

JOHN J. ESTABROOK

IBLA 2004-82

Decided November 17, 2005

Appeals from a decision of the Alaska State Office, Bureau of Land Management, rejecting Alaska Native Veteran allotment application AA-83641.

Affirmed.

1. 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 the Alaska Native had applied for the same lands under the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), and the Department had determined with finality that the Native did not establish qualifying use and occupancy of those lands.

APPEARANCES: Carolyn G. Grzelak, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for appellant; Regina L. Sleater, 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

John J. Estabrook has appealed from a November 5, 2003, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting his Alaska Native Veteran Allotment application, AA-83641. Estabrook filed his application on January 30, 2002, 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), for 160 acres of unsurveyed land on the shores of Old Man Lake in

protracted sec. 10, T. 4 N., R. 8 W., Copper River Meridian, Alaska.<sup>1/</sup> Estabrook, who was born April 15, 1946, claimed use and occupancy of the lands sought by him for hunting, fishing, and berry picking, continuously since 1962, excluding a period of military service (Sept. 22, 1969, to June 25, 1971). He claimed to have constructed a lean-to and meat-drying rack on the lands in 1962, and a cabin and outhouse between 1972 and 1975.

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>2/</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).

Estabrook did not miss the opportunity to file a Native Allotment application pursuant to the 1906 Act. In fact, he filed such an application on March 1, 1971 (AA-6973), for the exact same lands identified in his ANVAA application.<sup>3/</sup> In United States v. Estabrook, 94 IBLA 38 (1986), we rejected Estabrook’s application because he had failed to overcome BLM’s prima facie case presented at an October 1983 contest hearing that he did not commence qualifying use and occupancy of the lands prior to a 1968 segregation of the lands from appropriation

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<sup>1/</sup> In the application, Estabrook described the lands sought by metes and bounds. The lands were also depicted on a 1949 U.S. Geological Survey topographic map (Gulkana (A-6), Alaska) attached to the application.

<sup>2/</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).

<sup>3/</sup> The metes-and-bounds description of the lands applied for in the original application is identical to the metes-and-bounds description in his present application. Further, attached to the original application is a copy of part of the 1949 U.S. Geological Survey topographic map (Gulkana (A-6), Alaska), on which are depicted the lands originally sought in the same location as on the copy of the map attached to the current application.

under that Act. In accordance with 43 CFR 4.21(d), that decision was final for the Department and Estabrook did not seek judicial review of it. BLM notified Estabrook on January 18, 1994, that “application AA-6973 has been closed without conveyance and will be removed from the land records of the Bureau of Land Management.”

In its November 2003 decision, BLM rejected Estabrook’s ANVAA application because the issue of his entitlement to an allotment of the land had “already been decided and need not be redetermined.” (Decision at 1.) BLM reasoned that ANVAA requires the same 1906 Act adjudication as was conducted for application AA-6973 and, because that adjudication had already occurred for the same land sought under AA-83641, no further action was required.

On appeal, Estabrook does not dispute the fact that his previous Native allotment application, AA-6973, covered the same lands now sought or that the Board’s 1986 decision rejected AA-6973 with finality. Rather, Estabrook contends that he is not precluded from filing an application under ANVAA and that he is entitled to have the validity of his application under ANVAA determined by the Department, following notice and an opportunity for a hearing, as required by Pence v. Kleppe, 529 F.2d 135 (9<sup>th</sup> Cir. 1976), should the application be found to be factually deficient. Estabrook argues that adjudication of his entitlement under ANVAA is not prevented by the doctrines of res judicata or collateral estoppel, since it involves a different claim (under ANVAA, not the 1906 Act) and a different issue (use and occupancy under the 1906 Act as it would be interpreted by the Department at the present time, not as previously interpreted). See Statement of Reasons (SOR) at 5-10. Estabrook asks the Board to vacate BLM’s November 2003 decision, and remand the case to BLM for adjudication of the merits of his current application.

[1] The issue presented in this case is whether BLM must provide full adjudication of an application filed under ANVAA, including the opportunity for a hearing, when the Alaska Native filing that application applied for the same land under the 1906 Act and received full adjudication of that application, resulting in rejection of the application for failure to establish qualifying use and occupancy. The answer is no. <sup>4/</sup>

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<sup>4/</sup> ANVAA precludes receipt of an allotment by a “person who received an allotment or has a pending allotment under the Act of May 17, 1906[.]” 43 U.S.C. § 1629g(b)(3) (2000); see 43 CFR 2568.50. We agree with Estabrook that this statutory preclusion does not apply in his case, since his application under the 1906 Act was rejected prior to the enactment of ANVAA. See SOR at 3-4.

ANVAA does not expressly state that one who filed an application under the 1906 Act cannot file an application for an Alaska Native Veteran Allotment. However, it does state that “[n]o person who received an allotment or has a pending allotment under the Act of May 17, 1906 may receive an allotment under this section.” 43 U.S.C. § 1629g(b)(3) (2000). Such language indicates Congressional intent that applications under the 1906 Act and applications under ANVAA are mutually exclusive. Moreover, because Congress limited ANVAA’s benefits to only certain veterans, who served in the military during a specific time period immediately prior to repeal of the 1906 Act, Congress directed the Secretary of the Interior to conduct a study to assess the circumstances of veterans of the Vietnam era who served during a period other than that covered by ANVAA, were eligible for an allotment under the 1906 Act, and “did not apply for an allotment under that Act.” 43 U.S.C. § 1629g(c)(1) (2000). Thus, the clear implication of ANVAA was, as interpreted in George F. Jackson, 158 IBLA at 307, that ANVAA only applied to those eligible veterans who may have missed an opportunity to file for an allotment under the 1906 Act because of their qualifying military service. Nevertheless, because of the lack of an express prohibition against a separate filing under ANVAA, we will consider the arguments raised by Estabrook.

As set forth above, ANVAA provides that an Alaska Native Veteran is eligible to select an allotment under that statute, if he would have been eligible for an allotment under the 1906 Act, as that Act was in effect before its repeal on December 18, 1971. The regulations at 43 CFR 2568.50 pose the question: “What qualifications do I need to be eligible for an allotment?” That regulation lists six qualifications (43 CFR 2568.50(a) through (f)), the second of which states that an applicant must establish that he or she used the land in accordance with the regulations in effect before December 18, 1971.<sup>5/</sup> 43 CFR 2568.50(b). Therefore, in this case Estabrook’s qualifications must be judged, *inter alia*, by whether or not he complied with the use and occupancy requirements of the 1906 Act, and its implementing regulations, and specifically whether he initiated qualifying use and occupancy prior to the 1968 segregation of the lands at issue. That precise question, however, has been answered, with finality for the Secretary, in the Board’s September 1986 decision.

Estabrook argues, however, that the doctrine of administrative finality, to the extent it incorporates the judicial doctrine of collateral estoppel or issue preclusion, is not applicable here because the present case raises a “different” issue concerning his entitlement under the 1906 Act. The issue is different, he contends, because of a

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<sup>5/</sup> Eligibility under the 1906 Act and its implementing regulations is determined primarily by whether the applicant satisfied the requirements for qualifying use and occupancy. See 43 U.S.C. § 270-3 (1970); 43 CFR 2561.0-5(a) and 2561.2.

change in the governing law since the time of the October 1983 hearing. (SOR at 9.) He asserts that BLM issued a “new interpretive rule,” Instruction Memorandum (IM) No. AK 2004-002, titled “Standards for Adjudicating Native Allotment Applications,” on October 9, 2003, in which the State Director, Alaska, BLM, sets forth instructions on adjudicating applications, which change the requirements for finding that an allotment applicant is entitled to an allotment. (SOR at 8.)

The doctrine of collateral estoppel generally precludes the Department from readjudicating an issue which has already been decided, with finality, by the Department, where it arises between the same parties to the original adjudication.<sup>6/</sup> Muskingum Mining Co. v. OSM, 113 IBLA at 356-57. In the administrative context, application of the doctrine depends on the following circumstances:

[W]hen an administrative body has acted in a judicial capacity and has issued a valid and final decision on disputed issues of fact properly before it, collateral estoppel will apply to preclude relitigation of fact issues only if: (1) there is identity of the parties or their privies; (2) there is identity of issues; (3) the parties had an adequate opportunity to litigate the issues in the administrative proceeding; (4) the issues to be estopped were actually litigated and determined in the administrative proceeding; and (5) the findings on the issues to be estopped were necessary to the administrative decision. [Emphasis added.]

Muskingum Mining Co. v. OSM, 113 IBLA at 358 (quoting Pantex Towing Corp. v. Glidewell, 763 F.2d 1241, 1245 (11<sup>th</sup> Cir. 1985)).

All of those circumstances exist in this case: (1) the parties are the same (BLM and Estabrook); (2) the basic issue is the same (whether his use and occupancy of the lands at issue qualified under the 1906 Act); (3) Estabrook had an adequate opportunity to litigate that issue before the Department in the prior proceeding; (4) the use and occupancy issue was litigated and decided in the prior proceeding; and (5) the Board’s findings on that issue were necessary to our September 1986 decision.

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<sup>6/</sup> We agree with Estabrook that the doctrine of administrative finality, to the extent that it incorporates the judicial doctrine of res judicata or claim preclusion, does not apply here, since, strictly speaking, the Board’s September 1986 decision adjudicated a different application filed under a different statute. See, e.g., Muskingum Mining Co. v. Office of Surface Mining Reclamation and Enforcement (OSM), 113 IBLA 352, 356-57 (1990).

However, we agree that the doctrine may not be applicable where the issue during the subsequent adjudication is different, because of an intervening change in the governing law. Muskingum Mining Co. v. OSM, 113 IBLA at 359 (citing Artukovic v. Immigration & Naturalization Service, 693 F.2d 894, 898 (9<sup>th</sup> Cir. 1982)). The IM cited by appellant provides guidance for adjudication of Native allotment applications and expressly states that “with the passage of time the law evolves to incorporate new case law and interpretation.” (IM at 1.) Nevertheless, appellant has failed to point to any particular change in the governing law, as set forth in the IM, that is relevant to the use and occupancy issue for the land in question, and we have not found any.<sup>2/</sup>

Thus, the question of Estabrook’s qualifications for an allotment under the 1906 Act to the land sought in his Alaska Native Veteran Allotment application was determined with finality in 1986, and BLM properly rejected Estabrook’s Alaska Native Veteran Allotment application AA-83641 for lands he previously sought in Native Allotment application AA-6973. See, e.g., State of Alaska (Florence Sabon), 154 IBLA 57, 60-61 (2000).

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.

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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>2/</sup> The 1906 Act and its implementing regulations (43 CFR Subpart 2561) have remained unchanged since the October 1983 hearing. One of the ANVAA regulations, 43 CFR 2568.21, specifically incorporates the regulations implementing the 1906 Act, except to the extent that they are inconsistent with ANVAA or its implementing regulations (43 CFR Subpart 2568). There is no inconsistency with regard to the issue of use and occupancy. See 43 CFR 2561.0-5(a), 2561.2, 2568.50(b), and 2568.90.