

DAVID O. OSTERBACK

IBLA 2004-154

Decided June 29, 2006

Appeal from a decision by the Alaska State Office, Bureau of Land Management, rejecting a Native veteran allotment application. AA-83918.

Affirmed as modified.

1. Alaska: Alaska Native Veteran Allotment: Generally--Alaska: Native Allotments

The Alaska Native Veterans Allotment Act, as amended, 43 U.S.C. § 1629g (2000), provided an opportunity to those who may have missed the deadline to apply for a Native allotment pursuant to the Alaska Native Allotment Act of May 17, 1906, formerly codified at 43 U.S.C. § 270-1 through 270-3 (1970); it did not extend an opportunity to relitigate principles well settled under the 1906 Act. An assertion that independent use and occupancy potentially exclusive of others began in 1980 does not qualify an Alaska Native veteran to apply for land “under the Act of May 17, 1906 \* \* \* as such Act was in effect before December 18, 1971,” or make him a person who “would have been eligible for an allotment under the Act of May 17, 1906.” 43 U.S.C. § 1629g(a)(1) and (b)(1)(A) (2000).

APPEARANCES: Lisa M. Lang, Esq., Anchorage, Alaska, for appellant; 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 ADMINISTRATIVE JUDGE HEMMER

David O. Osterback appeals from a decision dated February 9, 2004, issued by the Alaska State Office, Bureau of Land Management (BLM), rejecting his application for Native allotment submitted under the Alaska Native Veterans Allotment Act

(ANVAA), as amended, 43 U.S.C. § 1629g (2000). Osterback filed the application on February 6, 2002, for land located on Wosnesenski Island, but timely placed the application in an envelope postmarked on January 31, 2002. See 43 CFR 2568.70 and 2568.72 (application will be “filed too late” if postmarked after January 31, 2002). Osterback submitted a map in which he has drawn the boundaries of the parcel in secs. 25 and 26, T. 57 S., R. 80 W., Seward Meridian.

In completing the application form, Osterback deliberately did not fill in those portions of the form in which the applicant is to document “periods of actual residence on the land.” Sections 10-14 require the applicant to submit information including the dates each period of residence began and ended (section 10); whether occupancy was exclusive (section 11); improvements made (section 12); evidence of fishing, trapping and other traditional uses of the land and the dates those uses began and ended (section 13); and any other relevant remarks “showing \* \* \* use and occupancy of the land for a period of 5 or more years” (section 14). (Application at 2.) According to regulation 43 CFR 2568.73, the applicant must complete the form.

Instead, Osterback filled in the form with the notation “see attached letter.” The referenced letter, dated January 31, 2002, states that he was “interested in obtaining land on Wosnesenski Island” on which his Finnish grandfather and Aleut grandmother resided “until their deaths in 1965 and 1975.” Osterback does not aver that he used or occupied the land. Rather, he states that the “Osterback family (including myself) has continued to live hunt, fish, and camp on this Island since the last remaining family member last resided there in 1980.” He avers he is “interested in obtaining 160 acres of land where the current houses are still standing.”

BLM rejected the application because it did not demonstrate the applicant’s use and occupancy prior to December 1968. (Decision at 1.) The Decision states: “43 CFR 2568.82(b) states the land must have been used and occupied for five or more years having began [sic] before December 1968. 43 CFT [sic] 2568.90(a)(5).” Id. Departmental regulation 43 CFR 2568.90(a)(5) requires the applicant to prove, by a preponderance of the evidence, that he or she used and occupied the land in a substantially continuous and independent manner, at least potentially exclusive of others, for 5 or more years. Regulation 43 CFR 2568.90(a)(4) states that the applicant may receive title only to land that he “started using before December 14, 1968, the date when Public Land Order [(PLO)] 4582 withdrew all unreserved public lands in Alaska from all forms of appropriation and disposition under the public land laws[.]” We conclude from the context of the decision that BLM intended to refer to 43 CFR 2568.90(a)(4) and (a)(5) as authority for its rejection of Osterback’s

application, and that the decision inadvertently cites 43 CFR 2568.82(b), which has no relevance to these facts,<sup>1/</sup> and we modify BLM's decision accordingly.

Osterback timely appealed. In his Statement of Reasons (SOR) on appeal, he contends that BLM made incorrect factual assumptions when it concluded that he did not occupy the land prior to December 14, 1968, and that he should receive a hearing to establish his use and occupancy, as, absent a hearing, his due process rights have been violated pursuant to Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). (SOR at 3-5.) Osterback included an affidavit with his SOR which avers that his grandparents "possessed and occupied" the land for which he applied "from 1900 until about 1976." (SOR, Ex. B at 1.) The affidavit states that his parents married in the late 1940s, after which they "used the land I claim for my allotment every summer for three months" "until about 1960." (SOR, Ex. B at 2.) Osterback avers that "[i]n the early 60's I began to take my boat and travel to my land alone to help meet my families [sic] subsistence needs," and that he continues to do so. Id. Additionally, he argues that as Alaska Natives, his family members possessed the land he claims on December 14, 1968, and that it was therefore not affected by PLO 4582. (SOR at 6-12.) Lastly, he argues that 43 CFR 2568.90(a)(4) is invalid (SOR at 12), because the ANVAA does not "address or even mention the 1968 requirement" found in the regulation (SOR at 13), and that, when it enacted the ANVAA "Congress did not intend that use of an allotment begin before 1968." (SOR at 14.)

The Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), granted the Secretary of the Interior authority to allot up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Native Alaskan Indian, Aleut, or Eskimo, 21 years old or the head of a family, upon satisfactory proof of substantially continuous use and occupancy for a 5-year period. Forest Service, U.S. Department of Agriculture, 143 IBLA 175, 177-78 (1998). The Act was repealed, subject to a savings provision for pending Native allotment applications, in section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (2000). Section 4 of ANCSA also abolished any existing claims against the United States based on "aboriginal right, title, use or occupancy" and claims based on statute or treaty relating to Native use and occupancy. 43 U.S.C. § 1603(a) through (c) (2000). Thus, ANCSA extinguished all prior claims based on use and occupancy except those pending on December 18, 1971, under the Act of May 17, 1906, and preserved in section 18(a) of ANCSA, 43 U.S.C. § 1617(a) (2000), and expressly repealed the Act of May 17, 1906, to ensure that in the future no right remained to establish an allotment claim based on aboriginal rights. See Joan A. (Anagick) Johnson, 159 IBLA 121, 123-24 (2003) (discussion of ANCSA).

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<sup>1/</sup> That regulation provides that BLM may request additional information from an applicant if it cannot determine from the information submitted whether an applicant has met the use and occupancy requirements of the Native Allotment Act.

[1] This Board has recently had the opportunity to reiterate the purpose of the passage of ANVAA in Burkher M. Ivanoff, 169 IBLA 83, 85-86 (2006). We explained that the statute provided an opportunity to those who may have missed the deadline to apply for a Native allotment pursuant to the Act of May 17, 1906, as a result of their military service during the critical period prior to the passage of ANCSA, when the right to submit a Native allotment application was terminated. Alaska Natives serving in the military between certain dates in 1969-71 were often outside of Alaska during the period that their civilian counterparts had an opportunity to submit allotment applications before the 1906 Act was repealed. Congress enacted the ANVAA to permit a “person described in subsection (b)” an “Open Season for Certain Alaska Native Veterans for Allotments,” during an 18-month period subsequent to its 1998 date of enactment and “following promulgation of implementing rules.” 43 U.S.C. § 1629g(a)(1) (2000). Such persons would be “eligible for an allotment of \* \* \* federal land totaling 160 acres or less under the Act of May 17, 1906 (chapter 2469; 34 Stat. 197), as such Act was in effect before December 18, 1971.” Id.; Larry M. Evanoff, 162 IBLA 62, 70 (2004); George F. Jackson, 158 IBLA 305, 306-07 (2003). An eligible person is one who “would have been eligible for an allotment under the Act of May 17, 1906, \* \* \* as that Act was in effect before December 18, 1971.” 43 U.S.C. § 1629g(b)(1)(A).

Thus it is clear that the ANVAA provided an opportunity to any person who “would have been eligible” under the Native Allotment Act as it was “in effect before December 18, 1971,” to apply for an allotment. 43 U.S.C. § 1629g(a) and (b) (2000). Both subsections ensured that what was extended was the time to apply for an allotment. The applicant was nonetheless required to comply with the Native Allotment Act of 1906 as it was in effect before its repeal. Thus, on its own terms, the ANVAA makes clear that it provided no opportunity to relitigate principles well settled under the 1906 Act.

Yet, relitigation of the nature of a Native allotment under that Act is what Osterback’s application would require. Osterback deliberately chose not to respond to questions on the application form that would give information regarding qualifying use and occupancy under the Native Allotment Act of 1906. Osterback states that he is interested in an allotment based upon his grandparents’ use until their deaths in 1965 and 1975, and then his family’s continued use thereafter. Neither the application nor the attached letter provides any evidence that he would have been eligible for an allotment under the Native Allotment Act of 1906. To the contrary, as BLM points out in its Answer at 4-5, the letter Osterback attached to his application states that members of his extended family resided until 1980 on the property he claims, thus establishing that his occupation was not independent and potentially

exclusive of others during the period of time that he would have been eligible to apply for a Native allotment.<sup>2/</sup>

It is well settled that an Alaska Native may not qualify for a Native allotment based upon the occupancy of family members. See Akootchook v. United States, 271 F.3d 1160, 1167 (9th Cir. 2001), stating that “[t]he right to an allotment is personal to the applicant and not a communal right.” In order to demonstrate that the land was used and occupied to the potential exclusion of others, it must be shown that others knew or should have known that the applicant asserted a superior right to the land because he actually used or occupied the land and/or left behind physical evidence of such use or occupancy sufficient to put others on notice of the assertion of such a right, or because others acknowledged that assertion in some way. United States v. Pestrikoff, 167 IBLA 361, 379 (2006), citing United States v. Pestrikoff, 134 IBLA 277, 288-89 (1995), and United States v. Heirs of Jake Yaquam, 139 IBLA 376, 384 (1997). Construing the application most favorably for Osterback, he could only hope to establish a use or occupancy potentially exclusive of others after the remaining family members ceased their residency on the property in 1980. An assertion that an independent use and occupancy potentially exclusive of others began in 1980 does not qualify an Alaska Native veteran to apply for land or make him a person who “would have been eligible for an allotment under the Act of May 17, 1906.” 43 U.S.C. § 1629g(b)(1)(A) (2000). See Burkher M. Ivanoff, 169 IBLA at 88-89. Thus, while Osterback timely filed an application under the ANVAA and may otherwise have qualified to apply under the statute, he did not apply for an allotment as a person “who would have been eligible” under the Native Allotment Act of 1906.

Moreover, because Osterback’s application is deficient as a matter of law, we reject his claim for a hearing. A Native allotment application may be rejected without a hearing when, assuming the truth of the relevant facts supporting the application, the application is deficient as a matter of law. Boy Dexter Ogle, 140 IBLA 362, 371-72 (1997), and cases cited. BLM has not violated Osterback’s due process rights by rejecting his allotment application without granting him a hearing. In fact, Osterback confuses the right to submit an application with a right to a hearing. We have explained, as did the Ninth Circuit Court of Appeals in Pence v. Kleppe, 529 F.2d 135, that a Native allotment applicant is entitled to a hearing on disputed issues of material fact before rejecting the application. Heirs of Linda Anelon, 101 IBLA 333, 336-37 (1988). An applicant cannot, however, create a disputed issue of material

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<sup>2/</sup> Osterback’s affidavit submitted with his SOR differs slightly from the facts set forth in his letter attached to the application. In the affidavit he adds that he began to travel alone to the land in the 1960s, but does not retreat from his statement regarding a grandparent’s residence there until 1975. The affidavit thus does not establish facts that would change the outcome of this appeal.

fact by refusing to assert facts sufficient to meet the statutory requirements of the Native Allotment Act of 1906 in his application, and then arguing he is entitled to an allotment on the basis of facts that patently would not conform to that statute as it was in effect on December 18, 1971. E.g., Gaither D. Paul, 160 IBLA 77, 83 (2003). Osterback's argument is one of law; it does not present any disputed issue of fact.

We turn to appellant's challenge to 43 CFR 2568.90(a)(4). The rule at 43 CFR 2568.90(a)(4) allows qualified veterans to apply for land that they "started using before December 14, 1968, the date when [PLO] 4582 withdrew all unreserved public lands in Alaska from all forms of appropriation and disposition under the public land laws." PLO 4582 went into effect on December 14, 1968, in anticipation of the repeal of the Act of May 17, 1906. It withdrew all unreserved public lands within Alaska from appropriation or selection under the public land laws, except for certain mining claims. 34 FR 1025 (Jan. 22, 1969). The PLO was extended by PLO 4962 (Dec. 11, 1970) and PLO 5081 (June 24, 1971), and continued in effect until the passage of ANCSA. Joan A. (Anagick) Johnson, 159 IBLA at 122. The combined effect of the PLOs was to preclude any Native Alaskan from entering land in Alaska for use and occupancy, for purposes of an appropriation pursuant to a Native allotment application, after December 14, 1968. See Burkher M. Ivanoff, 169 IBLA at 88.

Osterback argues that the regulation is "void" because it is "not in accord" with the ANVAA (SOR at 12), as that Act did not include the requirement that Alaska Native veterans establish use and occupancy prior to December 14, 1968, and the regulation thus adds an additional requirement "not found in the ANVAA." (SOR at 13.) We rejected a challenge to this rule in Burhker M. Ivanoff, 169 IBLA at 87-89. It is well settled that PLO 4582 withdrew all unreserved public lands in Alaska from appropriation under the Native Allotment Act and its predecessors as of December 14, 1968, until repeal of the Native Allotment Act on December 18, 1971. Id. at 85, 88. We emphasized in that case that the ANVAA did not "revisit the repeal of the Act of May 17, 1906, 43 U.S.C. § 1617(a) (2000), see also 43 U.S.C. § 1603 (2000), or reopen lands in Alaska for use and occupancy by Alaska Natives for allotments under that statute[.]" Id. at 87. <sup>3/</sup>

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<sup>3/</sup> Notably, Osterback's claim of his own exclusive use beginning some time in 1980, like Ivanoff's, makes his challenge to the rule largely irrelevant. As we said in Ivanoff, 169 IBLA at 88-89, "[e]ven if they could challenge the date chosen by BLM in the rule (and we do not find that they have), appellants nonetheless could not explain how a date defining qualifying use and occupancy could postdate December 18, 1971. In no case could BLM apply a rule to encompass use and occupancy begun in 1973 or 1980."

Osterback also argues that 43 CFR 2568.90(a)(4) cannot apply in this case as the land was occupied by his family and, therefore, in possession of Alaska Natives in 1968. Osterback claims it was not “public land” subject to administrative withdrawals by the Department. (SOR at 6.) The Board has disposed of these same arguments against similarly situated appellants in prior appeals. In Larry M. Evanoff, 162 IBLA at 68, the Board noted that “[t]he Supreme Court and lower Federal courts, as well as this Board, have all recognized that the possessory interests of Alaska Natives are not property interests that prevent the United States from reserving or otherwise disposing of public land.” Id., citing, inter alia, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278-80, 285 (1955). The Board stated that in order for an Alaska Native to convert a possessory interest in public land to a vested property right for a particular tract, the Alaska Native “had to couple qualifying use and occupancy with the actual filing of a Native allotment application.” Larry M. Evanoff, 162 IBLA at 69, citing United States v. Flynn, 53 IBLA 208, 234, 88 I.D. 373, 387 (1981). As in Evanoff, no such showing has been made here that any of Osterback’s family members did so.<sup>4/</sup>

Therefore, 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 as modified.

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Lisa Hemmer  
Administrative Judge

I concur:

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T. Britt Price  
Administrative Judge

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<sup>4/</sup> Moreover, as noted above, section 4 of ANCSA abolished any claims against the United States based on “aboriginal right, title, use or occupancy.” 43 U.S.C. § 1603(a) through (c) (2000).