

CATHERINE ANGAIK
(ON RECONSIDERATION)

IBLA 75-579

Decided July 15, 1982

Petition for reconsideration of Board's decision styled Catherine Angaik, 23 IBLA 91 (1975), affirming a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application F-16499.

Petition for reconsideration granted; prior Board decision vacated and case remanded.

1. Alaska: Native Allotments

A Native allotment application for withdrawn lands may be granted when the applicant has commenced the required use and occupancy prior to the withdrawal, if all other requirements have been met. The substantial use and occupancy required by the Native Allotment Act must be achieved by the Native as an independent citizen acting for herself, and not as a dependent child visiting and using the land in the company of her parents. Native allotment applicant's minority on the date the land was withdrawn does not automatically disqualify the applicant from being able to show independent use and occupancy of the land and applicant should be afforded notice and opportunity for a hearing to prove the adequacy and independence of her use and occupancy.

APPEARANCES: Norman A. Cohen, Esq., Alaska Legal Service Corporation, Bethel, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Catherine Angaik has petitioned the Board for reconsideration of our decision, Catherine Angaik, 23 IBLA 91 (1975), in which we affirmed the rejection of her Native allotment application, F-16499, filed under the Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3

(1970). The Act was repealed on December 18, 1971, subject to pending applications by section 18(a), Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1976). ^{1/} Appellant had not been given an opportunity for hearing. In Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), the court held that Native allotment applicants were entitled to notice and an opportunity for hearing where there was an issue of fact with respect to an applicant's qualifications. Appellant filed a petition for reconsideration in light of this decision.

The Board initially affirmed the BLM rejection of this application because the land applied for had been segregated in 1955 by a wildlife range withdrawal application (F 012151), noted on BLM records, when appellant was about 7-1/2 years old. The land was subsequently withdrawn December 8, 1960, for the Clarence Rhodes National Wildlife Range. BLM found that appellant failed to show 5 years of substantially continuous use and occupancy prior to the withdrawal. The Board held that the applicant could not show the required independent nature of use and occupancy of the claimed land beginning at age 2 to the exclusion of others, and that she may not tack on her ancestors use and occupancy to establish a right for herself prior to the withdrawal.

[1] Appellant certified in her application that she had used her land continuously since 1947 for trapping, berrypicking, and fishing. In the statement of reasons in support of her original appeal, appellant requested a hearing to demonstrate her own use of the land. Since our original decision, the requirement that an applicant must complete 5 years of use and occupancy prior to a withdrawal has been abolished by Secretarial Order No. 3040 of May 25, 1979. Instead, it is sufficient if the full 5 years' use and occupancy was 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 the withdrawal of the land. Jimmie A. George, Sr., 60 IBLA 14 (1981).

Under Secretarial Order No. 3040, 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. Andrew Gordon McKinley (On Reconsideration), 61 IBLA 282 (1982), and cases cited.

This Board has ruled that an applicant's minority at the time of the initial use and occupancy does not automatically disqualify the applicant from being able to show use independent from the parents' use and occupancy

^{1/} 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 Clarence Rhode National Wildlife Range on Dec. 8, 1960, the provisions of section 905 of ANILCA are deemed not to apply, and appellant's application would only be approved if she meets the requirement of the Alaska Native Allotment Act, as amended, supra.

of claimed land. William Bouwens, 46 IBLA 366 (1980). As long as the use and occupancy began before the event which caused segregation, i.e., in this case the 1955 withdrawal application, then the 5-year period would start at that point and go forward into the withdrawal period. Warner Bergman, 21 IBLA 31 (1977). This applicant, though having a heavy burden of proof, will be accorded an opportunity for a hearing and BLM should initiate a contest pursuant to Donald Peters, 26 IBLA 235, 83 I.D. 309, sustained on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976), so that appellant may attempt to prove that she had begun substantially independent use and occupancy of a parcel before the withdrawal, and had otherwise continued to use and occupy the land from that time forward in a fashion which would qualify her to receive an allotment under the Act.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is granted and our prior decision is vacated and the case is remanded for initiation of contest proceedings.

Gail M. Frazier
Administrative Judge

I concur:

Anne Poindexter Lewis
Administrative Judge

ADMINISTRATIVE JUDGE HARRIS CONCURRING:

While not having been presented with the exact issue in this case in the past, the Board has dealt on a number of occasions with the general issue of whether or not minor children can establish the requisite substantial use and occupancy required by the Native Allotment Act.

In Floyd L. Anderson, Sr., 41 IBLA 280, 86 I.D. 345 (1979), the Board ruled as a matter of law that a Native allotment applicant who was 5 years old at the time the land sought was withdrawn from all forms of appropriation was incapable of having exerted independent use and occupancy of the land to the exclusion of others prior to the withdrawal. Subsequently, the Board established another rule for minor children 8 years and older. In William Bouwens, 46 IBLA 366 (1980), the Board was presented with Native Allotment applicants who asserted independent use and occupancy of various lands and whose ages ranged from 8 to 16 years as of the date the lands in question were segregated from entry. In holding that BLM should initiate contest proceedings pursuant to 43 CFR 4.451 and the Board's decision in Donald Peters, 26 IBLA 235, 83 I.D. 308, sustained on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976), the Board stated:

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 of 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.

* * * * *

* * * 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.

46 IBLA at 369-70.

Thus, this case involves an applicant who at the time of the withdrawal was younger than those provided with the opportunity for a hearing in Bouwens, but older than the applicant in Anderson who was, as a matter of law, too young to have exerted independent use and occupancy of the land to the exclusion of others.

In this case we have extended the Board's rationale in Bouwens to cover an applicant who was approximately 7-1/2 years of age at the time of the withdrawal. I am constrained to concur with that action because of my reluctance to close the gap between Anderson and Bouwens by ruling that any applicant who was age 5 to 8 at the time land was withdrawn is incapable, as a matter of law, of meeting the necessary requirements of use and occupancy. Even though I find the possibility remote at best that an applicant at such an age could have exhibited the requisite independent use and occupancy, the slight chance that such an applicant could exist precludes my endorsement of a ruling that would bar that individual from the opportunity to establish use and occupancy. Clearly, one who has commenced the requisite use and occupancy at such a tender age would be among the most deserving to reap the benefits of compliance.

This is not to say that appellant falls in that category, but having alleged independent use in her application, 1/ I agree she is entitled to the opportunity for a hearing. Had appellant stated that her only presence on the land prior to the withdrawal was as a dependent child visiting and using the land in the company of her parents, there could not be the requisite independent possessory use and occupancy, and there would be no need for a hearing. See Andrew Petla, 43 IBLA 186, 198-202 (1979), Judge Burski concurring. 2/

1/ Therein, appellant states: "I have used this land for food, getting furs for income. I have used it exclusively for berrypicking."

2/ I note that other documents in the case record would support the conclusion that appellant's use was as a dependent minor. Two affidavits filed in support of appellant's application indicate dependent use. One affiant states that "he knows that Catherine has used the land, because he has seen her parents use the land * * *." The other swears that "he has seen Catherine's parents use the land * * *." In addition, on page 2 of the statement of reasons in this case it is stated:

Since I cannot conclude that a Native allotment applicant at 7-1/2 years of age is incapable, as a matter of law, of initiating independent use and occupancy, and because appellant has alleged independent use, I agree that she should be afforded the opportunity for a hearing.

Bruce R. Harris
Administrative Judge

fn. 2 (continued)

"CATHERINE ANGAIK is a Yup'ik Eskimo from the isolated village of Tununak on the coast of the Bering Sea in southwestern Alaska. For many generations the Appellant and her family have used her allotment land for the traditional Yup'ik Eskimo subsistence food gathering activities of fishing, trapping and berry picking. All of her life the Appellant has substantially and continuously used and occupied her land in the manner of her parents and her parent's parents." (Emphasis added.)

