

NATIONAL PARK SERVICE

IBLA 94-434

Decided March 19, 1996

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving Native allotment application AA-7992.

Affirmed.

1. Alaska: Native Allotments

Evidence that a Native allotment applicant's claim was a matter of common knowledge in the local community supported his claim of use and occupancy of land subject to entry under the Native Allotment Act at least potentially exclusive of others; nor could an interruption of his qualifying use and occupancy be inferred from the fact that access to the land claimed may have become inconvenient before he filed his application, when the record of decision shows he continuously used and occupied the land until the date of his application.

APPEARANCES: F. Christopher Bockmon, Esq., Office of the Solicitor, Alaska Region, U.S. Department of the Interior, Anchorage, Alaska, for appellant National Park Service; Willa B. Perlmutter, Esq., Alaska Legal Services, Juneau, Alaska, for heirs of the Native allotment applicant Jack Paul Brown.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The National Park Service (NPS) has appealed from a March 18, 1994, decision of the Alaska State Office, Bureau of Land Management (BLM), approving Native allotment application AA-7992 made by Jack Paul Brown. NPS contends that the decision should be reversed because it is not supported by the record compiled by BLM, and that the application should be made the subject of a Government contest to determine whether Brown's use and occupancy of the land, which lies within Glacier National Bay National Park, was sufficient to support his application for allotment.

The case file shows that Brown, on November 8, 1971, signed Native allotment application AA-7992. The application, filed with the Bureau of Indian Affairs (BIA) on November 16, 1971, sought the grant of a single tract of land lying across a peninsula of land extending into Excursion Inlet and described as the "[f]ractional SW¹/₄NW¹/₄, fractional S¹/₂NW¹/₄, fractional NW¹/₄SE¹/₄, fractional N¹/₂SW¹/₄, Sec. 22, T. 39 S., R. 60 E., CRM[.] As

shown on the attached portion of a copy of USGS [U.S. Geological Survey] quadrangle map Juneau B-5 which becomes a part of this application."

BIA filed Brown's application with the BLM on May 22, 1972, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (Native Allotment Act), repealed December 18, 1971, by 43 U.S.C. § 1617 (1988), subject to pending applications. Concerning his use and occupancy of the land, Brown attached to his application a document entitled "Expanded Seacap Land Allotment Questionnaire" (questionnaire) to show that he had used and occupied the land described in his application in a manner so as to qualify him for a grant under the Native Allotment Act. To qualify for such a grant he was required to show substantially continuous use and occupancy of the land for 5 years; to qualify, the use must amount to substantial actual possession, at least potentially exclusive of others, and not intermittent. See 43 U.S.C. § 270-3 (1970); 43 CFR 2561.0-5(a).

The questionnaire indicates that Brown, a Tlingit Indian who was born on April 22, 1902, used and occupied the land for hunting, fishing, trapping, gardening, and food gathering from 1922 until he submitted his application in 1971, and that there was a cabin on the land. Brown died in 1972. On June 12, 1985, BIA supplemented the record supporting Brown's application with an affidavit from Ida Kadashan, who stated that Brown used the land every summer for fishing and hunting, and that members of the Native community in the vicinity were generally aware that the land was claimed by him under the Native Allotment Act.

On November 25, 1975, BLM notified BIA that the land sought by Brown's application had been continuously withdrawn from entry under the Native Allotment Act since April 1, 1924, when it was first withdrawn from such entry by Exec. Order No. 3983. Acknowledging that Brown may have occupied the land he claimed for more than 5 years, BLM nonetheless questioned whether he was eligible to make such a claim because "his occupancy during that [5-year] period could only have been as a minor child in company with his parents." Additional evidence of use and occupancy was requested. Thereafter, BIA furnished an affidavit in support of Brown's application, following which a field examination was conducted, and a report of examination provided on January 4, 1989.

The field examiner traveled to the site by aircraft; present with her were Gilbert Mills (husband of Brown's sister), Gary Vequist (an NPS employee), John Brower (identified as "Tlingit Haida"), and Russ Kaufmann (her pilot). Noting that the parcel had a double shoreline, the field examiner found it was "in the natural state," although there was a structure present that the examiner concluded was a "powder magazine" by reference to a report prepared for NPS by Robert E. Ackerman of Washington State University in 1965 (Report at 2). Part of this referenced document is included with the report, and indicates that the structure found was "a very solidly built rectangular structure" that "was, according to Mr. Des Rosiers, used for a powder magazine by the U.S. Army during the

wartime occupation" (Report at 5). The examiner acknowledged the existence of an affidavit by Ida Kadashan, a resident of the locality, that confirmed Brown's use of the land between 1922 and 1971 and reported (Report at 2a) that Gilbert Mills, another member of the local community, knew Brown spent "one season there in 1927." The report concluded, at page 4, that, inasmuch as Brown was born in 1902 and began his use of the land in 1922, he "could have occupied the land as an adult, exclusive of others, prior to the withdrawal (43 CFR 2561). There was no physical evidence found on the land to show that this occurred. The witness statement of Ida Kadashan and the applicant's own questionnaire state that it did occur." Finally, the examiner commented, at page 5, that an adjustment of the boundary of the claim might be needed in order to keep an allotment within the 160-acre limitation placed on such grants.

On April 9, 1991, reciting that the Brown application was not approved by section 905 of the Alaska National Interest Lands Conservation Act because it was "within the boundaries of a unit of the National Park System," BLM provided BIA and NPS with copies of the 1989 field examiner's report of investigation described above, and allowed both agencies 60 days to comment whether the application should be referred to hearing, citing Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1975). On April 26, 1993, BLM notified BIA and NPS that, based upon the file developed in this case, BLM proposed to approve Brown's application. On June 9, 1993, the NPS Alaska Regional Director responded to BLM, objecting that the evidence assembled by BLM, particularly the Seacap questionnaire, was ambiguous and would not support a decision to approve Brown's application; he requested that a Government contest be brought against the application. After the decision here under review issued on March 18, 1994, a timely appeal was filed by NPS.

On appeal, NPS elaborates arguments first raised by the Alaska Regional Director; it is again contended that the record now before us on appeal does not support the decision approving Brown's application that was issued by BLM in 1994. NPS also submits that the 1989 report of the field examiner was "negative," that evidence provided in support of the application was "conflicting and insufficient" so that it does not support the decision issued, and that, even if Brown had once perfected qualifying use of the land he claimed, he ceased to do so before he filed his application with BIA in 1971. NPS requests that the BLM decision be set aside and that a Government contest of the Brown application be initiated.

[1] It is difficult to say what it is about the report of field examination that might be considered negative to the application filed by Brown. The examiner does not recommend that the application be denied, but concludes, rather, that it ought to be "adjusted" to compensate for the likelihood that the acreage claimed exceeds 160 acres in extent. The fact that the site is bordered on two sides by tidal water undoubtedly complicates calculation of the exact extent of the land claimed by Brown, but it seems clear that it is more than 160 acres that is described by his application. Nonetheless, the examiner did not recommend against approval

of the application; her report conformed precisely to the statement of purpose provided with it: to document field examination findings, identify conflicts and to transmit survey instructions. It was neither negative or positive, but has every appearance of being factual. NPS has not shown that it is incorrect or inadequate in any way.

Contrary to the assertion by NPS, moreover, nothing in the Brown application indicates any ambiguity about the location of the allotment itself. While NPS argues that the Seacap questionnaire contains information that casts doubt upon the location of the land claimed, or suggests that Brown's father's allotment may have been the site of activities claimed for the site in question (see statement of reasons (SOR) at 3, 5), this attack is merely speculative. The questionnaire was not furnished to modify the land description of the application, which is, as BLM found, complete on the face of the application itself. The questionnaire was supplied to describe the manner and extent of Brown's occupancy and use, and was properly read by BLM as relating only to questions concerning his use of the land at issue. Brown's application was specific in confining the use of the questionnaire to the questions of use and occupancy only: Brown did so by incorporating by direct reference the questionnaire into only those parts of the application dealing with use and occupancy.

Relying on statements in the questionnaire concerning Brown's use and occupancy, BLM concluded that he began his occupation in 1922, prior to withdrawal of the land from availability for Native selection 2 years later; initiation of use and occupancy prior to withdrawal provides a valid foundation for a later allotment application. See Andrew Gordon McKinley (On Reconsideration), 61 IBLA 282, 285 (1982). NPS does not dispute that Brown initiated use and occupancy before the land was withdrawn from entry on April 1, 1924, at a time when he was an adult and capable of independent use and occupancy. See generally United States v. Akootchook, 130 IBLA 5, 11 (1994), and cases cited therein.

The uses said by Brown to have been made of the land during occupancy are the uses traditionally relied upon by Native claimants in support of such claims as this one: hunting, fishing, gathering, and related subsistence activity. See 43 CFR 2561.0-5. The questionnaire states these uses continued annually from 1922 until 1971 without interruption. NPS does not deny that Brown used the land as he said he did, but argues that after 1940, when Brown moved to Klawock and thereby increased his traveling distance to the site, he must have ceased to use the land altogether, thereby abandoning his claim. This argument is founded on the belief that the distance between Klawock and the land at issue would have made such travel inconvenient. NPS argues that United States v. Elsie Hansen Wilson, 128 IBLA 252 (1994), provides controlling precedent for the position taken by NPS that we should find use and occupancy by Brown ceased in 1940.

This argument fails to find support in the record. Unlike the situation in the Wilson case, which involved a Government contest of a Native allotment application that had been rejected by BLM, there is no evidence that Brown ceased to use the land in a qualifying manner. See id. at 253,

255. The best means of access to the site at issue are provided by boat or aircraft. NPS has not shown that Brown stopped using the land in the manner described by his application, nor has it been shown that the distances involved were so great that his access to the site was effectively denied after 1940, or that he was unable or unwilling to travel to the site. The record before us supports the finding by BLM that there was continuous use and occupancy of the land by Brown in the manner described by his responses to the Seacap questionnaire.

Questioning whether Brown's use was potentially exclusive of others, NPS points to the fact that, in 1989, when the land was examined for traces of occupancy and use, the "only evidence of use was a powder magazine said to have been built by the Army" (SOR at 3). This assertion overstates the evidence gathered by the field examiner, who found remains of a structure on the land consistent with a finding reported in the 1965 Ackerman report, quoted above. The Ackerman report referred to the area where a structure was found as "site 8," which appeared on a sketch map at about the location of Brown's claim on the peninsula extending into Excursion Inlet. The Ackerman report did not, however, state that the structure was built by the Army, but reported only that it was the "remains" of a "very solidly built rectangular structure" that was "used for a powder magazine." *Id.* The Ackerman report simply describes a use that occurred sometime "during the wartime occupation" and does not pretend to describe when, or by whom, the structure was built. It could have been both the powder magazine used by the Army and the cabin referred to by Brown; the two possibilities are not, as NPS suggests, mutually exclusive. A ruined structure was present on the land claimed by Brown; it was therefore a signal that someone had, at some time, used and occupied the land, and provided some evidence of that fact. See generally Angeline Galbraith, 97 IBLA 132, 168 (1986).

The history of this ruin is not, however, as important as NPS would make it seem, because the structure found on the Brown site is not the only evidence tending to establish that the use made by Brown of the site was at least potentially exclusive of others. The affidavit of Ida Kadashan, which is not challenged by NPS, establishes that it was reputed in the local community ("all the old people in Hoonah knew") that Brown was the claimant of an allotment in Excursion Inlet. Exclusive use, or use at least potentially exclusive of others, can be shown by witness statements such as hers. See, e.g., United States v. O'Leary, 125 IBLA 235, 245 (1993). The Kadashan affidavit is evidence supporting the claim by Brown's application that his use and occupancy of the land was at least potentially exclusive of others.

There is no suggestion that Brown ever stopped using the land at the confluence of the two bays comprising Excursion Inlet, either in his questionnaire or in the statement by Ida Kadashan. NPS has submitted, as counsel admits, an "analysis" of the case file (see SOR at 4) in the form of speculation that Brown stopped using the site he claimed because it became inconvenient for him to go there. In adopting this stance, NPS has failed to show error in the BLM decision. On the record before us, there is no evidence that BLM erred in finding that Brown used and occupied the land

in customary native ways for the required time so as to entitle him to the allotment applied for. The record assembled by BLM supports the decision issued. While NPS may suspect that investigation into circumstances surrounding Brown's move in 1940 might produce proof to rebut the evidence relied upon by BLM, it is apparent that no such further investigation was conducted, and the record before us showing continuous qualifying usage from 1922 until 1971 remains unrefuted. Since NPS has failed to show error in the BLM decision, the relief it seeks cannot be granted, and the BLM decision here under review must be affirmed.

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 affirmed.

Franklin D. Amess
Administrative Judge

I concur.

C. Randall Grant, Jr.
Administrative Judge

