<u>Editor's note</u>: Reconsideration denied by Order dated Aug. 5, 1991

NATIONAL PARK SERVICE

IBLA 89-189 Decided March 6, 1991

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving Native allotment application AA-8168, Parcel A.

Set aside and remanded; contest ordered.

1. Alaska: Native Allotments--National Park Service: Jurisdiction of Lands Within--Rules of Practice: Appeals: Standing to Appeal

   While the principal means by which a person becomes a "party to a case" within the meaning of 43 CFR 4.410(a) is to actively participate in the decisionmaking process which leads to the appeal, it is not the only means. Where BLM approves a Native allotment application on National Park System lands and the National Park Service files an appeal of that decision, the status of the National Park Service as the agency charged with administrative responsibilities for the management of such lands satisfies the "party to a case" requirement of 43 CFR 4.410(a).

2. Alaska: Native Allotments

   Where the record in a Native allotment case contains conflicting evidence regarding the existence of substantially continuous use and occupancy at least potentially exclusive of others, a decision approving the allotment without any analysis of the facts to support the adjudication will be set aside as unsupported by the record and a contest ordered.

APPEARANCES: F. Christopher Bockmon, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the National Park Service; Tred R. Eyerly, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for the heirs of Warder C. Showalter III.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

The National Park Service (NPS) has appealed from a decision dated November 28, 1988, by the Alaska State Office, Bureau of Land Management

(BLM), approving the Native allotment application of Warder C. Showalter III (AA-8168, Parcel A).

On December 3, 1971, Showalter filed Native allotment application AA-8168 with the Bureau of Indian Affairs (BIA), pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970). 1/ BIA submitted the application to BLM on August 18, 1972. Therein, Showalter claimed seasonal use and occupancy of lands on the shores of Lake Clark, described as "Frac. N 1/2 SE 1/4, Sec. 8 excluding there from homesite entry A-063402, T 1 N, R 29 W, SM [Seward Meridian]" 2/ and now referred to as Parcel A. 3/ Showalter indicated that his seasonal use and occupancy commenced in June 1968 and continued to the date of filing.

Showalter stated in his application that the land was used annually from June to October and that he engaged in various activities during that seasonal use, including hunting, fishing, and berrypicking. He listed a tent frame as an improvement on the land. Under the remarks section of the application which provides for any other information showing compliance with the requirements of the law, he stated:

> I have lived my lifetime in Kenai area using the land in the traditional way of life of my ancestors. Then when I could no longer use the lands there I started using lands in Lake Clark area and this tract of land I have used the past several seasons for fishing, hunting and berry picking.

Witness statements submitted in 1980 by a friend, Nita Childers, and two of Showalter's brothers, Emery Showalter and James R. Showalter, confirmed the applicant's use of the land, citing various activities, including hunting, berrypicking, fishing, food gathering, and wood cutting and gathering. The three witnesses also indicated that a campsite, including a tent frame or temporary shelter and fire pit, existed on the land. However, the witnesses indicated a much earlier beginning date for Showalter's occupancy--1953, rather than the 1968 date claimed by the applicant in the application. They noted that his occupancy continued until 1977 when he suffered a heart attack. The applicant died in 1978.

1/ The Allotment Act was repealed by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1988), on Dec. 18, 1971, subject to applications then pending before the Department. Showalter's application was pending before the Department on that date.

2/ Section 201(7) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 410hh(7) (1988), created Lake Clark National Park and Preserve in 1980 and this described land was included within the boundaries of the preserve.

3/ Showalter apparently also applied for lands near Kenai, Alaska, referred to in the record as Parcel B. BLM states that those lands were conveyed to the State of Alaska; are subject to the stipulated procedures in Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979); are not within a National Park unit; and are not involved in this appeal.

A BLM realty specialist conducted a field examination of Parcel A in August 1982. 4/ No authorized representative of Showalter's estate was able to attend the examination. The realty specialist stated in his Native Allotment Field Report (Field Report) that he found no evidence that the parcel had been posted anywhere along the shoreline. He reported that posting was claimed to have been made in the spring of 1969, but may have been removed by parties unknown. He did not find the tent frame. Also, "[n]o signs of use were found on the parcel during the examination in the form of campsites, debris, cut wood or the remains of campfires" (Field Report at 3). He stated that numerous claims were located in the area, but that "[l]ocal area residents are not familiar with applicant's land use or claim" (Field Report at 2).

The report refers to an interview with the applicant's widow, Wanda Showalter, in September 1982 in which she indicated the applicant did not start using the land until March 1969. The realty specialist noted that the natural resources were available on the site to support the claimed use in the traditional Native manner. He reported a conflict between the subject application and another allotment application (AA-6534-C). Even though the examiner determined occupancy could be assumed to have occurred as documented by witness statements, he could not conclude "that the claimed use was exclusive of other claimed use" (Field Report at 4). He recommended that the case be referred to BIA for conflict resolution. 5/

In its decision, BLM noted that because the subject lands are located within Lake Clark National Park and Preserve, the allotment application was not legislatively approved but was subject to adjudication pursuant to section 905(a)(4) of the Alaska National Interest Lands Conservation Act (ANILCA) of December 2, 1980, 43 U.S.C. § 1634(a)(4) (1988). 6/ It then concluded:

4/ The "Land Report Title Page," dated May 5, 1983, lists the date of the examination as Aug. 20, 1982. The first page of the accompanying "Native Allotment Field Report," bearing the same date, shows Aug. 19, 1981, as the date of examination, yet subsequently, on page 10 of that report, the Aug. 20, 1982, examination date is given. We assume that Aug. 20, 1982, was the correct date.

5/ Although the record contains a memorandum from BIA to BLM dated June 7, 1984, stating that Wand Showalter had signed a conflict resolution form and that the conflict had been verbally discussed with the applicant for AA-6534-C, Glades Evanoff, the record contains no evidence of the final resolution of that conflict.

6/ Section 905 of ANILCA, 43 U.S.C. § 1634 (1988), approved Native allotment applications pending before the Department on or before Dec. 18, 1971, which described either land that was unreserved on Dec. 13, 1968, or land within the National Petroleum Reserve in Alaska, subject to certain exceptions. Subsection 905(a)(4), 43 U.S.C. § 1634(a)(4) (1988), required adjudication of Native allotment applications where the application described land within the boundaries of a unit of the National Park System established on or before the effective date of the Act and where the described land was not withdrawn pursuant to section 11(a)(1)(A) of ANCSA.

> Based upon adjudication of Parcel A of this application, this office has determined the applicant has used the lands applied for and satisfies the use and occupancy requirements of the Act of May 17, 1906, as amended. At the time the claim was initiated, the lands were vacant, unappropriated, and unreserved. Therefore, Native allotment application AA-8168, Parcel A, is hereby approved as to the land described above.

(Decision at 2).

On appeal NPS claims that the evidence of record does not establish that the applicant's alleged use and occupancy was sufficient to constitute substantially continuous use and occupancy at least potentially exclusive of others as required by the Alaska Native Allotment Act. NPS asserts that the record in this case merely shows allegations of hunting, fishing, and berrypicking and, at most, occasional trips to Parcel A without evidence of substantial and exclusive use. NPS also points out that there are many factual conflicts as to the dates and duration of occupancy, the alleged types and seasons of use of the site, and types of improvements, which must be resolved at a hearing.

Alaska Legal Services (ALS) filed an answer on behalf of the heirs of the applicant, contending, that NPS lacks standing to prosecute this appeal because it is not a "party to a case" within the meaning of 43 CFR 4.410(a). ALS asserts that even if NPS does have standing, "the burden of proof is now on the complainant, the NPS, to establish that the BLM determination is unreasonable" (Answer at 7). ALS further contends the BLM decision must stand because "[t]he NPS has failed to present the substantial countervailing evidence to rebut the presumption that the BLM's approval of Mr. Showalter's application is valid" (Answer at 7-8). Finally, ALS asserts that the appeal should be dismissed because NPS has failed to show error in the BLM decision.

[1] First, we must address the argument that NPS lacks standing to prosecute this appeal because it is not a "party to a case" within the meaning of 43 CFR 4.410(a). 7/ ALS, citing Edwin H. Marston, 103 IBLA 40, 42 (1988), charges that one must actively participate in the decisionmaking process which leads to the appeal to become a "party to a case." While that is clearly the principal means by which a person becomes a "party to a case," it is not the only means.

7/ The regulation at 43 CFR 4.410(a) provides that "[Any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management * * * shall have the right of appeal to the Board * * * ." Thus, it sets forth two separate and discrete standing prerequisites where there is a decision by an officer of BLM: (1) the appellant be a party to the case, and (2) the appellant be adversely affected by the decision under appeal. Greg Williams, 98 IBLA 303, 305 (1987). ALS charges only that NPS fails to meet the first prerequisite.

NPS is charged with administrative responsibility for the management of the National Park System which includes the Lake Clark National Park and Preserve, as created by ANILCA. In view of this function of NPS and the location of the allotment lands in question, NPS has a direct interest in the outcome of the adjudication of this allotment application because it will affect lands under its jurisdiction. That it may not have participated in BLM's decisionmaking process prior to issuance of the November 28, 1988, decision does not negate that fact. Thus, mere status of NPS with regard to the lands in question satisfies the "party to a case" requirement of 43 CFR 4.410(a). The contention of ALS that NPS lacks standing to appeal because it is not a party to a case must be rejected.

Section 1 of the Act of May 17, 1906, authorized the Secretary of the Interior "in his discretion and under such rules as he may prescribe" to allot up to 160 acres of vacant, unappropriated, and unreserved non-mineral land to a Native Alaskan who is head of a family or 21 years of age. 43 U.S.C. § 270-1 (1970). The principal statutory prerequisite for proving entitlement to an allotment is that the claimant must submit satisfactory proof "of substantially continuous use and occupancy of the land for a period of five years." 43 U.S.C. § 270-3 (1970). As defined by the Department, such use and occupancy "contemplates the customary seasonality of use and occupancy * * * of any land used by [the applicant]" but 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).

A Native allotment applicant, no less than any other public land claimant, is required to establish compliance with the applicable laws and regulations and, thus, to bear the burden of establishing entitlement to an allotment. Ira Wassilie (On Reconsideration), 111 IBLA 53, 39 (1989); Angeline Galbraith, 97 IBLA 132, 155, 94 I.D. 151, 163 (1987), reaffirmed, Angeline Galbraith (On Reconsideration), 105 IBLA 333 (1988). Where an applicant has not established entitlement to an allotment, BLM is required to provide an applicant with notice and an opportunity for a hearing at which the applicant may attempt to show compliance. See Donald Peters, 26 IBLA 235, 83 I.D. 308, sustained on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976); see also Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). In determining whether a contest is necessary, it is BLM's obligation to examine the entire record to ascertain whether an allotment applicant has shown entitlement by a preponderance of the evidence. See United States v. Estabrook, 94 IBLA 38, 52 (1986).

[2] Applying these criteria to the facts of this case, we find little or no evidence of record to support the conclusion reached by BLM approving the Showalter allotment. Moreover, BLM failed to present any factual analysis of the evidence it relied on in making its determination that Showalter's use met the requirements of the law. BLM's decision does not set forth a reasoned explanation of how it resolved the conflicts of record as to dates and the duration and the nature of use and occupancy. Nor does it explain how such use could be considered substantially continuous and at least potentially exclusive of others where the record is unclear as to the use.

In similar circumstances where this Board has found the evidence in conflict as to a Native applicant's use and the record contained only scant evidence of the applicant's physical presence on and use of the land, we have held that BLM's adjudication was not supported by the record and remanded the case to the State Office to issue a contest complaint. State of Alaska, 117 IBLA 148, 151 (1990), and cases cited therein. The same result is dictated by the state of the record in this case.

ALS asserts that BLM's determination in this case, undertaken pursuant to its delegated authority, is presumed to be valid, citing Kootznoowoo v. Heirs of Jimmie Johnson, 109 IBLA 128, 135 (1989). However, any presumption of validity in this case falls victim to a total lack of reasoned analysis to support the action taken. NPS has pointed out the record inconsistencies that are unresolved in this case. Further, although AILS charges that NPS has the burden of proof, it is clear that since there are material issues of fact for which a hearing is required, the burden of proof rests with the Native applicant to establish entitlement to the allotment. Pence v. Andrus, 586 F.2d 733, 741 (9th Cir. 1978).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case file is remanded with instructions to initiate a contest of Native allotment AA-8168, Parcel A.

Bruce R. Harris
Administrative Judge

I concur:

David L. Hughes
Administrative Judge