

BART G. AHSOGEAK, ET AL.

IBLA 2004-273, et al.

Decided October 26, 2005

Appeals from decisions of the Alaska State Office, Bureau of Land Management, rejecting Alaska Native Veteran allotment applications. FF-93607A&B, et al.

Affirmed.

1. Alaska: Alaska Native Veteran Allotment: Generally–Alaska National Interest Lands Conservation Act: Native Allotments

Section 905(a)(1)(A) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(1)(A) (2000), providing for legislative approval of Alaska Native allotment applications pending before the Department of the Interior on December 18, 1971, for land within the National Petroleum Reserve-Alaska, does not apply to an Alaska Native Veteran allotment application filed pursuant to the Alaska Native Veterans Allotment Act, as amended, 43 U.S.C. § 1629g (2000), for land within that reserve.

2. Alaska: Alaska Native Veteran Allotment: Generally–Alaska National Interest Lands Conservation Act: Native Allotments

BLM properly rejects an Alaska Native Veteran allotment application filed pursuant to the Alaska Native Veterans Allotment Act, as amended, 43 U.S.C. § 1629g (2000), when, at the time the Native applicant initiated use and occupancy, the claimed lands were set apart and reserved as part of the National Petroleum Reserve-Alaska, and, therefore, were not “vacant, unappropriated, and unreserved,” as required by the Act.

APPEARANCES: Cecilia M. LaCara, Esq., Carolyn G. Grzelak, Esq., and Carol Yeatman, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for appellants;

Kenneth M. Lord, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Bart G. Ahsogeak, Dale B. Stotts, and Benjamin P. Nageak (collectively, appellants) have appealed from separate decisions of the Alaska State Office, Bureau of Land Management (BLM), rejecting their respective Alaska Native Veteran allotment applications as legally defective.<sup>1/</sup> In each case BLM based rejection on the fact that the lands sought were not vacant, unappropriated, and unreserved when appellants initiated their use and occupancy, since the lands had earlier been set apart and reserved as part of the National Petroleum Reserve-Alaska (NPR-A), by Executive Order No. (EO) 3797-A, on February 27, 1923.<sup>2/</sup>

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<sup>1/</sup> In decisions dated May 24, June 28, and July 15, 2004, respectively, BLM rejected Ahsogeak's application (FF-93607A&B), Stotts's application (FF-93628), and Nageak's application (FF-93613). The Board docketed their appeals as IBLA 2004-273 (Ahsogeak), IBLA 2004-299 (Stotts), and IBLA 2004-311 (Nageak).

<sup>2/</sup> We explained a portion of the history of the NPR-A in Kate Aiken, 102 IBLA 131, 132 (1988):

“NPR-A was formerly known as Naval Petroleum Reserve No. 4. 42 U.S.C. § 6502 (1982). On February 27, 1923, President Harding issued Exec. Order No. 3797-A ‘setting apart’ as Naval Petroleum Reserve No. 4 a vast acreage not then covered by valid entry, lease, or application. These lands were to be ‘reserved for six years for classification, examination, and preparation of plans for development and until otherwise ordered by the Congress or the President.’” [Emphasis added.] See 10 FR 9479 (July 31, 1945) (deleting time limitation). Thereafter, Acting Secretary of the Interior Abe Fortas withdrew from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, over 67,440,000 acres of land in Alaska, including Naval Petroleum Reserve No. 4, “for use in connection with the prosecution of the war.” Public Land Order No. 82, 8 FR 1599 (Feb. 4, 1943). Later, in section 102 of the Naval Petroleum Reserves Production Act of 1976, Pub. L. No. 94-258, 90 Stat. 303, codified as amended at 42 U.S.C. § 6502 (2000), Congress redesignated Naval Petroleum Reserve No. 4 as the NPR-A, to be administered by the Secretary of the Interior, and withdrew the lands from all forms of appropriation under the public land laws, including the mining and mineral leasing laws. See Elsie May Pikok Crow, 3 IBLA 114, 116 (1971). The lands remain withdrawn.

Appellants filed timely applications pursuant to the Alaska Native Veterans Allotment Act (ANVAA), as amended, 43 U.S.C. § 1629g (2000), and its implementing regulations, 43 CFR Subpart 2568. Ahsogeak seeks two 80-acre parcels of land, one in protracted sec. 6, T. 17 N., R. 16 W., Umiat Meridian (Parcel A), and the other in protracted sec. 21, T. 19 N., R. 21 W., Umiat Meridian (Parcel B). In their applications, Stotts and Nageak each describe a single 160-acre parcel in protracted secs. 7, 8, 17, and 18, T. 21 N., R. 15 W., Umiat Meridian (Stotts), and in protracted sec. 5, T. 17 N., R. 17 W., Umiat Meridian (Nageak), as the land they are selecting.<sup>3/</sup> Appellants, who were born on August 8, 1947 (Ahsogeak), February 11, 1950 (Stotts), and March 26, 1950 (Nageak), claim to have initiated qualifying use and occupancy of the lands in 1950 (Ahsogeak), 1961 (Stotts), and 1958 (Nageak).

ANVAA allows certain Alaska Natives who were on active military duty during a specific period of time to apply for an allotment of not more than two parcels of Federal land, totaling 160 acres or less, under the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), as that Act was in effect before December 18, 1971.<sup>4/</sup> 43 U.S.C. § 1629g(a)(1) and (b)(1) (2000). “The statute \* \* \* reopened the application period to those persons who had military service during the last two years during which applications could be filed under the Native Allotment Act [of 1906] and may have missed the opportunity to timely apply for that reason.” George F. Jackson, 158 IBLA 305, 307 (2003).

Most importantly for our purposes, ANVAA also provides that “[a]llotments may be selected only from lands that were vacant, unappropriated, and unreserved

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<sup>3/</sup> Nageak states, on appeal, that BLM incorrectly plotted the parcel of land claimed by him on its Master Title Plat, relying on the legal description in the application, rather than on the map attached to the application, which, he asserts, accurately reflected his intent. However, he notes that, regardless of the error, the land sought is in sec. 5, T. 17 N., R. 17 W., Umiat Meridian. Even if BLM erred in plotting the land sought, it does not affect the adjudication of the application because all of sec. 5 is within the NPR-A.

<sup>4/</sup> The 1906 Act provided for the allotment of up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska which had been subject to substantially continuous use and occupancy by an Alaska Native applicant for a period of five years. It was repealed, effective Dec. 18, 1971, subject to pending Native allotment applications, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (2000).

on the date when the person eligible for the allotment first used and occupied those lands.” 43 U.S.C. § 1629g(a)(2) (2000); see 43 CFR 2568.90.

In their statements of reasons for appeal (SORs), appellants do not dispute the fact that the lands encompassed by their Alaska Native Veteran allotment applications are situated within the NPR-A, or that such lands were set apart and reserved pursuant to EO 3797-A on February 27, 1923, well before they initiated use and occupancy under the 1906 Act.

Ahsogeak contends, however, that, although not used and occupied by him until well after the reservation for the NPR-A, the lands sought were, in fact, possessed and occupied by his Alaska Native family members, in accordance with the 1906 Act, at the time of the 1923 reservation. He asserts that, because the lands in question were possessed by his family members at that time, they were not public lands subject to the reservation, and that, upon the December 18, 1971, repeal of the 1906 Act, which extinguished such possessory rights, the lands were restored to the public domain, and were thereafter available for selection by him, pursuant to ANVAA.

We addressed a similar argument in Larry M. Evanoff, 162 IBLA 62 (2004), an Alaska Native Veteran allotment case in which Evanoff claimed lands within the Chugach National Forest, which had been reserved from settlement, entry, or sale, and set apart as a public reservation on July 28, 1907, by Proclamation of President Theodore Roosevelt, 35 Stat. 2149 (1907). Evanoff asserted that the lands in question were not public lands at the time of the reservation because they were being used and occupied by his Alaska Native family members. However, we rejected that argument, holding that the lands sought by Evanoff were public lands at the time, and within the meaning, of the 1907 Proclamation, and not excepted from the reservation. 162 IBLA at 69. Our rationale is applicable in this case to Ahsogeak’s argument.

Appellants contend that, despite the fact that the lands in question are within The NPR-A, they are still available for allotment under the 1906 Act, pursuant to ANVAA, and, in fact, their applications should be legislatively approved in accordance with section 905(a)(1)(A) of the Alaska National Interest Lands Conservation Act (ANILCA), as amended, 43 U.S.C. § 1634(a)(1)(A) (2000).<sup>5/</sup>

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<sup>5/</sup> “[Appellant’s] ANVAA application should be legislatively approved because under the Alaska National Interest Lands Conservation Act \* \* \* land within the NPR[-]A is considered ‘vacant, unappropriated and unreserved,’ thus making it subject to  
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[1] Section 905(a)(1)(A) of ANILCA provided, at the time of enactment of ANVAA, that

[s]ubject to valid existing rights, all Alaska Native allotment applications made pursuant to the Act of May 17, 1906[.] \* \* \* which were pending before the Department of the Interior on or before December 18, 1971, and which describe either land that was unreserved on December 13, 1968, or land within the National Petroleum Reserve-Alaska \* \* \* are hereby approved on the one hundred and eightieth day following December 2, 1980, except where provided otherwise \* \* \*. [Emphasis added.]

43 U.S.C. § 1634(a)(1)(A) (2000). The purpose of legislative approval was to approve allotments in all cases where no countervailing interest required full adjudication. Kate Aiken, 102 IBLA at 134. Prior to enactment of ANILCA, the issue whether a Native allotment could be granted for lands in NPR-A had been repeatedly resolved in the negative. Id. Further, the legislative history of section 905(a)(1)(A) of ANILCA made clear that, when an Alaska Native allotment application could not be legislatively approved, it would not be barred from adjudication under the 1906 Act because it described lands within the NPR-A. 126 Cong. Rec. 33,472 (1980); see Heirs of Doreen Itta, 97 IBLA 261, 269 (1987) (Burski, A.J., concurring in the result) (“Congress was attempting to remove any withdrawal of such land [in the NPR-A] as a present obstacle to the grant of a Native allotment”).

However, the fact that an Alaska Native allotment applicant, who had an application pending before the Department on December 18, 1971, for lands within the NPR-A might benefit from section 905(a)(1)(A) of ANILCA, does not mean that Congress later intended to extend that same benefit to an Alaska Native Veteran allotment applicant. In fact, it is clear that Congress did not.

Section 905(a)(1)(A) of ANILCA clearly does not apply to ANVAA applications. That section applied only to allotment applications “made pursuant to the Act of May 17, 1906,” which were “pending before the Department of the Interior on or before December 18, 1971[.]”<sup>5/</sup> 43 U.S.C. § 1634(a)(1)(A) (2000). ANVAA

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<sup>5/</sup> (...continued)

legislative approval and alleviating the requirement that use and occupancy commence prior to the land’s withdrawal.” (SOR (Stotts) at 2.)

<sup>6/</sup> Appellants are also fundamentally mistaken in their assertion that by enacting  
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applications are made pursuant to ANVAA, not the 1906 Act, and were not pending before the Department of the Interior on December 18, 1971. Moreover, the Department expressly addressed the applicability of section 905 of ANILCA in the preamble to the final rulemaking for the ANVAA regulations, stating:

BLM received two comments suggesting that we should allow the legislative approval provision of Section 905 of ANILCA, 43 U.S.C. §1634(a), to apply to Native veterans allotments. Since ANILCA was enacted in 1980, it does not apply to Native veterans allotments. Public Law 105-276 said that veterans allotments must meet the requirements of the 1906 Native Allotment Act as it was in effect before December 18, 1971.

Additionally, Congress recognized that legislative approval does not apply to Native veterans allotments because legislation was recently introduced that would amend Public Law 105-276 to provide for it. This final rule does not contain language relating to legislative approval of Native veterans allotments because Public Law 105-276 contains no authority for such approval.

65 FR 40959 (June 30, 2000.) The fact that Congress considered amending ANVAA in order to provide for legislative approval of such allotment applications is conclusive evidence that section 905 of ANILCA does not apply to Alaska Native Veteran allotment applications.

[2] The only language in ANVAA cited by appellants in support of their position that section 905 of ANILCA is applicable to Alaska Native Veteran allotment applications is found in 43 U.S.C. § 1629g(a)(3) (2000), stating that the Secretary of the Interior “may not convey allotments containing \* \* \* lands withdrawn or reserved for national defense purposes other than National Petroleum Reserve-Alaska[.]” Relying on this language in ANVAA, they assert that the only logical explanation for why Congress included a specific provision in ANVAA that allowed allotments within the NPR-A was that it intended that such allotments be subject to legislative approval

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<sup>6/</sup> (...continued)

section 905(a)(1)(A) of ANILCA, which provides that lands within the NPR-A are considered vacant, unappropriated and unreserved within the meaning of the 1906 Act, Congress was allowing for the selection of allotments within the NPR-A. Plainly, at the time of its Dec. 2, 1980, enactment, section 905(a)(1)(A) of ANILCA applied only to “selection[s]” which had already been made, and thus had no relevance to future allotment applications.

under ANILCA. They explain further that, while 43 U.S.C. § 1629g(a)(2) (2000) lays down the general rule that the land selected by the applicant must be vacant, unappropriated, and unreserved, 43 U.S.C. § 1629g(a)(3) goes on expressly to list certain lands that are not available for selection, including lands withdrawn or reserved for national defense purposes “other than National Petroleum Reserve–Alaska.” 43 U.S.C. § 1629g(a)(3)(G) (2000). According to appellants, Congress clearly wanted to allow Alaska Native veterans to be able to select land within the NPR-A.

It is clear from a reading of 43 U.S.C. § 1629g (2000), that Congress wanted to establish in subsection (a)(2) that allotments could only be selected from certain lands, i.e., those that “were vacant, unappropriated, and unreserved on the date when the person eligible for the allotment first used and occupied those lands.” The intent of subsection (a)(3) was expressly to exclude certain lands from conveyance. Thus, § 1629g(a)(2) and § 1629g(a)(3) must be read in sequence. The first relates to selections, the second to conveyances. This is made clear by a reading of 43 U.S.C. § 1629g(a)(4) (2000), which provides that “[a] person who qualifies for an allotment on lands prohibited from conveyance by a provision of (a)(3) may select an alternative allotment” from certain lands. Thus, an applicant may qualify for an allotment by selecting vacant, unappropriated, and unreserved land for which he or she has satisfied the use and occupancy requirements of the 1906 Act. However, that person is not entitled to a conveyance of that land, if it falls within the categories of lands listed in § 1629(a)(3). <sup>7/</sup>

In this case, appellants fail to satisfy 43 U.S.C. § 1629g(a)(2), which requires that land selected be vacant, unappropriated, and unreserved “on the date when the person eligible for the allotment first used and occupied those lands.” In each of these three cases, the lands sought were not vacant, unappropriated, and unreserved on the date when the applicants first used and occupied those lands. Each applicant was born well after the 1923 reservation. Thus, the lands sought were unavailable for selection by appellants, and each of the Alaska Native Veteran allotment applications at issue here was properly rejected. The fact that lands within the NPR-A are available for conveyance is irrelevant to appellants’ circumstances. <sup>8/</sup>

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<sup>7/</sup> While Congress expressly excepted lands within the NPR-A from those lands which could not be conveyed, it made no exception to the requirement that selected lands be vacant, unappropriated, and unreserved on the date when the applicant first used and occupied the land.

<sup>8/</sup> Lands within the NPR-A were available for selection by and conveyance to a person  
(continued...)

To the extent that appellants have raised other arguments in this case, they have been considered and rejected, as contrary to the facts or law, or immaterial.

We, therefore, conclude that BLM properly rejected appellants' Alaska Native Veteran allotment applications because they initiated use and occupancy of the subject lands at a time when the lands were set apart and reserved as part of the NPR-A, and thus not "vacant, unappropriated, and unreserved," as required by 43 U.S.C. § 1629g(a)(2) (2000) and 43 CFR 2568.90.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

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Bruce R. Harris  
Deputy Chief Administrative Judge

I concur:

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H. Barry Holt  
Chief Administrative Judge

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<sup>8/</sup> (...continued)

eligible for an allotment who first used and occupied the selected lands prior to the 1923 reservation of those lands.