

EVA WILSON DAVIS, ET AL.

IBLA 93-217, 93-263

Decided September 25, 1996

Motion to vacate previous decisions and close certain Native allotment case files as improvidently reinstated.

Motion denied.

1. Administrative Authority: Generally--Administrative Procedure: Judicial Review--
Alaska: Native Allotments--Res Judicata

Application of the principle of res judicata will normally, in the absence of compelling legal or equitable considerations, bar further consideration of a matter finally decided by a court of competent jurisdiction. However, a precondition for the application of this principle is that the matter raised in the subsequent proceeding was one distinctly put in issue and directly determined in the earlier litigation.

APPEARANCES: Regina L. Sleater, Esq., Office of the Regional Solicitor, United States Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management; Mary Anne Kenworthy, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for Eva Wilson Davis and Frank M. Williams; James J. Ustasiewski, Esq., Office of the General Counsel, United States Department of Agriculture, Juneau, Alaska, for the United States Forest Service.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The Bureau of Land Management (BLM) has filed a motion to vacate the agency decisions underlying the above-captioned appeals and to order that the case files in these matters be closed. Each appeal involves a Native allotment application 1/ for lands within the Tongass National Forest which

1/ The applications were filed pursuant to the Act of May 17, 1906, 34 Stat. 197, as amended, Act of Aug. 2, 1956, 70 Stat. 954; repealed by section 18 of the Alaska Native Claims Settlement Act, with a savings clause for applications pending on Dec. 18, 1971, 43 U.S.C. § 1617(a) (1994).

had been rejected by BLM in 1975 based on a determination that the applicant had not demonstrated sufficient personal independent use and occupancy of the lands sought so as to justify the grant of a Native allotment. While, as explained below, these applications had subsequently been reinstated by BLM on its own motion, BLM now seeks permission to rescind its reinstatement of the applications and to close these cases on the theory that, inasmuch as appellants had unsuccessfully sought Federal court review of the original decisions adverse to them, the principle of *res judicata* is properly invoked to bar further consideration of these applications. For reasons explained below, we do not agree.

At the outset, we note that Eva Wilson Davis, heir of George A. Davis and the appellant in IBLA 93-217, has filed a request to consolidate her appeal with the Forest Service's appeal of the approval of Frank M. Williams' allotment in IBLA 93-263. She notes that the issues raised by BLM's motion to vacate are the same in each case and that the interests of efficiency and uniformity of result would be advanced by consolidation. There being no objection by the Forest Service, this request is granted and these appeals are consolidated solely for the purpose of ruling on the motion to vacate. We turn now to a brief examination of the factual milieu in which these appeals arise.

George A. Davis was born on May 5, 1899. On December 7, 1971, he completed his Native allotment application (AA-7028), asserting both personal use commencing from the date of his birth as well as ancestral use of certain described lands within secs. 26 and 27, Ts. 47 and 48 S., R. 66 E., Copper River Meridian. These lands had been withdrawn on February 16, 1909, for inclusion in the Tongass National Forest.

BLM rejected Davis' application on May 12, 1975. BLM noted that Davis had been less than 10 years old at the time the lands sought were withdrawn from settlement and entry and that any qualifying personal occupancy was, thus, not as an independent citizen or head of a family but as a minor child in the company of his parents. The decision also refused to recognize Davis' attempt to tack on ancestral use to his actual personal use for purposes of establishing qualifying settlement predating the withdrawal. This determination by BLM was subsequently appealed and, in Mary Y. Paul, 21 IBLA 223 (1975), the Board affirmed BLM's decision in the Davis case, among others. The Board's decision, however, was based solely on rejection of the tacking on of ancestral use. No reference was made to any assertion of qualifying personal use and occupancy.

Frank M. Williams was born on February 3, 1890. His Native allotment application (AA-7912), filed on December 9, 1971, described lands within sec. 16, T. 79 S., R. 88 E., Copper River Meridian, and asserted personal use commencing in 1900 or 1902 as well as prior ancestral use. These lands had been withdrawn for inclusion in the Tongass on August 20, 1902. BLM rejected this application on May 5, 1975, because, like Davis, Williams had been a minor at the time of the withdrawal and any occupancy prior to the withdrawal could only have been as a minor child and not as an independent citizen or head of a family. The decision also recited the prohibition

against tacking on ancestral use to establish the requisite use and occupancy needed for an allotment. This determination was affirmed by the Board in the consolidated decision styled Louis P. Simpson, 20 IBLA 387 (1975).

While the Simpson decision involved numerous appeals by Alaska Natives, the great majority of whom were born after the lands sought by them were withdrawn for inclusion in the Tongass, the Board noted that several appellants in Simpson had, indeed, been born prior to the relevant withdrawal. With respect to these appellants, the Board observed:

Those born prior to the inclusion of the land within the forest were of such tender age at that time that an assertion that they had commenced use and occupancy in their individual and exclusive capacities prior to withdrawal is patently unacceptable. Arthur C. Nelson [On Reconsideration], 15 IBLA 76 (1974). Nor has counsel suggested that they did. Thus for this reason, the applications must be rejected insofar as they are based upon the applicants' individual acts.

20 IBLA at 392.

Both Davis and Williams were subsequently included in a class action suit challenging the Department's rejection of ancestral use. In Shields v. United States, 504 F. Supp. 1216 (D. Alaska 1981), the Court, after describing the affected class as consisting of those Native allotment applicants seeking land in a national forest occupied by Alaska Natives prior to the forest withdrawal but who were "unable to establish their personal use of it before its withdrawal" (id. at 1217), granted a motion for summary judgment filed by the United States and dismissed the case. In its decision, the Court noted that a single issue was presented, viz., whether Alaskan Natives applying for a Native allotment within a national forest were required to establish personal use and occupancy of the land prior to the establishment of the forest. The Court answered this question in the affirmative.

The District Court in Shields placed particular reliance on the 1956 amendments to the Native Allotment Act. These amendments had provided, inter alia, that:

Allotments in national forests may be made under this Act if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes.

While the Court recognized that the primary impetus behind the adoption of the 1956 amendments had been the Congressional desire to allow for alienation of allotments, it noted that concern was also expressed that some Natives might seek allotments in the national forests for the purpose of selling the land to others. As the Court pointed out, it was to eliminate

this danger that Congress enacted into law the substance of the Department's then existing regulations requiring, *inter alia*, personal occupancy prior to establishment of the forest as a precondition to obtaining an allotment. ^{2/} See 504 F. Supp. at 1218.

Though the decision rendered by the District Court in Shields did not explicitly discuss the permissibility of tacking on ancestral use to actual personal use, any doubt as to whether ancestral use could be claimed by a Native was put to rest by the Court of Appeals for the Ninth Circuit in Shields v. United States, 698 F.2d 987 (9th Cir. 1983), *cert. denied*, 464 U.S. 816. There, the Court specifically contrasted personal use with ancestral use and held that only personal use would satisfy the Act. We note, however, that while the Shields litigation clearly addressed any claims appellants may have made with respect to the permissibility of tacking ancestral use to personal use for the purpose of qualifying for an allotment, nothing in these decisions touched upon any claim by those involved relating to actual personal use. ^{3/}

In 1980, while judicial review of the class action was underway, BLM reinstated the Davis and Williams applications. This action was presumably occasioned by a number of developments occurring subsequent to the original adjudications herein, including decisions in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), Donald Peters, 26 IBLA 235, 83 I.D. 308 (1976), (On Reconsideration), 28 IBLA 153, 83 I.D. 564 (1976), and Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978), which ultimately required that the Department afford claimants the opportunity for a fact-finding hearing prior to rejection of a Native allotment application based on factual determinants. More to the point with respect to the instant appeals, we note that reinstatement of these two applications was immediately preceded by this Board's decision in William Bouwens, 46 IBLA 366 (1980). In Bouwens, the Board held that, in those cases involving withdrawn lands in which the Native allotment applicants were 8 years old or older at the time the land was withdrawn and they asserted qualifying independent use and occupancy of the land as of the date of the withdrawal, BLM was required to initiate a contest proceeding against the allotment application prior to rejecting it. ^{4/} We note that,

^{2/} While, as recited above, section 2 of the 1956 amendments also permitted the allotment of land within national forests upon a determination by the Secretary of Agriculture that the land was chiefly valuable for agricultural or grazing purposes, BLM had noted in its 1975 Davis and Williams decisions that the authorized officer of the Tongass National Forest had determined that the lands sought under the applications were not chiefly valuable for agricultural or grazing purposes. Thus, this provision is not involved in the instant appeals.

^{3/} This, of course, is scarcely surprising given the fact that the class certification was directed towards those allotment applicants who were "unable to establish their personal use of [the land] before its withdrawal." 504 F. Supp. at 1217.

^{4/} The Bouwens decision was one of a number of decisions in the post-Pence period in which the Board attempted to refine the standards determining in

based on their applications, both Davis and Williams would have been at least 10 years old at the time of the relevant withdrawal.

While the appeals were reinstated in 1980, actual reconsideration by BLM was delayed owing to a number of factors. By decision dated December 14, 1992, the Alaska State Office rejected Davis' application for lands described as parcel A on the basis of a 1983 affidavit stating that Davis had first used this parcel in the summer of 1909, *i.e.*, after the parcel had been withdrawn. This decision led to Davis' appeal, docketed as IBLA 93-217. By separate decision dated January 29, 1993, the Alaska State Office approved Williams' application for an allotment. This decision led to the Forest Service's appeal, docketed as IBLA 93-263. Subsequent to the filing of these notices of appeal, BLM filed the motion to vacate and remand which is the subject of this decision.

[1] In its motion, BLM argues that res judicata attaches to all members of a properly certified class, such as the Shields class. BLM notes that the application of the principle of res judicata was described by the United States Supreme Court in Montana v. United States, 440 U.S. 147, 153 (1979):

A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies . . ." Southern Pacific R. Co. v. United States, 168 U.S. 1, 48-49 (1897). Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.

BLM contends that the rejection by the Shields courts of ancestral use

fn. 4 (continued)

which cases hearings must be granted. Thus, in Nellie Boswell Beecroft, 41 IBLA 70 (1979), the Board had, in essence, determined that the assertion by an allotment applicant that she had use and occupied the land when she was 13 years old was sufficient to raise a question of fact necessitating a hearing prior to rejection. On the other hand, in Floyd L. Anderson, Sr., 41 IBLA 280, 86 I.D. 345 (1979), the Board held that the claim of an applicant that he had independently used a specific parcel of land at age 5 could be rejected as a matter of law. The Bouwens decision, while seemingly in conflict with the earlier Board precedent established in Arthur C. Nelson (On Reconsideration), *supra*, and upon which the Simpson decision relied in originally rejecting the Williams application, was actually consistent with that decision, given the change in the 5-year rule effectuated by Secretarial Order No. 3040, which was signed by Secretary Andrus on May 25, 1979. The effect of this Order on the issues involved herein is discussed subsequently in the text of this decision.

for the purposes of showing compliance with the use and occupancy requirements of the Native Allotment Act constituted an affirmation of the Board's rejection of these two applications and, under the principle of res judicata, prevented subsequent reconsideration of the allowability of these applications by BLM. For a number of reasons, we do not agree.

In the first place, as the Supreme Court noted in Montana v. United States, *supra*, res judicata, like collateral estoppel, applies to matters "distinctly put in issue and directly determined." Accord, United States v. Knoblock, 131 IBLA 48, 78, 101 I.D. 123, 139 (1994). The question explored in the Shields litigation was not whether the individual applications involved therein had been correctly rejected but rather, as the District Court phrased it, "Must Alaskan Natives applying for allotments within a national forest under the 1906 Alaska Native Allotment Act establish personal use and occupancy of the land prior to establishment of the forest?" 504 F. Supp. at 1216. ^{5/} While this question was answered in the affirmative, nothing in the District or Circuit Court's decision can fairly be read as deciding the allowability of any specific allotment. What is res judicata is the determination that ancestral use may not be utilized as a substitute for actual personal use of the land by the applicant. Neither allotment applicant, however, makes such a claim in the present appeals.

Moreover, even if the Shields case had involved a direct appeal from the rejection of the Davis' and Williams' applications, res judicata would not absolutely prohibit reconsideration of the allowability of the allotments in the proper circumstances. Res judicata is a jurisprudential, not a jurisdictional, construct. See, e.g., United States v. ITT Rayonier, Inc., 627 F.2d 996, 1000 (9th Cir. 1980); State of California, 121 IBLA 73, 130, 98 I.D. 321, 352 (1991). It is because of this that this Board has frequently observed that "[i]n the absence of compelling legal or equitable reasons for reconsideration, the principle of res judicata, and its counterpart, finality of administrative action, will bar consideration of a new appeal arising from a later proceeding involving the same claim and the same issues." Carmel J. McIntyre (On Judicial Remand), 67 IBLA 317, 328 (1982), citing Dallas C. Qualman, 36 IBLA 119, 121 (1978) (emphasis supplied). We believe that, with respect to the instant appeals, sufficient equitable and legal reasons exist to justify reconsideration of the Board's earlier rejection of these applications.

There have been numerous modifications and revisions over the years in the standards applied to determine whether or not a Native allotment application should be granted. When such changes have occurred, the consistent

^{5/} For its part, the Court of Appeals characterized the issue before it as an appeal from a decision "holding the Allotment Act requires the applicant to establish personal, rather than ancestral, use and occupancy of the land prior to its withdrawal for national forests." Id. at 988.

practice of the Department has been to afford the benefit of the change to all allotment applicants, even those whose applications had already been rejected. ^{6/} Precisely such a critical change occurred herein.

As discussed above, both applicants asserted personal use of the lands prior to the withdrawals in their original applications and did not merely raise the specter of this possibility after issuance of the Shields decisions. While the Paul decision, which covered the Davis application, did not directly address such contentions, we have noted above that, insofar as the Williams application was concerned, the Simpson decision did arguably address this issue when it noted that "those born prior to the inclusion of the land within the forest were of such tender age at that time that an assertion that they had commenced use and occupancy in their individual and exclusive capacities prior to withdrawal is patently unacceptable." Id. at 392, citing Arthur C. Nelson (On Reconsideration), *supra*.

What is critical to keep in mind is the fact that, under the standards being applied at the time that these two decisions were rendered, it is clear that the applicants' assertions of personal use were subject to rejection as a matter of law. With respect to Davis' application, he would have been just under 10 years old when the land was withdrawn, ^{7/} while Williams would have been slightly older than 12 years old. Under the Secretarial guidelines being applied in 1975, Native allotment applicants were required to show 5 years' qualifying use prior to the withdrawal of the land being sought. Thus, Davis would have been required to show that he had commenced independent and potentially exclusive use of the land before he was 5 years old. Such an assertion would have been rejected as a matter of law. See Floyd L. Anderson, Sr., 41 IBLA 280, 86 I.D. 345 (1979). Williams' application was equally flawed under this theory since he had asserted use of the land commencing only 2 years before its withdrawal and, thus, it would have been impossible for him to show compliance with the law as it was then being interpreted.

In 1979, however, Secretary Andrus issued Secretarial Order No. 3040. This Order rescinded the 5-year prior rule and instead provided that allotment applications filed for land which was subsequently withdrawn could be granted so long as personal qualifying use commenced prior to the withdrawal of the land involved. See Secretarial Order No. 3040, section 3(b).

^{6/} These changes have been effectuated by Federal court determinations (see, e.g., Pence v. Kleppe, supra), Congressional enactments (see, e.g., Olympic v. United States, 615 F. Supp. 990 (D. Alaska 1985)), and Secretarial policy pronouncements (see, e.g., Warner Bergman (On Reconsideration), 31 IBLA 21 (1977)).

^{7/} While we are aware of the fact that BLM premised its rejection of the Davis' application in 1992 upon a 1983 affidavit which Davis had provided which indicated that the first use of the parcel was in the summer of 1909, after the parcel had been withdrawn, this affidavit was clearly not a causative factor in the original rejection of his application in 1975.

The relevance of this Order to the instant appeals is that, whereas before they both would have been subject to rejection as a matter of law, each would now be allowable if it could be shown that qualifying use commenced prior to the respective withdrawals. While it is by no means certain why these two applications were reinstated in 1980, it is certainly conceivable that application of the new policy delineated by Secretarial Order No. 3040 played a decisive part.

In view of the foregoing, it is difficult to ascertain any plausible basis upon which to grant BLM's motion. Certainly, there is no ground for the application of laches or similar equitable principles. Once BLM reinstated these two applications of its own volition in 1980, there would have been no reason for either applicant to take any other action in an attempt to obtain the benefits of the Secretarial policy change. Given the factual background of these two appeals, there is little justification for the attempted invocation of the doctrine of res judicata. BLM's motion to vacate and close the files is, accordingly, denied.

We note that no statement of reasons has as yet been filed by Davis in IBLA 93-217, nor has an answer been filed by BLM or Williams in IBLA 93-263. We hereby grant the affected parties 90 days in which to submit these documents in each respective appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the request for consolidation is granted for the limited purpose of deciding the motion to vacate and close files, and that motion is denied.

James L. Burski
Administrative Judge

I concur.

John H. Kelly
Administrative Judge

