

WILLIAM M. TENNYSON, JR.

IBLA 75-644

Decided July 23, 1982

Petition for reconsideration of Board decision William M. Tennyson, Jr., 23 IBLA 77 (1975), affirming rejection of Native allotment application AA 7682.

Petition granted; prior decision reaffirmed.

1. Alaska: Native Allotments

An Alaska Native allotment application is not approved under sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371, 2435 (1980), where the land is included in a State selection application filed by Dec. 18, 1971, and is not within a core township of a Native village. Under subsection (a)(4) of that section, such an application shall be adjudicated pursuant to the requirements of the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970).

2. Administrative Procedure: Adjudication-- Administrative Procedure: Hearings--Alaska: Native Allotments--Alaska: Statehood Act--Hearings--Rules of Practice: Hearings

An application for a Native allotment must be rejected if the alleged use and occupancy commenced after the time that a State selection application was filed for the land.

APPEARANCES: Lucy M. Lowden, Esq., James Grandjean, Esq., Dillingham, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GRANT

William M. Tennyson, Jr., has petitioned for reconsideration of our decision in William M. Tennyson, Jr., 23 IBLA 77 (1975), in which we affirmed

the rejection of his Native allotment application AA 7682. Tennyson's application on its face stated that the applicant had not initiated qualifying use and occupancy of the parcel applied for until 1964. As State selection application A-054617 covering the same land had been filed in 1961, the land was segregated from entry at the time appellant allegedly initiated use and occupancy. See 43 CFR 2627.4(b). The Bureau of Land Management (BLM) decision stated in part:

According to our records, the applicant was born on September 23, 1952. Based on his date of birth the applicant was 12 years old when he claims to have commenced use and occupancy of the land. Similarly, the applicant was 9 years old when the subject tract was segregated from entry by the filing of the State selection application.

We must conclude that the applicant did not assert independent control and use of the land prior to the State selection; rather his use and occupancy was as a minor child in company with his parents (see Helen F. Smith, 15 IBLA 301 (1974).)

The decision concluded that since Tennyson failed to present clear and credible evidence of statutory use and occupancy of the land prior to the effective date of the State selection application, the allotment application was therefore rejected on May 5, 1975. We affirmed. Shortly after issuance of our decision, the court in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), held that a hearing was required where the Department proposed to reject a Native allotment application.

Appellant, by and through his attorney, petitioned for reconsideration of our decision on the grounds that he was not afforded an opportunity for a hearing in accordance with Pence v. Kleppe, supra, and further because the Board failed to consider Native custom and mode of living in affirming BLM's determination that appellant was a minor at the time of the application and therefore incapable of initiating independent use and occupancy of the land at any time prior to the State selection.

While this petition was pending, Congress enacted the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371 (1980), which has a provision concerning Alaska Native allotments. It is therefore appropriate that we initially determine whether this provision affects the adjudication of this case.

[1] Section 905(a)(1) of the statute approved, subject to certain exceptions, all Native allotment applications pending before the Department on or before December 18, 1971, which described either land that was unreserved on December 13, 1968, or land within the National Petroleum Reserve in Alaska subject to valid existing rights. Subsection 905(a)(4) concerns the adjudication of Native allotment applications which conflict with State selection applications. That subsection provides in pertinent part:

[W]here an allotment application describes land * * * which on or before December 18, 1971, was validly selected by or tentatively approved or confirmed to the State of Alaska pursuant to the Alaska Statehood Act and was not withdrawn pursuant to section 11(a)(1)(A) of the Alaska Native Claims Settlement Act from those lands made available for selection by section 11(a)(2) of the Act by any Native Village certified as eligible pursuant to section 11(b) of such Act [i.e., "core" township selection by an eligible Native village], paragraph (1) of this subsection and subsection (d) of this section shall not apply and the application shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended, the Alaska Native Claims Settlement Act, and other applicable law.

The parcel for which appellant has applied, although within a village selection, is apparently not within the core township of a Native village. Because a State selection application has been filed for the land, the allotment must be adjudicated pursuant to the provisions of the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed, 43 U.S.C. § 1617 (1976). Daniel Johansen (On Reconsideration), 54 IBLA 295 (1981); Roselyn Isaac (On Reconsideration), 53 IBLA 306 (1981).

[2] An application for a Native allotment must be rejected if the alleged use and occupancy commenced after the time that a State selection application was filed for the land. Daniel Johansen (On Reconsideration), supra; Roselyn Isaac (On Reconsideration), supra; Andrew Petla, 43 IBLA 186 (1979). Appellant has not alleged that he used and occupied the land prior to the filing of the State selection in 1961.

In his petition for reconsideration, counsel for appellant speculates on the "possibility" that at the time of the State selection the land was being used and occupied by appellant's father. Appellant contends: "Such use and occupancy * * * would have precluded the land from being 'vacant, unappropriated and unreserved', and hence the land was unavailable for State selection. State of Alaska v. Udall, 420 F.2d 938, 940 (9th Cir. 1969) cert. denied, 397 U.S. 1076 (1970)." The Board has previously decided that no rights to land are acquired on the basis of use and occupancy by an applicant's ancestors. A Native who applies for reserved or withdrawn lands must show that he complied with the law (or at least initiated use and occupancy) prior to the effective date of the reservation or withdrawal, and he may not tack on his ancestor's use and occupancy to establish a right for himself prior to the reservation or withdrawal. See Andrew Gordon McKinley (On Reconsideration), 61 IBLA 282 (1982); Larry W. Dirks, Sr., 14 IBLA 401 (1974). The protection afforded the occupancy of an individual Native is not an inheritable property right, and upon the death of the occupant the land would become subject to the withdrawal and be closed to the initiation of use and occupancy by others. Louis P. Simpson, 20 IBLA 387, 393 (1975). Thus, occupancy of the land by appellant's father prior to the State selection would not cause the land to be open to initiation of use and occupancy by appellant after the State selection was filed.

Appellant has failed to allege facts which, if proven in a hearing, would result in a different determination than that previously reached by the Board.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the prior decision of the Board, William M. Tennyson, Jr., *supra* is reaffirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

