. § 270-3 (1970) to require an applicant for a Native allotment to complete 5 years use and occupancy prior to any withdrawal of the lands sought. Secretarial Order No. 3040 of May 25, 1979, rescinded these guidelines in favor of an interpretation requiring the commencement of use and occupancy or the filing of a Native allotment application prior to a withdrawal of the land.

3. Alaska: Native Allotments

The substantial use and occupancy contemplated by the Native Allotment Act must

be by the Native as an independent citizen for himself or as head of a family, and not as a minor child occupying or using the land in company with his parents. An applicant's use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

4. Alaska: Native Allotments -- Administrative Procedure: Hearings -- Rules of Practice: Hearings

The Department of the Interior will not grant a hearing to examine a determination by the Forest Service that land is not chiefly valuable for agricultural or grazing uses where such determination is entrusted by statute to the Secretary of Agriculture.

APPEARANCES: Donald E. Clocksin, Esq., Elisabeth A. Werby, Esq., Alaska Legal Services Corporation, Sitka, Alaska, for appellant.

#### OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Jimmie A. George, Sr., appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated May 17, 1978, rejecting Native allotment application AA-6580 and evidence of occupancy filed therewith.

[1] Appellant's application was filed pursuant to the Act of May 17, 1906 (the Act), 34 Stat. 197, as amended by the Act of August 2, 1956, 70 Stat. 954, 43 U.S.C. §§ 270-1 through 270-3 (1970). The Act authorizes the Secretary of the Interior to allot not to exceed 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska, including lands in national forests, 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 in national forests if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary of Agriculture certifies that the land is chiefly valuable for agricultural or grazing purposes. 43 U.S.C. § 270-2 (1970). No allotment shall be made to any person until the applicant has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of 5 years. 43 U.S.C. § 270-3 (1970). The Act was later repealed on December 18, 1971,

subject to pending applications, by section 18(a), Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1976). <sup>1/</sup>

The applicant seeks approximately 210 acres as his allotment, a portion of which lands were patented on May 13, 1929, and lie within United States Survey 1480. The remainder of the lands sought are within the boundaries of the Tongass National Forest, protracted T. 52 S., R. 69 E., Copper River meridian, Sitka Quadrangle (B-2). These latter lands were withdrawn for inclusion in the Tongass National Forest by Presidential proclamation on February 16, 1909. Public Land Order (PLO) No. 593 of July 8, 1949, as amended by PLO 744 of December 19, 1951, withdrew a portion of these lands from the forest for the Angoon Community Administrative Reserve. Each withdrawal segregated the lands from appropriation under the public land laws, including settlement under the Act.

Jimmie A. George, Sr., was born on November 30, 1889. At the time of the Presidential proclamation withdrawing a portion of the subject lands for the Tongass National Forest, appellant was 20 years of age. Appellant's application for allotment recites the following facts:

#### CHAIN OF OCCUPANCY

A. JIMMY ALBERT GEORGE: I was born on November 30, 1889, and was raised by my father in Hood Bay. After the 1913 death of my father, I continued using these Hood Bay Claims as my summer camp each year until 1938. In that year, I married my present wife (Lydia George). I have continued to make regular seasonal visits to the two Hood Bay tracts up to the present.

B. JIMMY ALBERT: My father was born in 1860's and died accidentally in 1913. As a frequently used Tlingit name indicates he was the hereditary Chief of Hood Bay, and lived there year round throughout his life. He maintained a house (in which I was raised) and a smokehouse on Tract 2 \* \* \* and a second smokehouse on Tract 1 \* \* \*.

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<sup>1/</sup> Section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96-487 (Dec. 2, 1980), provides for approval of applications for Alaska Native allotments pending before the Department on Dec. 18, 1971, for land unreserved Dec. 13, 1968, with specified exceptions. However, as the land sought in this application was withdrawn for the Tongass National Forest by Presidential proclamation on Feb. 16, 1909, the provisions of section 905 of ANILCA are deemed not to apply.

C. CHAIN: I have thus used and occupied these Hood Bay tracts substantially all my life, and had reached the age of twenty at the time that this region was withdrawn into Tongass National Forest. My father and I have together maintained a chain of substantially continuous use and occupancy from about 1880 to the present as follows:

1880 -- 1913 JIMMY ALBERT  
1913 -- present JIMMY ALBERT GEORGE

A supplemental affidavit by the applicant contains the following statement:

12. At the time I was a young man growing up in Hood Bay, a Tlingit male was considered to be an adult at around the age of twelve (12).

13. At about the age of twelve (12) a Tlingit man could, and often did, leave his family and began living completely separately from them.

14. In my particular case I decided to remain a part of my extended family unit and began substantially contributing to the food gathering and other economic basis of the family at approximately the age of twelve (12).

BLM rejected appellant's application on the basis of these allegations and cited well developed case law for the proposition that no rights are acquired to land on the basis of use and occupancy by an applicant's ancestors. The decision further stated that a Native who applies for withdrawn lands must show that he complied with the law prior to the effective date of the withdrawal, and he may not tack on his ancestor's use and occupancy to establish a right for himself prior to the withdrawal. Larry W. Dirks, Sr., 14 IBLA 407 (1974).

[2] Inasmuch as appellant was 20 years of age at the time of withdrawal of a portion of the subject lands, BLM concluded that appellant's occupancy, 5 years prior to withdrawal, could only have been as a minor child and not for himself as an independent citizen or as a head of a family. Implicit in BLM's statement is the notion that an applicant must complete 5 years use and occupancy prior to the 1909 withdrawal. This notion was fostered by Secretarial guidelines of October 18, 1973, and by subsequent decisions of the Board. Susie Ondola, 17 IBLA 359 (1974); Christian G. Anderson, 16 IBLA 56 (1974). However, Secretarial Order No. 3040 of May 25, 1979, abolished this interpretation. That order stated in part:

Sec. 3 Policy Decision. A. I have undertaken a review, with the Solicitor, of the five-year prior rule. I have approached the review from the premise that the Alaska Native Allotment Act was an act passed for the benefit of

Natives and should, therefore, be liberally construed in favor of Natives. The Act itself does not contain the five-year prior rule as an express requirement. The policy appears to have originated as a result of the exercise of agency discretion. Since it was issued, however, the United States Court of Appeals for the Ninth Circuit has ruled, in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), that the range of the Department's discretion, in dealing with Native allotments is narrower than was previously supposed. Whether or not the five-year prior rule is a proper exercise of the Department's discretion, it is not consistent with my policy, that of liberally construing acts passed for the benefit of Natives.

B. Accordingly, I hereby rescind the five-year prior rule in favor of a rule which merely requires that the full five years use and occupancy must be completed prior to the granting of the Native allotment application, provided that the applicant has either filed for a Native allotment or commenced use and occupancy prior to a withdrawal of the land.

[3] BLM's reliance on the Secretarial guidelines of October 18, 1973, is no longer proper. It does not follow, however, that its decision must be reversed. While appellant's use and occupancy predated the 1909 withdrawal and hence met the requirements of Secretarial Order No. 3040, appellant's use and occupancy is not sufficient to qualify for an allotment. The substantial use and occupancy contemplated by the Act must be by the Native as an independent citizen for himself or as head of a family, and not as a minor child occupying or using the land in company with his parents. Arthur C. Nelson (On Reconsideration), 15 IBLA 76 (1974). An applicant's use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use. 43 CFR 2561.0-5(a); Natalia Wassilliey, 17 IBLA 348 (1974).

We find that the applicant's use and occupancy of the subject lands in the company of his father was not potentially exclusive of others. BLM's rejection of the subject application was, accordingly, proper. It was only after the death of the applicant's father in 1913, some 4 years after the Presidential proclamation withdrawing the Tongass National Forest, that the applicant began use and occupancy at least potentially exclusive of others. The application is silent as to allegations of independent use and occupancy at least potentially exclusive of others prior to 1909. In his statement of reasons on appeal appellant does not contend that he "independently" used the land. Rather he maintains that his father's prior use may be tacked on to his own use subsequent to 1913. This Board has repeatedly rejected that argument. The application raises no issues of material fact to justify a hearing pursuant to Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), and Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978). As BLM's decision properly

noted, appellant may not tack on his father's use and occupancy prior to the withdrawal to meet the requirements of 43 U.S.C. § 270-3 (1970).

[4] As set forth in 43 U.S.C. § 270-2 (1970), appellant's application may nevertheless be approved if the Secretary of Agriculture certifies that the land sought by appellant is chiefly valuable for agricultural or grazing purposes. BLM's decision of May 17, 1978, contained the following brief conclusion in this regard: "Furthermore, an authorized officer for the Tongass National Forest has determined that the lands applied for are not chiefly valuable for agricultural or grazing purposes." No facts supported this statement.

Counsel for appellant argues that the subject lands are in fact chiefly valuable for agricultural and grazing purposes and maintains that the procedure by which the Forest Service reached its negative conclusion violated the Due Process Clause of the Fifth Amendment, United States Constitution. On behalf of the appellant, counsel asks for a hearing to resolve this issue. This argument and many others contained in appellant's lengthy statement of reasons have been addressed by this Board previously. See, e.g., Louis P. Simpson, 20 IBLA 387 (1975) and the concurring opinion of Judge Fishman in Estate of Benjamin A. Wright, 23 IBLA 120 (1975). In Simpson, supra at 394, we held:

The Secretary of Agriculture is the sole party authorized to classify lands within the forest, 16 U.S.C. § 471 et seq. (1970); no useful purpose could possibly be served by a hearing before the Department of the interior for classification purposes. This Department has no authority to reverse or modify an agricultural classification of National Forest lands by the Department of Agriculture. Donald E. Miller, 15 IBLA 95, 81 I.D. 111 (1974).

While there may exist real questions as to the validity of the procedures used by the Forest Service in arriving at its negative determination, especially in light of the Ninth Circuit's decisions in Pence v. Kleppe and Pence v. Andrus, supra, we are constrained to deny appellant's request for a hearing within the Department of the Interior to examine this determination.

With respect to those lands sought by appellant which had been patented on May 13, 1929, within United States Survey 1480, the effect of issuance of a patent is to transfer the legal title and remove from the jurisdiction of this Department an inquiry into and consideration of disputed questions of fact. Germania Iron Co. v. United States, 165 U.S. 379 (1897); State of Alaska, 45 IBLA 318 (1980). The holdings in Germania and State of Alaska are appropriate, where as here, appellant has made no allegation questioning the issuance of the patent in 1929. BLM's decision in rejecting appellant's application as to these patented lands was correct.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office is affirmed.

Douglas E. Henriques  
Administrative Judge

We concur:

James L. Burski  
Administrative Judge

Edward W. Stuebing  
Administrative Judge