

UNITED STATES  
v.  
HEIRS OF ELSIE HANSEN WILSON

IBLA 91-356

Decided March 2, 1994

Appeal from a decision of District Chief Administrative Law Judge John R. Rampton, Jr., rejecting Native allotment application AA-7881.

Affirmed as modified.

1. Alaska: Native Allotments

The right to a Native allotment vests only upon completion of 5 years' use or occupancy of the land and the filing of an application therefor. Absent the timely filing of an allotment application, where a Native, who has completed the requisite 5 years' use, ceases to use or occupy the land and permits the land to return to an unoccupied state, the right to an allotment of that land also terminates, regardless of the subjective intent of the Native.

APPEARANCES: Mark Sokkappa, Esq., Alaska Legal Services Corporation, Juneau, Alaska, for appellants; F. Christopher Bockmon, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The heirs of Elsie Hansen Wilson have appealed from a May 22, 1991, decision of District Chief Administrative Law Judge John R. Rampton, Jr., rejecting Wilson's Native allotment application AA-7881 for failure to establish her independent use of the allotment prior to its withdrawal on April 1, 1924, by Exec. Order No. 3983 (Contestant's Exh. 12). The land has remained continuously withdrawn and is now a wilderness area within Glacier Bay National Park (Contestant's Exhs. 13-18).

On April 21, 1972, the Bureau of Indian Affairs (BIA) filed Native allotment application AA-7881 on behalf of Wilson pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (Native Allotment Act), repealed effective December 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1988), subject to applications then pending. Wilson claimed use and occupancy of approximately 160 acres of land in fractional W $\frac{1}{2}$  SW $\frac{1}{4}$  sec. 16 and fractional SE $\frac{1}{4}$  sec. 17, T. 40 S., R. 60 E., Copper River Meridian, Alaska. The application

signed by Wilson on November 3, 1971, and received by BIA on November 18, 1971, and attached questionnaire contained in BLM's case file (Contestant's Exh. 5), indicated that Wilson, a Tlingit Indian born on April 15, 1905, began using the land in 1915 with her parents and ceased regular use of the land in 1930, the same time that her parents stopped using the land. Wilson stated that the land had been used for fishing, hunting, trapping, berry picking, food gathering, gardening, and putting up food, and that physical improvements, including a smokehouse, drying racks, and a tent, had been placed on the land. Wilson died on August 29, 1973 (Contestees' Exh. C).

Although BLM initially rejected Wilson's application on June 18, 1975, on the ground that her occupancy of the land prior to the withdrawal could only have been as a minor child and not as an independent citizen (Contestant's Exh. 6), BLM reinstated the application to comply with the procedural mandates of Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). The allotment was examined by a BLM realty specialist on September 27, 1986, accompanied by Wilson's son. In a May 20, 1987, field report documenting her findings (Contestant's Exh. 8), the examiner indicated that while natural resources existed to support the claimed uses, there was nothing physically present on the land to demonstrate that the claimed use and occupancy had occurred.

After receiving no response to a September 18, 1987, request for additional information (Contestant's Exh. 19), BLM initiated a contest against Wilson's allotment application. In the contest complaint dated May 12, 1988, BLM charged that Wilson was unable to establish the adequacy and independence of her use and occupancy of the land prior to its withdrawal on April 1, 1924, because the questionnaire submitted with her application stated that she began using the land when she was 10, only used the land with her parents, and ceased using the land in 1930 when her parents stopped using the land, and that she also could not "establish continuity of claim sufficient to forestall termination of an inchoate right to an allotment of this parcel" (Complaint Paragraph 6d).

In accordance with her heirs' request, Judge Rampton held a hearing on May 15 and 16, 1990, in Hoonah, Alaska, to afford them the opportunity to present oral testimony in support of Wilson's claim. At the hearing, BLM presented the testimony of Melitta White, the realty specialist who had examined Wilson's allotment, and introduced 19 exhibits. Wilson's heirs called four witnesses: Cheri Vavalis, an employee of the Tlingit and Haida Central Council, BIA's contractor for services concerning restricted Native trust property, who identified the copy of Wilson's Native allotment application retained in BIA's files which contained seven pages not included in BLM's copy of the application further elaborating Wilson's use of the land (Contestees' Exh. A); William A. Wilson, Jr., Wilson's son, who accompanied White on the field examination and testified about his mother's use of the parcel in 1944; Katherine B. Mills, a longtime resident of Hoonah, Alaska, whose husband had an allotment in the vicinity of Wilson's allotment, who testified about Tlingit custom and Wilson's early use of the land; and Harlena Elsie Sanders, Wilson's youngest daughter, who testified about trips she made to the land with her mother and father. The heirs offered three exhibits into evidence.

In his May 22, 1991, decision, after finding that the evidence was sufficient to establish that Wilson had continued to use the land throughout her life and that the land was considered to belong to her and her family, Judge Rampton framed the principal issue to be decided as whether Wilson began qualifying, independent use of the allotment prior to its withdrawal in 1924. The Judge discounted the failure of the field examination to confirm the existence of the improvements claimed on the allotment, concluding that the examination was inadequate and inconclusive. Nonetheless, he observed that evidence offered at hearing attributed those improvements to either Wilson's father or uncle, not to her. He found that the testimony credited ownership of the land to Wilson's father until after the land was withdrawn and suggested that her father exerted control over the land as late as 1929. While acknowledging that Wilson used the land prior to withdrawal, Judge Rampton determined that, in accordance with Tlingit custom, her visits there were in the company of her parents and not likely independent since she would have been on the land because her parents were there, not vice versa. Accordingly, he rejected her claim on the ground that she had not presented evidence sufficient to conclude that her use of the allotment prior to its withdrawal was independent.

On appeal, Wilson's heirs argue that Wilson used the land in the customary manner of a Tlingit Indian woman prior to withdrawal and that her use of the land in the company of her parents did not preclude a finding of independent use and occupancy of that land. In response, BLM avers that Judge Rampton correctly rejected Wilson's Native allotment application because the record contains insufficient evidence that Wilson ever used the land and none that she used it independently of others.

The Native Allotment Act granted the Secretary of the Interior authority to allot "in his discretion and under such rules as he may prescribe" vacant, unappropriated, and unreserved nonmineral land in Alaska not to exceed 160 acres to any qualified Indian, Aleut, or Eskimo. 43 U.S.C. § 270-1 (1970). Entitlement to an allotment depends upon satisfactory proof of substantially continuous use and occupancy of the land for a 5-year period. 43 U.S.C. § 270-3 (1970). Departmental regulations interpret the Act as follows:

The term "substantially continuous use and occupancy" contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such 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). A Native applicant may be granted an allotment on withdrawn land if all other requirements have been met and the applicant commenced required use and occupancy prior to withdrawal. See United States v. Estate of George D. Estabrook, 94 IBLA 38, 42 (1986), and authorities cited. The burden rests with the Native applicant to establish her entitlement to an allotment. United States v. Rostopsoff, 124 IBLA 294, 300 (1992), and cases cited.

[1] Although appellants challenge Judge Rampton's conclusion that Wilson did not initiate independent use and occupancy of the claimed land prior to the land's withdrawal in 1924, we need not decide this issue. Rather, we conclude that, even if Wilson had commenced qualifying use and occupancy of the land before the withdrawal and had completed the requisite 5 years' use and occupancy, her cessation of use and occupancy of the land prior to the filing of her Native allotment application terminated her right to an allotment for that land. In so doing, we reject Judge Rampton's finding that Wilson continued to use the land throughout her life as unsupported by the record.

The right to a Native allotment vests only where the Native completes 5 years of use and occupancy and files an application therefor. Jonas Ningeok, 109 IBLA 347, 351 (1989), and cases cited. Unless an application for an allotment has been filed, cessation of qualifying use or occupancy for a period of time sufficient to remove any evidence of a present use or occupancy of the land terminates a Native's right to an allotment of the land regardless of the subjective intent of the Native. Id. The evidence presented in this case demonstrates that Wilson ceased using the land in a qualifying manner before her Native allotment application was filed. See Ira Wassillie, 103 IBLA 112, 119 (1988). In the SEACAP questionnaire attached to the application (Contestant's Exh. 5), Wilson indicated she last used the land in 1930. The additional pages submitted by appellants (Contestees' Exh. A) contain conflicting statements concerning her use of the land: unnumbered page 8 of contestees' Exhibit A states that Wilson ceased going to the land in 1940 when she and her first husband, George Williams, divorced, while unnumbered page 10 of that exhibit describes her use of the land as beginning in 1930 and continuing every summer through the present. This internally inconsistent evidence does not establish that Wilson continued to use the allotment until her application was filed.

The testimonial evidence also fails to show that Wilson continued to use the land in a qualifying manner. Wilson's son, William Wilson, Jr., testified that he went to the allotment in 1944 with his mother, father, grandfather, and uncle looking for things they could use to replace items lost in a June 1944 fire that burned much of Hoonah, and spent one night on the boat returning to Hoonah the next day (Tr. II 106, 136). He stated that his parents visited the land off and on until the late 1950's (Tr. II 132-33), and that his mother had returned to the land to do a visual survey sometime between the late 1950's and her death in 1975, but was unable to find anything left of the campsite (Tr. II 134). Wilson's youngest daughter, Harlena Elsie Sanders, who was born in 1951, testified that she took day boat trips to the allotment with her mother and father beginning when she was 6 or 7 years old, and that, although she and her mother were not allowed to leave the boat, her father would get out of the boat and go up onto the beach and check out the land and the stakes on the allotment (Tr. II 184-88, 190). Sanders stated that her mother did get off the boat occasionally to go to the bathroom and would also look around before she returned to the boat (Tr. II 187). Sanders testified that her mother stopped going to the land in 1968 and did not leave the boat during the

final 1968 trip (Tr. II 188-89, 192). Katherine B. Mills, a Native living in Hoonah whose husband had an allotment in the vicinity of Wilson's allotment, testified that she saw boats belonging to Wilson's first and second husbands anchored off Wilson's allotment at least five different times in 5 different years between 1937 and 1960 and that she saw Wilson's boat there after 1960, as well (Tr. II 171-72). She also stated that she saw Wilson on the land while Wilson was married to her first husband, i.e., prior to 1940 (Tr. II 175-76).

This testimony reveals that Wilson's use of the land after 1957 or 1958, when Sanders first accompanied her to the land, was not the notorious, exclusive, and continuous use and occupancy contemplated by the Native Allotment Act and was insufficient to leave visible evidence thereof and put strangers on notice that the land was used or occupied by another. See United States v. Melgenak, 127 IBLA 224, 243 (1993), and cases cited. Her travel by boat to the allotment where she then remained on the boat or left the boat to walk on the beach does not constitute substantial use potentially exclusive of others. Id. Wilson's nonuse of the allotment prior to the filing of her Native allotment application resulted in the removal of any evidence of present use or occupancy of the land. In fact, according to her son, Wilson admitted that she was unable to find any evidence of her campsite when she visited the land prior to her death (see Tr. II 134). The discovery of trees notched for setting marten traps and a 1-meter by 3-meter pit of unknown origin on the allotment recorded in a 1983 BIA cultural resource management inventory does not undercut the conclusion that no evidence of current use or occupancy existed on the allotment when Wilson's application was filed.

We therefore conclude that Wilson's cessation of qualifying use and occupancy, beginning in the late 1950's, nullified any rights to the land she acquired by prior use and occupancy regardless of her subjective intent, and we affirm the rejection of Wilson's Native allotment application.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Rampton's decision is affirmed as modified.

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Franklin D. Arness  
Administrative Judge

I concur:

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C. Randall Grant, Jr.  
Administrative Judge