

ELIZABETH G. COOK
EYA OSTERHAUS

IBLA 84-425

Decided December 30, 1985

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., rejecting the Native allotment applications of Elizabeth G. Cook, AA-5833, and Eya Osterhaus, AA-6053.

Dismissed.

1. Alaska: Native Allotments

An Alaska Native allotment application is not statutorily approved under sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(1) (1982), if the land is included in a State selection application filed on or before Dec. 18, 1971, but is not within a core township of a Native village. Under sec. 905(a)(4), such an application shall be adjudicated pursuant to the requirements of the Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970).

2. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Generally -- Alaska Native Claims Settlement Act: Native Land Selections: State-Selected Lands

The Department of the Interior does not retain jurisdiction to hear a contest against an applicant for a Native allotment where the lands sought by the Native were tentatively approved to the State of Alaska following commencement of the Native's use and occupancy. Sec. 906(c)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c)(1) (1982), confirming all tentative approvals of State land selections subject to valid existing rights, conveyed the lands in dispute out of Federal ownership thus ousting the Department's jurisdiction to adjudicate title in a contest proceeding.

3. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Duty of Department of the Interior to Native Allotment Applicants

Although the Department of the Interior loses jurisdiction over title to lands tentatively approved to the State of Alaska and effectively conveyed to the State by sec. 906(c)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c)(1) (1982), the Department has a duty to Native allotment applicants whose claims lie within such tentatively approved lands to make a preliminary validity determination as to such applications and to pursue recovery of such lands where appropriate. An administrative hearing before a trier of fact where evidence and testimony of favorable witnesses was submitted prior to a decision regarding validity of Native allotment claims will fulfill this obligation.

APPEARANCES: David C. Fleurant, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for appellants; Barbara L. Malchick, Esq., Assistant Attorney General, State of Alaska, Anchorage, Alaska, for the State;

Bruce E. Schultheis, Esq., Office of the Regional Solicitor, Alaska Region, Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Eya Osterhaus and Elizabeth G. Cook, mother and daughter, appeal from a decision of Administrative Law Judge John R. Rampton, Jr., rendered after a hearing, rejecting their Native allotment applications, AA-6053 and AA-5833 respectively. Their applications were filed pursuant to the Alaska Native Allotment Act of 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed subject to pending applications by section 18 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1982)). The hearings in the two Native allotment cases were held consecutively on August 1 and 2, 1983, and a joint decision was entered by Judge Rampton. The transcripts of the two hearings are identified by the name of the Native allotment applicant.

Appellants' applications both bear a date stamp indicating they were filed with the Bureau of Land Management (BLM) on August 9, 1965. ^{1/} On August 3, 1965, the State of Alaska filed with BLM a general purpose grant selection pursuant to the Alaska Statehood Act covering, among other lands, the tracts described in appellants' Native allotment applications. On July 11, 1967, the United States tentatively approved the State selection.

^{1/} Conflicting evidence was introduced at the hearing before the administrative law judge concerning the date the applications were filed. While both applications are date stamped August 9, 1965, appellants maintain that they went to the Bureau of Indian Affairs (BIA), in March or April of 1965 to sign up for some land (Cook Tr. 86; Osterhaus Tr. 81). This issue is examined in the text, infra.

Osterhaus, who executed a relinquishment of her Native allotment claim on February 4, 1967, subsequently filed a new application for the same land on September 28, 1970, asserting that she first occupied the land applied for on August 1, 1965. Under a section labeled "Remarks," Osterhaus explained the circumstances of her previous relinquishment: "I just learned that I signed a release for this land long time ago, but I did not release my land. I did not understand. I thought I was signing a paper to get title to my land. I want this for my Native allotment." Cook likewise filed an "Evidence of Occupancy," first on November 21, 1969, and again on December 6, 1972, asserting both times that she had occupied the land since August 1, 1965.

On August 16, 1982, the United States, through BLM, initiated contest proceedings against both appellants, charging that they had failed to make satisfactory proof of substantially continuous use and occupancy of the land for a period of 5 years as required at 43 CFR 2561.0-5 and 2561.2. Further, the complaint issued to appellants explained that the lands claimed in their Native allotment applications had been selected by and tentatively approved to the State of Alaska, and that the State had filed a protest on June 11, 1980, stating that the land is located in the Denali State Park. Appellants filed an "Answer," asserting that they "started using [their] land before the State did," and requested a hearing so they could present their evidence.

Prior to the hearings, which took place on August 1 and 2, 1983, the State of Alaska filed a "Motion to Intervene" as a party contestant in the proceedings for the "limited purpose of contesting the Department of the Interior's jurisdiction over the allotment claim[s]." In addition, the State filed a "Motion for Stay" of proceedings pending the outcome of State of Alaska v. Thorson, IBLA Docket No. 83-191, on the basis that Administrative Law Judge E. Kendall Clark had certified to the Interior Board of Land Appeals the question of whether section 906 of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1635 (1982), divests the Department of the Interior of jurisdiction over Native allotment claims relating to tentatively approved land. Judge Rampton proceeded with the hearings as scheduled, however, and issued his decision on March 9, 1984, rejecting both allotment claims. Judge Rampton ruled (1) that Osterhaus relinquished her Native allotment claim on February 4, 1967, and that because the State's selection was filed and tentatively approved before she refiled in 1970, her application was "preempted by the State selection;" (2) that because the State did not challenge the validity of the corrected August 1, 1965 date on the Cook application, that application was filed prior to the State selection of August 3, 1965; (3) but that both appellants had failed to prove the requisite 5 years "substantially continuous use and occupancy of the land" in accordance with 43 CFR 2561.0-5(a) and 2561.2.

Appellants assert they and their families have used their Native allotment parcels seasonally since 1965 for subsistence purposes. Counsel for appellants asserts the Government failed to present a prima facie case against appellants' allotment applications. Hence, appellants contend that the contests should have been dismissed and their proof of use and occupancy accepted. Further, appellants contend that proof of use and occupancy after the six-year period from 1965 to 1971 is relevant to establish their rights, and that Judge Rampton erred in failing to consider it.

In its answer, the State of Alaska avers that the State selection predates the use and occupancy of the land by appellants. The State notes the testimony at the hearing that neither appellant set foot on the land prior to 1969. Further, the State contends appellants' use from 1969 to 1979 was "sporadic at best." The State asserts that qualifying use and occupancy by appellants must be established by the time the proof of use and occupancy is submitted to BLM, *i.e.*, within 6 years after the application is filed. 43 CFR 2561.2. The State points out that 5 years of use and occupancy by appellants prior to the end of this period was simply not established on the record after hearing. In addition, the State asserts that a prima facie case of the invalidity of the Native allotment applications was established, but in any event, the validity of the applications must be determined on the basis of the entire evidentiary record.

The State filed another "Motion for Stay," this time with the Board, expressing its disagreement with the Board's ruling in State of Alaska v. Thorson (Thorson), 76 IBLA 264 (1983), and requesting that the Board delay its disposition of the instant appeal until resolution of that case upon reconsideration. In Thorson (On Reconsideration), 83 IBLA 237, 91 I.D. 331 (1984), the Director, Office of Hearings and Appeals, held that the Department does not retain jurisdiction to hear a contest brought against a Native allotment applicant where lands claimed were tentatively approved to the State following commencement of the Native's use and occupancy. Accordingly, on January 8, 1985, the State filed a "Motion to Dismiss" the appeals of Cook and Osterhaus on the basis of the ruling in Thorson (On Reconsideration). In that motion, the State concedes that the Department "nonetheless has a duty 'to make a preliminary determination as to the validity of Native allotment applications * * *,'" quoting Thorson (On Reconsideration), *supra* at 254. The State maintains that Judge Rampton's decision constitutes the required "preliminary determination" consistent with Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), and Thorson (On Reconsideration), *supra*, and, hence, no remand of these cases for further consideration of the allotment applications is appropriate.

[1] Section 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1982), approved 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, except where otherwise provided by other subsections of that section. However, where Native allotment applications describe land that on or before December 18, 1971, was tentatively approved to the State pursuant to the Alaska Statehood Act, the legislative approval provisions of section 905(a)(1) of ANILCA do not apply. William M. Tennyson, Jr., 66 IBLA 38 (1982). Section 905(a)(4) provides that such applications shall be adjudicated pursuant to the requirements of the Alaska Native Allotment Act of 1906, *as amended*, 43 U.S.C. §§ 270-1 through 270-3 (1970). *See, e.g., Victor A. Anahonak (On Reconsideration)*, 64 IBLA 289 (1982); Daniel Johansen (On Reconsideration), 54 IBLA 295 (1981).

The Department must reject an application for a Native allotment if the alleged use and occupancy commenced after the time that a State selection application was filed for the land. Victor A. Anahonak (On Reconsideration), *supra*; Daniel Johansen (On Reconsideration), *supra*. However, where the Native

allotment applicant alleges use and occupancy prior to the filing of the State selection application, as both Cook and Osterhaus have done in this case, the Ninth Circuit ruled in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), that it is improper to reject such an application without affording the applicant notice and an opportunity for a hearing. Donald Peters, 26 IBLA 235, 83 I.D. 308 (1976), sustained on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976).

[2] The lands embraced in the Native allotment applications filed by Cook and Osterhaus were also included in a State selection application which had been tentatively approved for conveyance to the State. This circumstance requires application of section 906(c)(1) of ANILCA, 43 U.S.C. § 1635(c)(1) (1982), which provides in relevant part:

All tentative approvals of State of Alaska land selections pursuant to the Alaska Statehood Act are hereby confirmed, subject only to valid existing rights under the Alaska Native Claims Settlement Act, and the United States hereby confirms that all right, title, and interest of the United States in and to such lands is deemed to have vested in the State of Alaska as of the date of tentative approval.

In Thorson, supra, the Board held that section 906(c)(1) did not convey to Alaska the lands subject to Native allotment applications prior to adjudication of the allotment applicant's rights, so that the Department retained jurisdiction to adjudicate those applications. The Director of the Office of Hearings and Appeals assumed jurisdiction of the case upon reconsideration and reversed the Board's ruling, holding that "[t]he language of subsection 906(c)(1) leaves little doubt that it was intended to constitute an immediate legislative conveyance of all previously [tentatively approved] lands." Thorson (On Reconsideration), supra at 244, 91 I.D. at 331 (1984). Thus, section 906(c)(1) serves to terminate the Department's jurisdiction to resolve the status of lands tentatively approved to the State affected by Native allotment applications. Accordingly, the State's motion to dismiss is granted.

[3] However, Thorson (On Reconsideration) provided that although the Department is without jurisdiction to adjudicate the status of lands subject to Native allotment applications but tentatively approved to the State, the Department must discharge its fiduciary duty toward the Natives:

This does not mean that Native allotment claimants are without a remedy or that the Department has no duty toward them. The Department does have a duty based on its special relationship to Alaska Natives and its responsibility under the 1906 Act to make a preliminary determination as to the validity of Native allotment applications and to pursue recovery of land where appropriate through negotiation with the State or litigation. This duty is recognized in subsection 905(a)(4) of ANILCA, 43 U.S.C. § 1634(a)(4) (1982), which provides that allotment applications to [tentatively approved] lands "shall be adjudicated pursuant to the requirements of the Act of May 17, 1906."

The situation here is in many respects similar to that which existed in Aguilar v. United States, *supra*, and the procedures which were stipulated to in that case might be appropriate in this type of case as well. [Footnote omitted.]

Id. at 254, 91 I.D. at 341.

While the Department lacks "authority on its own to affect title" to lands tentatively approved to Alaska, it must make a preliminary determination consistent with Aguilar v. United States, *supra*, whether the United States should institute proceedings for recovery of the lands subject to Native allotment applications. Oleanna Hansen, 84 IBLA 150, 154 (1984). We conclude that the hearing conducted by Judge Rampton on August 1 and 2, 1983, and his subsequent decision dated March 9, 1984, fulfills the requirements set forth in Aguilar v. United States, *supra*. See Thorson (On Reconsideration), *supra* at 254, 91 I.D. at 341.

The filing of a State selection application will not preclude consideration of a subsequent conflicting Native allotment application where it can be established that qualifying use and occupancy by the applicant predated the State selection. Aguilar v. United States, *supra* at 845; see Oleanna Hansen, *supra* at 153; Victor A. Anahonak (On Reconsideration), *supra* at 291. However, the filing of an application itself, when not accompanied by qualifying use and occupancy prior to the State selection, will not support favorable action on the Native allotment application. The vesting of a preference right to an allotment requires establishment of the requisite use and occupancy together with the filing of an application. United States v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981). The record supports the finding of the administrative law judge that appellants failed to use or occupy the allotment parcels prior to 1969. (Cook Tr. 88-93; Osterhaus Tr. 82).

However, a review of the record indicates that Judge Rampton misinterpreted a letter dated January 20, 1966, from A. H. Maytubby, Realty Specialist, BIA, to Al Steger, Chief, Records and Public Service, BLM, submitted as Exhibit A. Judge Rampton construed this letter as stating that the application date of August 9, 1965, was erroneous and should be changed to August 1, 1965. This is not, however, what the letter says. Rather, the letter alleged that a typographical error occurred in Item 9, the date of commencement of occupancy. It did not even address the question of when the application was filed. In any event, the application could not have been filed with either BIA or BLM on August 1, 1965, as that was a Sunday. ^{2/} Thus, we expressly find that Judge Rampton erred in holding that the filing of the application of Cook predated the filing of the State selection application.

However, where, as here, it is clear from the record after hearing that the Native allotment applicants never commenced use and occupancy of the tracts until 1969, well after the filing of the State selection in 1965

^{2/} Even were we able to conclude that the application had been filed with BIA prior to the filing of the State selection, the segregative effect of filing the Native allotment applications stems only from the date of filing the applications with BLM. See 43 CFR 2561.1(e).

and well after the time required to establish five years use and occupancy prior to the time for filing final proof thereof (see 43 CFR 2561.2), the Native allotment applications cannot be found to preempt the State selection.

With respect to appellants' concerns regarding establishment of a prima facie case and the burden of proof in applications for allotments, we note that the burden of proof is on the Native allotment applicant to establish compliance with the use and occupancy requirements of the Native Allotment Act. United States v. Flynn, supra. The record simply does not support a finding that appellants are entitled to Native allotments.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeals of Elizabeth G. Cook and Eya Osterhaus are dismissed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Bruce R. Harris
Administrative Judge

