

UNITED STATES
v.
HEIRS OF HARRY MCKINLEY

IBLA 2004-119

Decided June 27, 2006

Appeal from decision issued by Administrative Law Judge Harvey C. Sweitzer, rejecting Native Allotment application. AA-00441.

Affirmed as modified.

1. Alaska: Land Grants and Selections--Alaska National Interest Lands Conservation Act: Native Allotments

Even after a hearing by an Administrative Law Judge, the Board has authority to conduct de novo review of a record in the context of a decision involving an applicant for a Native allotment. This authority includes all the powers which the Secretary would have in making the initial decision.

2. Alaska: Land Grants and Selections--Alaska National Interest Lands Conservation Act: Native Allotments

The fact that a Native allotment application had been rejected without an APA hearing does not necessarily establish that the application is properly reinstated under section 905(a) of ANILCA, 43 U.S.C. § 1634(a) (2000). Mere application for a parcel of land, without occupancy, does not establish a preference right for the land under the Native Allotment Act of 1906. Where a 1909 application was not premised on occupancy, no evidence of occupancy was identified, an applicant received notice of termination in 1922 under then-prevailing procedures, and no objection was raised then or subsequently, the applicant had not established a property right that was terminated without due process requiring reinstatement

of the application under the terms of Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). Where the land was withdrawn in between the date the application was denied and the date it was reinstated, an applicant would only have a right to the land if he had established, prior to withdrawal, a preference right to it by occupancy.

APPEARANCES: Carol Yeatman, Esq., Alaska Legal Services Corp., Anchorage, Alaska, for appellants; 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 ADMINISTRATIVE JUDGE HEMMER

William Wilson and Harlena Sanders, heirs of Harry McKinley, appeal from the December 24, 2003, decision of Administrative Law Judge Harvey C. Sweitzer rejecting McKinley's reinstated Native allotment application, AA-00441, in response to the Government's contest. For reasons supplied below, we affirm the decision on modified grounds.

The record reflects that Harry McKinley was born in June 1872 and died at 54 years of age on February 16, 1927. Exhibits A (Certificate of Death) and B (Data for Heirship Finding and Family History) indicate that at the time of his death, McKinley had one step-daughter, Mary Hanson (Exhibit A) and that the named heirs are her grandchildren (Exhibit B).

On March 23, 1909, McKinley filed with the Register of the United States Land Office an application to obtain a parcel of land comprising 160 acres, pursuant to the Alaska Native Allotment Act of 1906, also known as the Act of May 17, 1906. The land was identified as "unsurveyed lands located in Glacier Bay on gah-teena River commencing at post No. one at the mouth of said river thence east 160 rods to post No. 2; thence 160 rods south to post No. 3; thence 160 rods west to post No. 4 thence 160 rods to place of beginning." No map or plat depicting the parcel was provided. The application was serialized as No. 0441, and later as AA-00441.

When McKinley filed his application in 1909, the Act of May 17, 1906, 34 Stat. 197, provided:

That the Secretary of the Interior is hereby authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of nonmineral land in the district of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a

family, or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred and sixty acres.

As we explained in Heirs of George Brown, 143 IBLA 221, 230 (1998), “in 1909, the Department was authorized to allot [to a Native] any 160-acre tract of nonmineral land which he requested; [such Native] had a ‘preference right’ to obtain an allotment, however, only to those parcels which were ‘occupied by him.’”

Without occupancy, the application merely served as a request for a specific parcel of land, along the lines of a homestead application. See Circular 491, Acquisition of Title to Public Lands in the Territory of Alaska, 45 L.D. 227, 228 (July 19, 1916) (discussing application of Act of May 14, 1898, 30 Stat. 409, to homesteading on Alaska public lands). A preference right to a particular tract was established only by occupancy. The filing of an application based on occupancy that pre-dated the application vested a preference right which related back to the time occupancy was initiated. State of Alaska, 124 IBLA 386, 391 (1992). If occupancy began at the time of the application, it would follow that a preference right would be established at that time, but the “continuous nature” of the occupancy was required. Departmental Circular dated February 11, 1907, 35 L.D. 437 (1907).^{1/} Otherwise, qualifying occupancy rights were lost by cessation of occupancy. United States v. Flynn, 53 IBLA 208, 235, 88 I.D. 373, 388 (1981).

McKinley did not indicate that the land applied for was land he occupied. To the contrary, he applied on a form which included a blank in which the applicant was to attest that “I have occupied the land so applied for since _____.”^{2/} The instructions on the form noted that the applicant should “[i]nser date, if occupied, or strike out the clause, if not occupied.” The clause was struck out on McKinley’s form,

^{1/} The procedures applicable for processing Native allotments in 1909 when the application was filed were those found in this unnumbered Circular entitled “Alaskan Lands–Allotments to Indians or Eskimos–Act of May 17, 1906,” 35 L.D. 437 (1907). The Circular noted, inter alia, that “[t]he allotments when found correct in form, and without valid adverse claims, will be placed on a schedule which will be submitted to the Department for approval * * *.” See also 37 L.D. 615, 616 (Apr. 29, 1909).

^{2/} The application form utilized was provided in the Circular dated Feb. 11, 1907. See 35 L.D. 437 (1907). This Circular provided that the application “must be sworn to by the person applying, and if claiming under the preference right clause the date of the beginning of his occupancy must be given, and its continuous nature stated.”

constituting a deliberate assertion that McKinley had not occupied the land. Two witnesses were also required to attest that the applicant “has occupied the land described in the foregoing application since _____,” and were similarly instructed to insert the date, if occupied, or strike the clause. The witnesses, Albert Mills and Willis Hammond, signed under a paragraph in which the occupancy clause had been struck. Thus, McKinley did not apply for a preference right to land. McKinley and the witnesses asserted on the form that he was a “full-blood” Native “Indian,” and they made similar deliberate assertions by striking out the words “Eskimo,” and “mixed” blood. McKinley applied for 160 acres as the head of a family. McKinley’s application was apparently completed by another person given that the signature appears next to an “X” mark in the same handwriting as the remainder of the form.

At the bottom of the form, in different handwriting, is written the following: “Cannot locate[,] Aug. 23/15” next to initials that are illegible to us. A stamp on the form indicates it was received by the Alaskan Field Division, General Land Office, on December 1, 1919. This receipt apparently corresponds to a notation dated November 18, 1919, on a General Land Office action sheet, indicating that the application was “to be sent to Chief of Field Div[ision].”

According to the record, Walter B. Heisel, Clerk of the General Land Office, conducted a field investigation on July 28, 1920. He reported that he employed directions in accordance with a Circular dated July 19, 1916, as amended on November 14, 1917.^{3/}

Circular 491 of July 19, 1916, 45 L.D. 227, is entitled “Acquisition to Title to Public Lands in the Territory of Alaska,” and specified the manner of acquisition of lands by application. With respect to Native allotments, the Circular required the application to be referred to the Superintendent of the United States Public Schools, Bureau of Education, who was required to furnish a report to the Commissioner of Education on various points, including the location of the land, the value of the tract for agricultural or fishing uses, the nature of any residence maintained, if at all, the nature of improvements made, the fitness of the land as a permanent home for the allottee, and “such other information as may serve to aid in determining whether the application should be allowed.” 45 L.D. at 246. The Commissioner of Education was to forward his recommendation to the General Land Office of the Department, which

^{3/} See also Circular of Jan. 31, 1914, 43 L.D. 88 (1914); Circular No. 749, 48 L.D. 70 (1921), revised at 50 L.D. 27, 48-54 (1923). The 1914 Circular is identical in material respects to the 1907 and 1909 Circulars addressed above, and the 1921 Circular is identical in material respects to the 1916 and 1917 Circulars addressed *infra*, and by Heisel. We therefore do not separately identify their contents here.

would make a recommendation for approval or rejection of the allotment by the Secretary of the Interior.^{4/}

Based upon the specifications in Circulars 491 and 572, Heisel reported that, from conversations “in the vicinity of Bartlett Bay,” he heard that McKinley once had a log cabin, but that a “diligent search by [him]self and James Russell, on whose boat [he] was traveling, fail[ed] to locate same.” He indicated that while he was conducting the investigation at the mouth of the Gah-teena River, he was required to cross a mile of muddy tide flats to get to the mainland, but that during wet periods, the river

covers the valley one mile wide. On the north are granite mountains rising almost perpendicular. On the south is bench land, about 20 feet high, covered with young spruce timber, which the river is gradually cutting into and washing away. * * * I found no evidence of recent habitation, although it appeared that someone had built a fire in the open not long before. This vicinity is reported as being good hunting grounds, but a poor fishing site. An indian following the fishing game would hardly choose this location on account of the fact that it is necessary to anchor so far from shore, due to the filling in of the channel with glacial silt.

[McKinley] was reported to be fishing for the Northwestern Fisheries Co. at Dundas Bay, and the particular locality in which he was fishing was unknown to my informants. Therefore, a personal interview was impracticable and the expense of looking him up not warranted by the nature of the case.

It may be that this indian lived on the land at one time – the application was made over 11 years ago, but I find that these indians never stay in one place very long.

(1920 Report at 2-3.) Heisel recommended that the application be rejected.

On March 27, 1922, the Commissioner of the General Land Office held the application for rejection, allowing a right of appeal. According to the Juneau General Land Office records, notice of this decision was issued to the applicant on April 7, 1922, and received on May 15, 1922. A return receipt appears in the record signed by Harry McKinley in handwriting different from that appearing on the application

^{4/} Circular 491 was amended by Circular 572 dated Nov. 6, 1917 (approved Nov. 14, 1917). 46 L.D. 226 (1917). The amendments relate to the involvement of the Commissioner of Education and are not otherwise relevant here.

(which we have noted above, and appellants agree, was likely not McKinley's). On July 7, 1922, the application was rejected and the file was closed 10 days later.

The case file discloses no further action, or facts other than McKinley's death in 1927, until November 30, 1978, when the file was retrieved for examination in the course of the Department's efforts to comply with the Court's decision in Pence v. Kleppe, 529 F.2d 135, 143 (9th Cir. 1976). Before turning to the reinstatement of the application, it is important to identify various changes that took place in intervening years both with respect to the land covered by the McKinley application and also with respect to the Native Allotment Act of 1906.

By Executive Order No. 3893 dated April 1, 1924, President Coolidge temporarily withdrew the lands subject to the McKinley application for purposes of creating a national monument. The Order was revoked by Presidential Proclamation No. 1733 dated February 26, 1925, but the land was withdrawn for various national monument and forest purposes after June 10, 1925. See Presidential Proclamation Nos. 1742 (June 10, 1925) (Tongass National Forest) and 2330 (Apr. 10, 1939) (Glacier Bay National Monument). In 1980, the land was included within the Glacier Bay National Park by section 202(1) of the Alaska Native Interest Lands Conservation Act (ANILCA). The land remains a part of the National Park System today.

In 1935, by Circular No. 1359, the Department issued rules requiring that Native allotment applicants complete 5 years of use and occupancy as a precondition for obtaining any allotment of land. See 55 L.D. 282, 285 (1935). In 1956, the Act of May 17, 1906, was amended to reflect the requirement that issuance of any allotment was dependent upon a showing of "substantially continuous use and occupancy of the land for a period of five years." Section 3 of the Act of August 2, 1956, 70 Stat. 954, 43 U.S.C. § 270-3 (1970). The Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), was thereafter repealed effective December 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. § 1617(a) (2000), with a savings provision for applications pending on December 18, 1971.

Then came the Pence cases. In Pence v. Kleppe, 529 F.2d at 137, the Ninth Circuit Court of Appeals addressed a class of persons claiming entitlement to Native allotments under the Native Allotment Act as it had been amended in 1956. The Court concluded that Native allotment applicants under that statute held sufficient property interests to warrant due process protection, justifying a "hearing before a trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment." 529 F.2d at 143. In Pence v. Andrus, 586 F.2d 733, 743 (9th Cir. 1978), the Ninth Circuit considered a subsequent challenge to procedures adopted by this Board in response to Pence v. Kleppe in Donald Peters, 26 IBLA 235, 241 n.1, 83 I.D. 308, 311 n.1,

reaffirmed, Donald Peters (On Reconsideration), 28 IBLA 153, 83 I.D. 564 (1976). There, the Board had noted that when the Department concludes that an application must be rejected as a matter of law, assuming the truth of relevant matters set forth in support of the application, the application may be rejected without a hearing. The Ninth Circuit agreed that a hearing was not required in all cases. As a result of the Pence cases, and subsequent legislation in section 905(a) of ANILCA, as amended, 43 U.S.C. § 1634(a) (2000), ensuring that legislative approval of allotments would be allowed for applications pending on or before the December 18, 1971, repeal of ANCSA, the Department began a review of closed Native allotment cases to reinstate those which improperly had been denied without a hearing.

This brings us back to McKinley's application. A Native Allotment Review form signed on various dates in 1980 contains the handwritten notation dated April 17, 1982: "appl[ication] not reinstated[;] no plottable legal description." On December 6, 1984, however, the Department reinstated the application after all. A June 4, 1985, Memorandum from the Acting Regional Director, Alaska Region, National Park Service, to the State Director recommended that a contest complaint be filed to reject the application because the "case has no plottable legal description."^{5/}

By letter dated June 25, 1985, the Central Council, Tlingit and Haida Indian Tribes of Alaska (Tribes), forwarded to the Bureau of Land Management (BLM) a statement dated June 14, 1985, of a person named Gilbert Mills regarding the McKinley application. Gilbert Mills stated that he was the son of Albert Mills, one of the witnesses to the 1909 application. Gilbert Mills' statement contained a comment about his father's verification that the people for whom Albert Mills had witnessed applications had all used land: "[T]he area that Harry McKinley claims on gah-teena River is the same place known as Bear Trap Creek today. Harry McKinley was known by my father and my father mentioned the use of the land all his life by Harry McKinley and other applicants that he assisted in filing for their land."

A BLM Transmittal Note dated August 5, 1985, requests the plotting of the Native allotment. "The point of beginning can be established by using the quad map which shows the mouth of the Gahteena River, (or Beartrack River as it is printed on the quad). This claim is approximately in Secs. 3 and 4, T. 38 S., R.58 E., [Copper River Meridian (CRM)]." A Quadrangle Map dated 1950 shows the Beartrack River entering Beartrack Cove from the east through Section 3 and just over the line into Section 4, into an area depicted as "tidal flat." The allotment was plotted as a

^{5/} Though the participants in the hearing before Judge Sweitzer seemed to have no explanation for this comment, the term "unplottable" has been explained by the Board as describing an allotment for which Departmental "reviewing personnel were unable to definitively plot the description since it had no determinable point of beginning." Heirs of George Brown, 143 IBLA at 224.

160-acre square within the southern halves of Sections 3 and 4, to the southeast of the mouth of the Beartrack River, as the allotment had been plainly described in the application.

By letter dated May 22, 1989, the Tribes forwarded to BLM what they identified as an affidavit of Gilbert Mills, Sr., along with a 1982 Archeological Inventory prepared by the Bureau of Indian Affairs (BIA). Based on a cabin reported in the 1982 BIA Inventory, the Tribes also submitted a re-plotting of the location of the allotment, moving it from the southern halves into the northern halves of Sections 3 and 4.

Starting with the purported affidavit,^{6/} Gilbert Mills' statement was written under the heading "Harry McKinley" and contained significant departures from known facts and his prior statement. Gilbert Mills states that McKinley died a "very old [man] close to 100."^{7/} Gilbert Mills explained that McKinley told him stories from when Mills was 8 years old until McKinley's death at an undisclosed point in Mills' life. Gilbert Mills claimed that, with Albert Mills' help, McKinley built a log cabin where McKinley lived in order to trap, hunt, and dry fish from the Gah-teena River, and take fern roots in the spring and Tlingit sweet potatoes for winter. According to Gilbert Mills, McKinley planted potatoes, carrots and turnips, and killed and smoked bear, seal, mountain goats and deer. Gilbert Mills alleged that McKinley built a smoke house to smoke this meat. The record contains no explanation of the discrepancies between Gilbert Mills' first and second statements, or why in the first one he asserted only that his father Albert had told him stories about Harry McKinley, but, in the second statement, he asserted that his contact was with "Harry" himself.

The 1982 BIA Inventory was a search for seven Native allotments applied for in the area of Glacier Bay. According to the document, BIA found a partial log cabin/partial dugout ½ mile upstream from the mouth of the Beartrack River on a steep slope northwest of the channel. The drafter of the Inventory stated that the river had moved away from the cabin, and that a swampy area, likely comprising the "old channel," ran between the river and the cabin. According to the Inventory, the cabin found was north of the river's 1982 location. Given that the "old channel" ran between the cabin and the current river course, this means that the cabin found by

^{6/} The document is actually only a handwritten statement with Mills' signature rather than an affidavit.

^{7/} Though the reference to McKinley as elderly does not appear to be ambiguous, we could speculate that the aged person Gilbert Mills meant to refer to was Albert Mills. Either this or confusion over the identity of McKinley appears to be the only explanation for Gilbert Mills' identification of a man who died in his early 50s as a centenarian.

BIA was also located north of the river as it ran in the old channel. BIA attached a map in which it plotted the allotment in the fractional N1/2 of Section 4 and the fractional W1/2 in the N1/2 of Section 3. Looking at the map, and even assuming the cabin is near to where the mouth of the river used to be, it is impossible to follow the land description of the 1909 application to derive the allotment drawn by BIA, because it plainly travels to the north and west of the river, while the 1909 allotment application sought land to the south and east of the river. The 1982 BIA Inventory did not find a smokehouse or remains of one.

A Short Note Transmittal contains a request that the Master Title Plat be corrected to locate "A-0441" in the W1/2 NW1/4 sec. 3 and the E1/2 NE1/4 sec. 4, T. 38 S., R. 58 E., CRM. On January 19, 1990, the BLM Branch of Adjudication requested a field report for this location. On August 14, 1990, BLM sent a letter to the Tribes advising them of the upcoming field examination. The Tribes signed for the letter on behalf of the heirs of Harry McKinley. On November 1, 1991, a BLM Realty Specialist prepared a report of a 1990 field examination of the location described by the Tribes. Though the Specialist was accompanied by representatives of both the Tribes and the National Park Service (NPS), they found no cabin remains within the boundaries of the land on which BIA had plotted the allotment.

By letter to BLM dated January 27, 1992, NPS stated:

Recently a park ranger who accompanied the BIA archeologist in 1982 reported to us the cabin is located on another stream, a half mile north of where the BLM's 1990 field exam located the allotment (see map). According to park ranger David Nemeth, the cabin is located on the right side (facing down river), about 1/4 mile above the mouth of the stream and about 100 yards from the river.

Promising to look for the cabin in the summer based on this recollection, NPS asked that the allotment be put on hold. By memorandum dated February 29, 1993, BLM did so and also sought a supplemental field report. On May 20, 1993, BLM again advised the Tribes it would be conducting another field examination for seven allotment applications, including Harry McKinley's.

On June 28, 1993, BLM and NPS conducted a supplemental examination, accompanied by a representative of the Tribes. Based on the representations given by Park Ranger Nemeth, the investigators found a cabin site on an unnamed glacier-fed stream mapped on the border of Section 4 and a half section away from the Beartrack River. Explaining that neither the information regarding a cabin provided in the 1982 BIA Inventory nor that of the current 1993 investigation corresponded to the specific legal description in the original application, the BLM field examiner stated that the site of the allotment described in the 1909 application could not be located.

On July 27, 1993, BLM issued a decision entitled “Final Date for Amendment, Additional Evidence Requested,” in which it stated that the conflict between the claimed locations of the allotment had to be resolved. BLM stated that examiners in three field examinations in 1920, 1990, and 1993, were unable to locate physical evidence to support “the claimed use and occupancy.” BLM demanded within 60 days more evidence of the “use and occupancy requirements of the claimed lands” and any statement regarding whether an amendment to the original application would be sought by the heirs. BLM sent this decision to the Tribes. BLM advised the recipients that, in the absence of any response, a hearing would be conducted in accordance with Pence v. Kleppe, 529 F.2d 135.

On December 14, 1993, BLM issued a decision entitled “Native Allotment Application Reinstated, Native Allotment Amendment Denied.” For reasons entirely unclear from the record BLM decided to consider the propriety of the reinstatement which had occurred in 1984 and justify it based on a finding that McKinley had shown occupancy that pre-dated the 1909 application. BLM stated:

The date of initial occupancy is not specifically identified. However, based on a U.S. Forest Service field examination conducted on July 28, 1920, use and occupancy existed prior to the date of application. * * *

The application was reinstated on December 6, 1984, in accordance with Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). It has been determined that this reinstatement was proper.

(Dec. 14, 1993, Decision at 1-2 (emphasis added).) BLM proceeded to reject the Tribes’ location of the allotment application within the northern halves of Sections 3 and 4, on grounds that the right to amend an application found in section 905(c) of ANILCA, 43 U.S.C. § 1634(c), exists in the heirs but that the Tribes did not

have the authority to submit an amended land description.

Since the amended land description was proposed by [the Tribes] and not an heir or potential heir, the BLM issued a Final Date to Amend Notice on July 27, 1993, affording the heirs or potential heirs of Harry McKinley an opportunity to confirm the location of the amended land description. To date no response has been received from any heirs or potential heirs, individually or through [the Tribes].

(Dec. 14, 1993, Decision at 2 (emphasis in original).) BLM did not acknowledge that the earlier decision had not been sent to individual heirs.

Notably, at some point around the time BLM issued this decision, BLM had located and included in the record a November 9, 1982, BIA Memorandum indicating that the cabin identified in the 1982 BIA Inventory may have related to a hunting and trapping camp established by Walter and Jim Obert, “mentioned by L. Caywood in his 1946 report, The Hoonah Territory.” Another 1946 Report, entitled “Possessory Rights of the Natives of Southeastern Alaska,” dated October 3, 1946, is attached. It mentions the Oberts’ camp on page 5.

The December 14, 1993, decision was served on the heirs, as reflected in signed service receipts. No appeal was filed.

On December 9, 1998, BLM submitted, on behalf of the United States of America, a contest complaint challenging the application as invalid. As grounds for the complaint, the Government contended that the applicant had not met the standards of 5 years of continuous use and occupancy, potentially exclusive of all others, established in the Native Allotment Act as amended in 1956, and in rules implementing that statute in 43 CFR 2651.0-5. Heir Harlena Sanders answered the complaint on December 18, 1998, and requested a hearing. The case was assigned to Judge Sweitzer who conducted a hearing on June 3 and 4, 2002.

At the hearing, the Government presented the testimony of Robert A. Perry, BLM Land Law Examiner. Perry testified regarding the Government’s record and presentation of exhibits, and also explained that his review of the record related to the use and occupancy requirements established by the Native Allotment Act as amended in 1956. (Transcript of Hearing at (Tr.) 133-35.)

Counsel for the heirs presented the testimony of a land surveyor and civil engineer, Malcolm Menzies, and a candidate for a doctorate degree in geophysics, Christopher Larson, in support of the heirs’ theory that the land around Glacier Bay has been subject to “isostatic rebound,” which would result in the mouth of the Beartrack (Gah-teena) River, as it existed in 1909, retreating further inland. (Tr. 186.) These witnesses testified that as the glaciers retreated after the 18th century around Glacier Bay, the land rebounded, rising dramatically in subsequent years. As Menzies described it: “As the glaciers and ice mass melt, the land in front of the glaciers and closest to the ocean, rebounds and rises, and it rises out of the sea.” (Tr. 143.) These witnesses testified, in addition, that glacial silt and moraine causes accretion which has resulted in the river’s mouth, as it existed in 1909, retreating even further back away from the water. (Tr. 150-51, 241.) They testified that the Beartrack River likely changed course in the century after the McKinley application was submitted, though neither witness testified as to any opinion as to where the McKinley allotment would be located.

Counsel for the heirs also presented the telephonic testimony of Native Alaskans Richard Dalton, Sr., and William Albert Wilson, Jr., who is presumably also the appellant William Wilson. Dalton testified that he knew Gilbert Mills, Sr., and Sam Hanlen and that Gilbert Mills and Hanlen were honest and well-respected. (Tr. 220-22.) Wilson testified as to the same points (Tr. 275) and also that he was aware of McKinley's "use area" being Beartrack Cove. (Tr. 277.) Wilson testified regarding clan history which included information regarding the retreat of the glaciers (Tr. 271), as well as the fact that Hanlen had told him that the Beartrack River had once been full of salmon. (Tr. 272.) Wilson testified that he was distantly related to McKinley, but had never met him and "really [did not] know anything about him." (Tr. 268.)

In their post-hearing briefing, the heirs' central argument was that BLM erred in applying the use and occupancy terms of the 1956 amendments to the Native Allotment Act to an allotment applied for in 1909. The heirs argued that this amounted to an improper retroactive application of the law to establish use and occupancy requirements not in place at the time the application was made, or even at the time it was denied. They argue that the only law that can be applied to a 1909 application is that law that was in effect in that year. They contend that in that year, the Native Allotment Act required only that an applicant apply for "less than 160 acres of nonmineral land; [be] an Alaska Native over twenty-one years of age and reside[] in Alaska." They argue that no occupancy was required at all under the statute and that the application itself segregated the land and vested property rights to it. (Heirs' Post-Hearing Brief at 5, citing State of Alaska v. 13.90 Acres of Land, 625 F. Supp. 1315, 1319 (D. Alaska 1985).)^{8/}

In the alternative, the heirs argue that the record establishes the requisite 5 years of use and occupancy by McKinley. (Heirs' Post-Hearing Brief at 23.) The heirs do not cite where they think the record shows this, but it would appear they mean to rely on Mills' second statement. The heirs argue that an allotment somewhere near the cabin found in the 1993 field examination should be declared to belong to the heirs. They do not specify a location of the allotment, but state that the effects of isostatic rebound would suggest that the mouth of the Beartrack River is now in a different location than it would have been in 1909. As to the fact that their request would necessarily require an amendment to the application as it was drafted in 1909, the heirs argue that they were never notified of the July 27, 1993, order requiring amendment within 60 days and had no reason to appeal the December 14, 1993, decision rejecting the Tribes' purported amendment.

^{8/} This case was aff'd sub nom., Etalook v. Exxon Pipeline Co., 831 F.2d 1440 (9th Cir. 1987).

Judge Sweitzer issued his decision on December 24, 2003. (Sweitzer Decision.) Without repeating his detailed discussion at pages 7-20, it is evident that Judge Sweitzer struggled with the question of whether it was proper for BLM to contest a 1909 application based on a failure to comply with terms of law imposed in 1956. Judge Sweitzer correctly concluded that the Government met its prima facie case of showing that McKinley had not met the standard of 5 years' use and occupancy, but queried whether retroactive application of that requirement was possible under Supreme Court precedent. *Id.* at 8. After considerable analysis of precedent on that topic, including precedent from disparate areas of law, Judge Sweitzer concluded that the answer depended on the fact that McKinley had not sought a preference right application based on occupancy under the terms of the Act of May 17, 1906, as it was enacted on that date. Judge Sweitzer pointed out that McKinley's application was merely one for 160 acres of land, without reliance on occupancy, and therefore that the Government's ability to grant or deny such a request was discretionary. He concluded, based on a Solicitor's Opinion, M-36662, 71 I.D. 342, 352-56 (1964), the legislative history of the 1906 Act, and the various Circulars cited above, that McKinley's filing of an application as a qualified person did not constitute the vesting of a property right. Rather, he found that the decision to grant or deny an allotment in such circumstances was discretionary and that consideration of use or occupancy is within the Secretary's discretion as well, allowing application of terms consistent with both the law as subsequently amended and the law in place in 1906. (Sweitzer Decision at 14-18.)

Judge Sweitzer also concluded that the heirs could not prevail against the Government's prima facie case given the nature of their evidence. As he pointed out, no one who testified had any personal knowledge regarding McKinley's activities. Likewise, the only evidence tying McKinley to any occupancy was found in Gilbert Mills' statements, and these comments merely reflected some knowledge of McKinley's activities without any connection to specific land. (Sweitzer Decision at 18.) Judge Sweitzer found that any contention regarding McKinley's use or any cabin requires considerable speculation, as reflected by the changing and unsubstantiated findings of BIA, NPS, and BLM during the 1980s and 1990s. He concluded that the question should be answered by the "deciding factor" that public policy would not favor granting an allotment in the National Park. *Id.* at 20.

Wilson and Sanders appealed the decision. Much of the briefs on appeal, understandably, relates to the question of retroactivity. We understand the appellants' concerns regarding the topic and share Judge Sweitzer's discomfort. Appellants are also troubled that Judge Sweitzer appeared to base his decision on a public policy in favor of National Park lands. Having considered the record as a whole, it appears to us that the case was mishandled by the BLM and that an exercise of our de novo review authority requires affirming on different grounds.

[1] We briefly focus on our own authority, which gives us greater latitude than Judge Sweitzer had in revisiting the case as a whole. It is clear that, even after a hearing by an Administrative Law Judge, the Board has authority to conduct de novo review of a record in the context of a decision involving an applicant for a Native allotment. Ira Wassillie (On Reconsideration), 111 IBLA 53, 59 (1989), appeal dismissed, Civ. No. A98-0068 (D. Alaska Dec. 7, 1998). This derives from the Board's authority on behalf of the Secretary to prevent the mistaken issuance of a patent to land to someone not entitled to it. Id. at 57, citing Knight v. United States Land Association, 142 U.S. 161, 178-81 (1891). In United States v. Willsie, 152 IBLA 241, 264-65 (2000), we noted that the Board, "as the delegate of the Secretary of the Interior, has the authority to make decisions concerning appeals relating to the use and disposition of the public lands and their resources as fully and finally as might the Secretary himself." We noted that the "authority includes the power to make a de novo review of the entire administrative record and to make findings of fact based thereon." Id. Citing 5 U.S.C. § 557 (2000), we stated: "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision * * *." 152 IBLA at 264-65, citing, inter alia, United States v. Dunbar Stone Co., 56 IBLA 61, 68 (1981), aff'd, No. 81-1271 (D. Ariz. Feb. 27, 1984), aff'd, No. 84-1915 (9th Cir. Jan. 24, 1985), cert. denied, 472 U.S. 1028 (1985).

[2] A review of the record in this case demonstrates that BLM began to go astray when it attempted to apply the Pence cases in order to reinstate the application. The Board has documented extensively the difficulties in attempting to determine what Native allotment applications were required to be reinstated, and the fact that, initially, both BLM and the Board acted too broadly in assuming that most applications should be reopened. William Demoski, 143 IBLA 90 (1998). In a concurring opinion in that case, Judge Burski described an "infirmity" in a number of Board decisions: "i.e., the reinstatement of an allotment application based on Pence even though Pence would not apply, has been replicated in a number of the Board's own decisions." 143 IBLA at 120. Judge Burski described the problem represented by a number of cases, including Ellen Frank, 124 IBLA 349 (1992), in which the Board "simply manufactured a disputed issue of fact where none was apparent." 143 IBLA at 120 (emphasis added). Judge Burski explained:

[I]n Frank, the allotment application of John Reese had initially been approved by the First Assistant Secretary. When, before completion of survey, it was discovered that Reese had died, the improvements had been destroyed by a forest fire, and that his wife had moved away with no apparent intention of ever returning, the prior approval was revoked and the applicant (and presumably his heirs) were afforded 90 days in which to show cause why the application should not be rejected. In the absence of any showing, the Commissioner of the [General Land Office] rejected the allotment in 1927.

When BLM refused to reinstate the application almost 60 years later, an appeal was filed with the Board. In its decision, the Board justified reinstatement of the application on the finding that the allotment application had been rejected without a hearing on a disputed issue of fact, a dispute which it characterized as “whether Reese’s widow wanted the land originally sought by him.” *Id.* at 351. Notwithstanding this holding, however, the decision offered not the slightest support to buttress either the assertion that there was an outstanding question as to whether or not Reese’s widow wanted the land or that this desire, unless coupled with an intention to return to the land sought, had any relevance to whether or not the [General Land Office] would have granted an allotment under allotment principles then being applied. But, having determined that the application had been improperly rejected without a hearing, the Board went on to direct BLM to adjudicate the application under the 1906 Act, an adjudication which, the decision further asserted in the face of the original rejection of the application in 1927, “has yet to occur.”

143 IBLA at 120 (J. Burski, concurring) (footnote omitted).

The Board heeded Judge Burski’s call to correct the many inconsistencies in how the Department reacted to the Pence decisions in Heirs of George Brown, 143 IBLA 221. In that case, the Board proceeded to overrule, *inter alia*, Ellen Frank, 124 IBLA 349, to the extent inconsistent. In Heirs of George Brown, the Board declared that an application which did not establish a due process right had been improperly reinstated and, on that ground, affirmed as modified a decision denying reinstatement.

We think the same problems afflicting the Ellen Frank case occurred here. As noted above, BLM reinstated the McKinley application on December 6, 1984. On December 18, 1993, BLM affirmed the reinstatement making the factual assertion that, “based on a U.S. Forest Service field examination conducted on July 28, 1920, use and occupancy existed prior to the date of application.” (December 18, 1993, Decision at 1.) Thus, BLM’s determination to maintain the reinstatement is based on a “manufactured” preference right application with occupancy pre-dating the date of application. As described in the statement of facts above, this is patently wrong. The 1909 application not only asserted no occupancy, but the space for assertion of occupancy was deliberately struck in accordance with instructions to do so if occupancy was not a factor. As even appellants must and do concede, their argument is premised on the view that McKinley’s right to the land vested by virtue of his being a qualified applicant and not on the basis of occupancy. (Statement of Reasons, First Argument.) Most importantly, nothing in the Field Report of the 1920 field examination renders the finding articulated by BLM from it in 1993. The field

examination in 1920 found “no evidence” of occupancy at all. BLM’s 1993 comment about the results of that examination is simply not supportable.

In fact, in Heirs of George Brown, as here, the applicant submitted an application in 1909 for 160 acres based on qualifying as a Native of full or mixed blood. As here, Brown did not seek a preference right based on occupancy. As here, the information was insufficient to plot the precise location of the land applied for. The Board concluded in that case:

[Of] relevance, in our view, is the assumption, unexamined below, that this application was properly reinstated. As we subsequently explain, we do not believe that it was, and for that reason we must deny the instant appeal.

* * * * *

Initially, we note that a number of previous Board decisions have proceeded under the implicit assumption that, unless an Administrative Procedure Act (APA) hearing had been afforded a Native allotment applicant on disputed issues of fact before the rejection of his or her application, all previous decisions were necessarily flawed and violative of due process. This is demonstrably false.

143 IBLA at 226.

After detailing the results of the Pence cases, Board precedent and section 905(a) of ANILCA, the Board held:

[W]hat Pence required and what section 905(a) of ANILCA authorized was the Departmental reexamination of those past cases in which an allotment application had been rejected with finality to determine whether or not due process was afforded the applicant and the reinstatement of those applications where either the minimum requirements of due process, as delineated by the court in Pence v. Kleppe, supra, were not met or where a manifest injustice would occur were the application not to be reinstated. See generally, Lord v. Babbitt, 943 F. Supp. 1203, 1208 (D. Alaska 1996).

Judged by the foregoing standard, it seems clear that the application herein should not have been reinstated. As we noted above, there is nothing in the application which asserted occupancy by George Brown of the land sought prior to or even after the filing of the application.

* * * * *

Accordingly, when George Brown filed his application in 1909, the Department was authorized to allot him any 160-acre tract of nonmineral land which he requested; Brown had a “preference right” to obtain an allotment, however, only to those parcels which were “occupied by him.” Yet, nothing in his application showed the existence of a preference right to an allotment with respect to the parcel described. As noted above, despite the fact that spaces were provided on the Allotment Affidavit in which the applicant and the witnesses could attest to the applicant’s pre-existing occupancy of the land being sought, both spaces were left blank. * * * The failure of either the applicant or the witnesses to indicate a present occupancy of the land described must properly give rise to a conclusion that no such occupancy was being asserted.

143 IBLA at 229-30 (footnotes omitted; emphasis added). The Board also noted that “notice was provided pursuant to then-prevailing procedures,” yet no appeal was filed.

Nor, apparently, were any questions raised in the ensuing 50 years as to the propriety of the [General Land Office’s] rejection of Brown’s application. Thus, at the time that this file was initially examined by BLM in 1978 there was no basis on which it could be concluded that the rejection of this application in 1924 either violated the requirements of due process or worked a manifest injustice. There was, in short, no basis in the record for reinstating this application either before or after the adoption of section 905(a) of ANILCA.

143 IBLA at 230.

We think the same result pertains here. There is no question that McKinley did not seek a preference right application. The only basis in the record for concluding that McKinley had occupied any land at all was in Heisel’s 1920 discussion with an unidentified source “in the vicinity of Bartlett Bay,” that McKinley once had a log cabin on the land, but such a vague assertion could not be verified to be related to the land described in the application any time in 1920, or after the reinstatement. The record shows that McKinley was notified of the decision adverse to his application “pursuant to then-prevailing procedures,” no appeal was filed, and no questions were raised in the ensuing 56 years as to the propriety of the General

Land Office's rejection of McKinley's application.^{2/} As we stated in Heirs of George Brown: "Thus, at the time that this file was initially examined by BLM in 1978 there was no basis on which it could be concluded that the rejection of this application in 192[2] either violated the requirements of due process or worked a manifest injustice. There was, in short, no basis in the record for reinstating this application either before or after the adoption of section 905(a) of ANILCA." 143 IBLA at 230.

Appellants argue that the fact that McKinley applied for the land, irrespective of whether he occupied it, gave rise to a vested right in the land for which he had a due process right. We reject the notion that mere application provided a "due process" right to the land requiring reinstatement of the denied application for several reasons. First, even under procedures applicable in 1907, before the 1909 application was filed, the Department clearly understood that a preference right was established only through occupancy. As noted above, the 1907 Circular specified that a qualifying Alaska Native could submit an application for available land, but, consistent with the Act of May 17, 1906, if the Native sought a preference right, he must assert a date of occupancy and must maintain it by continuous use. Circular dated February 11, 1907, 35 L.D. 437 (1907).

Second, even if we could presume, as required by the Circulars in place in 1916 and 1917, that McKinley had submitted an application for purposes of occupying the land, such use had been abandoned by the time of the 1920 field examination. Thus any preference right we might guess that McKinley established in land was abandoned. United States v. Flynn, 53 IBLA at 235, 88 I.D. at 388.

This leads to the third point deriving directly from the language of Pence v. Kleppe. The Ninth Circuit made abundantly clear that the Natives to which its decision was addressed were those who established a due process right in land they had used and occupied, because the use and occupancy established a property right that was a legitimate claim of entitlement.

^{2/} Counsel for appellants argues that we must find that McKinley was unaware that his application was rejected. Counsel reasons that because the application indicated that it was signed by someone other than McKinley, we must presume McKinley could not write his own name. The heirs thus suggest that we must find that the person who signed the certificate of service in 1992 could not have been McKinley and also that McKinley was never notified of the application's denial. We cannot fabricate such conclusions any more than BLM could to reinstate the application. As in Heirs of George Brown, McKinley was served under then-proper procedures, the service form was signed by someone other than the person who signed the application as "Harry McKinley." We will not presume either that the signer was not McKinley or that McKinley was never notified of the decision.

In the Report to the Full House of Representatives from the Committee on Public Lands which reported out the Alaska Native Allotment Act, the Committee said:

The necessity for this legislation arises from the fact that Indians in Alaska are not confined to reservations as they are in the several States and Territories of the United States, but they live in villages and small settlements along the streams where they have their little homes upon land to which they have no title, nor can they obtain title under existing laws. It does not signify that because an Alaska Indian has lived for many years in the same hut and reared a family there that he is to continue in peaceable possession of what he has always regarded his home. Some one who regards that particular spot as a desirable location for a home can file upon it for a homestead, and the Indian or Eskimo, as the case may be, is forced to move and give way to his white brother. This has in some instances already worked severe hardship upon these friendly and inoffensive natives to the shame of our own race, due more to a lack of needed legislation than to wanton disposition on the part of those who have thus dispossessed them than it has been to deprive the natives of what must be conceded to be their rights. [emphasis added] H.R.Rep. No. 3295, 59th Cong., 1st Sess. (1906).

This is a clear indication that Congress intended to create or to recognize rights in Alaska Natives to the land that they occupy for the statutory period, and not, as the Secretary contends, merely a hope that the government will give them the land.

529 F.2d at 141-42.

We do not read Pence v. Kleppe to have concluded that, by virtue of the act of filing an application to obtain 160 acres of land, without occupying it, an Alaska Native had a property right in that land requiring reinstatement of the application for failure of the Department to provide due process if no hearing was afforded when it was denied. BLM created facts in 1993 when it reviewed the record and confirmed that the land was reinstated on the basis of a finding in the 1920 field examination that McKinley's use of the land had pre-dated the application. BLM's mistaken assertions of fact generated its own erroneous conclusions regarding McKinley's use and occupancy, which problems were multiplied when the Department submitted the

contest complaint. Having premised reinstatement on McKinley's alleged occupancy, BLM appeared to believe it was required to show that the occupancy did not meet the 5-year continuous use test, open and notorious and exclusive of others established in 1935 regulations and 1956 legislative amendments, rather than a contest seeking cancellation of the application, as reinstated, on the basis that McKinley had not shown entitlement to the specified allotment based on the requirements of the Act of May 17, 1906.

Had BLM framed the contest complaint in those terms, the parties and Judge Sweitzer would not have been forced into what was a substantial detour into retroactive application of the law. In fact, we have considered a case establishing the burdens on the parties in a contest to a Native allotment application submitted before the Native Allotment Act was amended in 1956, or the 5-year occupancy requirement established in 1935, in BLM v. Heirs of James Rudolph, Sr., 163 IBLA 252 (2004). In that case, the applicant had submitted a Native allotment application in 1915, asserting occupancy, but the land had been withdrawn for a National Forest. We pointed out: "We have previously held that although an allotment applicant could claim almost any tract of nonmineral land not withdrawn, segregated, or subject to an adverse claim, the Native Allotment Act required an applicant to establish occupancy in order to qualify for a preference right to the land occupied which would survive a withdrawal of the land." *Id.* at 257 (citations omitted, emphasis added). We explained that the appropriate standard for determining whether a preference right surviving a withdrawal had been established before 1935 was "substantial and continuous use and occupancy of the land," as described in Frank St. Clair, 52 L.D. 597 (1929), as modified, Frank St. Clair (On Petition), 53 I.D. 194 (1930), or "substantial use and occupancy" as described in United States v. Flynn, 53 IBLA at 225-26, 88 I.D. at 383 (citing St. Clair for the principle that occupancy must only be "substantially continuous"). 163 IBLA at 259-60. Full time residence is not required but the term "substantial use and occupancy" contemplates customary seasonality of use and occupancy for the applicant's livelihood and well-being and that of his family. *Id.* at 260.

In short, had BLM not derailed the appropriate consideration of this case, it would be clear that the issue is that McKinley's heirs are not entitled to receive an allotment to land that has been withdrawn unless McKinley established a preference right to it that predates withdrawal of the land in 1925 for other purposes. Appellants' argument that mere application entitled McKinley to the land applied for is not accurate where the land was withdrawn following the denial of the application and before its reinstatement. McKinley only had a right to the land later withdrawn if he had established prior to withdrawal a preference right to it by occupancy. This is the import of the case cited by appellants, State of Alaska v. 13.90 Acres of Land, 625 F. Supp. at 1319, in which the United States District Court for the District of Alaska ensured that, even where lands had been conveyed outside the ownership of

the United States, the United States must pursue recovery of lands to which a Native had established a preference right by qualifying use and occupancy under the Act of May 17, 1906.

Accordingly, all that should have been required for the Government to meet its prima facie case is to show that the record did not establish substantial use or occupancy before the date the land was withdrawn. Here the record contained no evidence of occupancy of the land applied for at all, let alone substantial use and thus the Government clearly made the prima facie case it would have been required to make to show that the application should be denied.

And we agree with Judge Sweitzer that the appellants could not have overcome that prima facie case with their evidence of record. As Judge Sweitzer correctly noted, the best evidence for the heirs appeared in the second statement of Gilbert Mills. As noted above, we have serious doubts regarding whether Gilbert Mills was confused regarding the identity of McKinley, after explaining that he was approximately 100 years old when he died, almost a half-century older than McKinley's actual age at death. Mills' first written statement was a general comment regarding stories his own father, Albert, told him about McKinley and other persons to whom Albert gave assistance in submitting applications. The second statement asserted a personal relationship between Gilbert Mills and McKinley that is remarkable only given that Mills' first statement did not indicate that it existed, and suggests some confusion on Mills' part regarding the identity of McKinley. And, most importantly, nothing in that statement or any single fact of record ties McKinley's use to any cabin or tract at issue in the case.^{10/}

We recognize that the heirs pose questions regarding the process which took place before and after 1922. The heirs have a reasonable complaint that they did not receive the July 27, 1993, decision giving them 60 days to amend the application. However, they did receive the next decision and did not appeal it, though that decision made clear that "adjudication of the allotment claim will be based upon the location as described in the original application and shown on the enclosed [Master Title Plat]." (Dec. 14, 1993, Decision at 2.) If the heirs believed the allotment should have been amended, this and the appeal right proffered there constituted fair notice that they should appeal the decision. More significantly, nothing in the record indicates that the heirs know any better than does BLM where McKinley might have meant to locate the allotment. Based on the testimony and exhibits presented, there is nothing in this record permitting us to amend the application in accordance with

^{10/} Indeed, Mills asserts for the first time in his second statement that McKinley used the area of the cabin for planting crops and a smokehouse. Heisel found no evidence of such use in his 1920 field examination, yet, had it occurred, such use should have been visible.

the requirements of section 905(c) of ANILCA, 43 U.S.C. § 1634(c) (2000); see Unites States v. Galbraith, 166 IBLA 84, 103 (2005). There, we explained:

To justify an amendment, the evidence should clearly evince a reasonable likelihood that the land described by the amendment was the land the applicant actually intended to claim when the original application was filed. Heirs of Setuck Harry, 155 IBLA 373, 378 (2001). It is not enough that the land described in the proposed amended application is land the applicant would have desired to select.

Judge Sweitzer is correct that we would be compelled in the McKinley case to make such a determination solely on the basis of speculation. Yet, even where Angeline Galbraith testified in the Galbraith case, we refused to grant an application amendment where we would be required to speculate about facts in the record. We must hold this case record and the heirs to the same standard of proof and decline to find an amendment of the allotment location based on speculation.

We acknowledge the concern the heirs have registered regarding Heisel's comments that "these indians never stay in one place very long" and their assertions that such comments indicate a bias against them. On the other hand, Heisel's comments may reflect a world that predated today's standards, as well as an appropriate understanding that Native use was somewhat transitory and seasonal.^{11/} We also recognize the heirs' frustration that, with the passage of time, it is not possible to know the facts surrounding the notice McKinley received regarding the denial of the application in 1922. Nonetheless, there is no evidence McKinley meant to assert a preference right; one should not have been constructed for him in 1984 for land he could never get, once it had been withdrawn, without such a right.

^{11/} Appellants complain that, though Heisel found the "filling in of the channel with glacial silt" in 1920, this did not mean the area was so filled in 1909. We find his comment to be entirely consistent with the testimony of appellants' witnesses regarding isostatic rebound. To the extent his point was that the silting in of the channel made the site less attractive to settle as an explanation for the fact that no evidence of occupancy could be found in 1920, it is as plausible to imagine that the silting explains McKinley's decision not to use the site, as it is to imagine, as do the heirs, that the silting of the channel was not significant in 1909.

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

Lisa Hemmer
Administrative Judge

I concur:

Christina S. Kalavritinos
Administrative Judge