

IRVING P. SHELDON

IBLA 2004-139

Decided July 27, 2006

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting Native Veteran Allotment application. AA-83979.

Affirmed.

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

The Alaska Native Veterans Allotment Act, 43 U.S.C. § 1629g (2000), allows Alaska Natives who were on active military duty during a specific period of time to apply for an allotment under the Alaska Native Allotment Act of May 17, 1906, as amended, formerly codified at 43 U.S.C. §§ 270-1 through 270-3 (1970), as that Act was in effect before December 18, 1971. Allotments may be selected only from lands that were vacant, unappropriated, and unreserved on the date the person eligible for the allotment first used and occupied the lands.

2. Alaska: Alaska Native Veteran Allotment: Generally--Withdrawals and Reservations: Generally

Presidential Proclamation 37 (August 20, 1902) reserved from settlement, entry, or sale certain described public lands in Alaska for the Alexander Archipelago Forest Reserve (later merged into the Tongass National Forest). One seeking an Alaska Native Veteran Allotment for lands within that forest reservation may not rely on the possession and occupancy of relatives predating the Proclamation as excepting the lands from that reservation,

as such possession and occupancy amounted only to an inchoate preference right.

3. Alaska: Alaska Native Veteran Allotment: Generally--Withdrawals and Reservations: Generally

BLM properly rejects an application pursuant to the Alaska Native Veterans Allotment Act, 43 U.S.C. § 1629g (2000), when, at the time the Alaska Native veteran initiated use and occupancy of the claimed lands, those lands were reserved as part of a National Forest, and thus were not “vacant, unappropriated, and unreserved,” as required by the Act of May 17, 1906.

4. Administrative Procedure: Adjudication--Alaska: Native Allotments--Appeals--Evidence: Credibility

An Alaska Native Veteran Allotment application is properly rejected, as a matter of law, without the necessity for a hearing, where the applicant fails to allege, in his application or anywhere in the record, that he initiated his qualifying use and occupancy under the 1906 Act before the 1968 withdrawal of the claimed lands from entry under the 1906 Act, or that his use and occupancy was as an independent citizen acting on his own behalf, potentially exclusive of others, and not as a dependent child in the company and under the supervision of a parent.

APPEARANCES: Lisa M. Lang, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for appellant, Irving P. Sheldon; Lisa D. Doehl, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Irving P. Sheldon ^{1/} appeals from a January 27, 2004, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting his application for a Native allotment submitted under the Alaska Native Veterans Allotment Act (ANVAA), as amended, 43 U.S.C. § 1629g (2000). On February 5, 2002, BLM

^{1/} Sheldon was born on Aug. 31, 1949.

received Sheldon's allotment application, timely postmarked January 30, 2002, for approximately 160 acres of land in the vicinity of Security Bay, Kuiu Island. See 43 CFR 2568.70 and 2568.72. On the application, under "Legal description of occupied lands," Sheldon wrote, "Security Bay - Grandparents were the former owners at one time - 160 acres." (Application at 1.) Attached to the application is what appears to be an aerial map showing the claimed lands.^{2/} Under "Periods of Actual Residence on the Land," Sheldon stated that his "residence" began June 1, 1977, and ended September 20, 1990. He stated that there were no improvements on the land and that, during the period from 1977 to 1990, "[w]e anchored up there, camped out on land, picked berries, dried seaweed, picnic[k]ed" and fished. Id. at 2. In the space provided for "other information showing your use and occupancy of the land for a period of 5 or more years," Sheldon referred to "a cover letter of continuous use."

That letter, dated January 24, 2002, explains that Sheldon would like to apply for "ancestral land my grandparents and my mother used from the 1900 to 1947 for spring and summer camping to put up food for the winter" and to dry fish and seaweed, pick berries, and fish. (Letter dated Jan. 24, 2002 (Application cover letter).) The letter continues:

I had the privilege to stop there in 1965 to see the land with my father. We hiked and picnicked at this time and reminisced about my grandparents' life there in Security Bay. My grandparents once had a house there and a smoke house, which have fallen down, and my mom has the stake found on the land by the forest service when they were planning on logging off the timber * * * . My grandparents owned 160 acres of land in Security Bay. You will find enclosed an area map which I believe is the serial number #AA8020 for my grandparents lands.

Again, from 1977 to 1986 I fished out there at Security Bay with my wife. We hiked the land and camped on the beach, picnicked, picked berries, and dried seaweed. We acted out what my grandparents did for years, and enjoyed the memories and the atmosphere. Even our dogs enjoyed running on the beach.

(Application cover letter.)

BLM rejected the application on grounds that insufficient evidence of qualifying use and occupancy was submitted, noting that "43 CFR 2568.82(b) states

^{2/} Based on the map, BLM defined the allotment as 160 acres in sec. 35, T. 57 S., R. 70 E., and sec. 2, T. 58 S., R. 70 E., Copper River Meridian.

the land must have been used and occupied for five or more years having begun before December 1968.” (Decision at 1.) BLM also observed that Sheldon did not include a “Certificate of Indian Blood” with his application, as required by 43 CFR 2568.74(a).^{3/}

In his statement of reasons for appealing (SOR), Sheldon argues that BLM should not have applied 43 CFR 2568.90(a)(4) (requiring commencement of use prior to December 14, 1968, and quoted below) to his circumstances because (1) the regulation exceeds the scope of the statute and is therefore void, and (2) it applies to public land, and in 1968 the subject lands were not public land. He contends that the plain language of ANVAA clearly did not include any requirement that use start before December 14, 1968, and asserts that Congress did not intend such a specific limitation. He further claims that since this land was occupied by Alaska Natives in 1902 and such possession and occupation segregated the land from the public domain, these lands were exempted from the withdrawals. In an affidavit filed with the SOR, Sheldon states that the land applied for “was possessed and occupied by Alaska Native family members before and at the time the Tongass National Forest was created by Presidential Proclamation No. 37 dated August 20, 1902,” and that the land “has been continuously occupied by my family members from []about 1880 until 1971 when the Alaska Native Claims Settlement Act extinguished aboriginal title to land in Alaska.” (Appellant’s Ex. A, Affidavit of Irving P. Sheldon, at 1.) The affidavit continues as follows:

9. In the 40’s and 50’s my parents Rose and Robert Sheldon used and occupied my allotment for our summer activities.

10. Beginning in the 1950’[s] as a young child I began using and occupying the land while earning a living fishing with my father and continued until I entered the service in 1969.

11. My wife, Janet Sheldon, helped me fill out my Veterans Allotment Application. I had difficulty understanding the application and because of this she assisted me. I believe that she wrote down “we” to complete the two questions on page two of the Native Veterans Allotment application because she believed the question referred to our use of the land together as a married couple.

12. It is my understanding and belief that because Alaska Natives possessed and occupied my allotment land, that land was not included in the Tongass National Forest and when the possessory rights of Alaska

^{3/} Failure to attach a certificate of Indian blood is a curable defect. See 43 CFR 2568.75.

Natives were extinguished in 1971 by the Alaska Native Claims Settlement Act, this allotment land was restored to the public domain. This land is therefore available for my allotment claim.

Id. at 2.

In its Answer, BLM states that the lands in the two parcels Sheldon seeks have been withdrawn continuously since 1902 and 1968 respectively and, therefore, they were unavailable on the date Sheldon's application states his occupancy began. BLM further argues that appellant's affidavit standing alone is insufficient to contradict the date given in the application. In his reply to BLM's Answer, Sheldon refers to his affidavit to support an explanation, on appeal, for the reason his application lists 1977 as the date he began using the land. Sheldon states that the application, asking for "Periods of Actual Residence on the Land," is confusing and he did not interpret the question as asking when he began using the land. (Reply at 1.) Based on these circumstances, Sheldon argues that he "provided an adequate explanation for changing his use and occupancy dates on his ANVAA" application and he is entitled to a hearing. Id. at 5.

For the reasons discussed below, we find that Sheldon has not shown that BLM erred in determining that the lands he claimed were unavailable for selection under ANVAA and in denying his application.

[1] The Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (Alaska Native Allotment Act or Act of May 17, 1906), 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, at least 21 years old or the head of a family, upon satisfactory proof of substantially continuous use and occupancy for a 5-year period. See 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, by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (2000). In addition, section 4 of ANCSA 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 (2000). As a result, a Native Alaskan thereafter "could not establish rights which would antedate the repeal of the Alaska Native Allotment Act." David Capjohn, 14 IBLA 330, 332 (1974); see Joan A. (Anagick) Johnson, 159 IBLA 121, 123-24 (2003).

Congress enacted ANVAA as part of the "Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, 1999," Pub. L. No. 105-276, 112 Stat. 2461, 2516-18 (Oct. 21, 1998), to amend

ANCSA by adding an “Open Season for Certain Alaska Native Veterans for Allotments.” 43 U.S.C. § 1629g (2000); see Burkher M. Ivanoff, 169 IBLA 83, 85-86 (2006). The statute provided that, during an 18-month period subsequent to the 1998 date of enactment and following promulgation of implementing rules, Alaska Native veterans who served at least 6 months between January 1, 1969, and December 31, 1971, would be eligible for an allotment of not more than 160 acres of “vacant, unappropriated, and unreserved” Federal land under the Alaska Native Allotment Act, as it “was in effect before December 18, 1971.” 43 U.S.C. § 1629g(a)(1), (b) (2000). The implementing regulations were promulgated on June 30, 2000, to provide for an application period of July 31, 2000, through January 31, 2002. 65 FR 40961 [June 30, 2000]. They are codified at 43 CFR Subpart 2568. The criteria for an individual’s qualification are set forth as follows:

- (a) Have been eligible for an allotment under the Native Allotment Act as it was in effect before December 18, 1971; and
- (b) Establish that [he] used land in accordance with the regulation in effect before December 18, 1971, and that the land is still owned by the Federal government; and
- (c) Be a veteran who served at least six months between January 1, 1969, and December 31, 1971, or enlisted or was drafted after June 2, 1971, but before December 3, 1971; and
- (d) Not have already received conveyance or approval of an allotment * * *; and
- (e) Not have a Native allotment application pending on October 21, 1998; and
- (f) Reside in the State of Alaska or, in the case of a deceased veteran, have been a resident of Alaska at the time of death.

43 CFR 2568.50. Addressing the applicant, the regulation further provides that land is eligible for allotment if it

- (1) Is currently owned by the Federal government,
- (2) Was vacant, unappropriated, and unreserved when you first began to use and occupy it,
- (3) Has not been continuously withdrawn since before your sixth birthday,
- (4) You started using before December 14, 1968, the date when Public Land Order 4582 withdrew all unreserved public lands in Alaska from all forms of appropriation and disposition under the public land laws, and
- (5) You prove by a preponderance of the evidence that you used and occupied in a substantially continuous and independent manner, at least potentially exclusive of others, for five or more years.

43 CFR 2568.90(a). The same restrictions applicable to Native allotment applications submitted under the Alaska Native Allotment Act apply to Veteran allotment applications submitted during the 18-month period. See David O. Osterback, 169 IBLA 230, 233 (2006), Burkher M. Ivanoff, 169 IBLA at 87. Thus, a veteran who claimed lands not open to appropriation is not entitled to apply for an allotment under ANVAA, and a veteran whose use and occupancy began after the repeal of the Alaska Native Allotment Act cannot be eligible for an allotment under ANVAA. Burkher M. Ivanoff, 169 IBLA at 87; Bart G. Ahsogeak, 167 IBLA 148, 153 (2005).

[2] We find the facts clear. The 160 acres sought by Sheldon were subject to Presidential Proclamation 37, 32 Stat. 2025 (Aug. 20, 1902), establishing the Alexander Archipelago Forest Reserve and reserving from entry, settlement, and sale, *inter alia*, Kuiu Island.^{4/} Among those 160 acres is an area of 4.96 acres, identified as Home Site 332, later excluded from the withdrawal and restored to entry by Executive Order No. 6959 (Feb. 4, 1935). Subsequently, all unreserved public lands in Alaska were withdrawn, subject to valid existing rights, from all appropriation and disposition effective December 14, 1968, by PLO 4582. 34 FR 1025 (Jan. 23, 1969). To qualify for a Veteran allotment, Sheldon must show that his own qualifying use and occupancy of the 160 acres sought began when these lands were “vacant, unappropriated, and unreserved.” See 43 U.S.C. § 1629g(a)(1) (2000).

Sheldon asserts that “because Alaska Natives possessed and occupied my allotment land, that land was not included in the Tongass National Forest and when the possessory rights of Alaska Natives were extinguished in 1971 by [ANCSA], this allotment land was restored to the public domain,” and therefore was available for his allotment claim. (Appellant’s Ex. A, Affidavit at 2 ¶ 12.) The Board addressed similar arguments in Larry M. Evanoff, 162 IBLA 62 (2004). In that case, Evanoff filed for an allotment under ANVAA of lands within the Chugach National Forest. He argued that the subject lands were, by virtue of the possessory rights initiated by his Alaska Native family members prior to the date of the proclamation establishing the Chugach National Forest, not “public land” and were thus excluded from the withdrawal effected by the proclamation. He also asserted that the term “public land” does not include any land to which any claims or rights of others have attached and also claimed that the lands were restored to entry under ANCSA. We rejected his arguments for the following reasons:

^{4/} This forest reserve was later merged into the Tongass National Forest by Executive Order 908 dated July 2, 1908. The withdrawal from entry and appropriation remains effective.

The 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. See Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278-80, 285 (1955); Akootchook v. United States, 747 F.2d 1316, 1320 (9th Cir. 1984), cert. denied, 471 U.S. 1116 (1985); United States v. Flynn, 53 IBLA [208], 225, 88 I.D. [373,] 382 [(1981)]; Myrtle M. Jensen Shanigan, 29 IBLA 255, 257 (1977); Louis P. Simpson, 20 IBLA 387, 392-94 (1975); Terza Hopson, 3 IBLA 134, 143 (1971).

* * * * *

In order to convert the inchoate preference right protections of Native use and occupancy into a vested property right for a particular tract of land, the Alaska Native had to couple qualifying use and occupancy with the actual filing of a Native allotment application. United States v. Flynn, 53 IBLA at 234, 88 I.D. at 387, and cases cited therein. Appellant repeatedly asserts that the rights of his family members arose only from possession of the subject lands. He provides no evidence of the filing of a Native allotment application by any relative for the lands in question. Therefore, we must conclude that the subject lands were public land at the time, and within the meaning, of the 1907 Proclamation, and not excepted from the reservation. See Akootchook v. United States, 747 F.2d at 1319-20; United States v. Blendaur, 128 F. 910, 913 (9th Cir. 1904).

Larry M. Evanoff, 162 IBLA at 68-69 (footnote omitted).

We further observed that use and occupancy of public land by a forebear, while the land was open to entry or settlement, does not create any right that excepts the land from a withdrawal in favor of an applicant who may have initiated independent use and occupancy subsequent to the withdrawal and that possessory rights are personal and uninheritable, and thus extinguished at death. Id. at 69-70; see also Akootchook v. United States, 747 F.2d at 1167 (“[t]he right to an allotment is personal to the applicant and not a communal right.”) Consequently, we held: “BLM correctly determined that the subject lands were not ‘vacant, unappropriated, and unreserved,’ within the meaning of 43 U.S.C. § 1629g(a)(2) (2000), at the time appellant initiated his personal use and occupancy thereof. As such, they are not available pursuant to ANVAA.” 162 IBLA at 70; see also Andrew Evan, 164 IBLA 56, 63 n.7 (2004).

[3] This allotment application essentially involves two parcels totaling

160 acres. One is defined as Home Site 332, an area of 4.96 acres withdrawn from entry in 1902, restored to entry in 1935, and withdrawn again in 1968. The second parcel includes the remainder of the land sought under the allotment application. These lands were withdrawn from entry in 1902. As emphasized in the Evanoff case, Sheldon must show that the lands in this second parcel, withdrawn in 1902, were “vacant, unappropriated, and unreserved” when he initiated his personal use and occupancy, whether it was in the 1950’s or 1977. He cannot make this showing. Since the lands were unavailable, Sheldon’s application with respect to the larger parcel fails as a matter of law.

Regarding the 4.96 acres of Home Site 332, we find that BLM properly concluded that these lands were withdrawn in 1968 under PLO 4582. Sheldon objects to the regulatory use of this date. As we have stated, recognition of this date in 43 CFR 2568.90(a)(4) does no more than provide notice to applicants that, after this date, public lands in Alaska were unavailable for entry under the Alaska Native Allotment Act because of the withdrawal under Public Land Order 4582.^{5/} See Burkher M. Ivanoff, 169 IBLA at 88. This regulatory provision neither modifies nor replaces the ANCSA date of December 18, 1971.

[4] BLM, in its answer, asserts that Sheldon’s affidavit does not create a material issue of fact because it does not present a persuasive explanation of error in identifying 1977 as the beginning date of Sheldon’s use and occupancy. BLM cites Andrew Petla, 43 IBLA 186 (1979), wherein we stated that when “an application is rejected by BLM for the reason that the applicant’s own declaration of material facts demonstrates conclusively that the application must be rejected as a matter of law, an effort on appeal to revise, amend, or deny such facts will not be considered by this Board absent a persuasive explanation of error in the application.” 43 IBLA at 192.^{6/}

We agree that Sheldon’s affidavit does not constitute a persuasive explanation of error. His application presents a history of ancestral and personal use and occupancy consistent with the historical account he provided in the very detailed cover letter to his application. In the Reply, he refers to the affidavit as support for the claim that his wife mistakenly provided 1977– the date that together they first occupied the land – as the beginning date of his occupancy and avers to sometime in the 1950’s as the actual start date. However, Sheldon’s cover letter provides a chronological history of the family’s use and occupancy of the land and mentions only

^{5/} We pointed out in Joan A. (Anagick) Johnson, 159 IBLA at 122, that the Secretary issued PLO 4582 in anticipation of ANCSA to preserve the status of Alaska lands.

^{6/} In Petla the applicant was given an opportunity to explain the difference in dates given in the application and in his appeal, which he failed to do. 43 IBLA at 191.

one trip he made to the land prior to 1977. We are unpersuaded that this attempted explanation of error reveals a material issue of fact now in dispute.

Moreover, even if we accepted as fact the historical scenario described in Sheldon's Reply, nowhere does he allege that his use and occupancy was "substantial actual possession and use of the land" as an independent citizen, "potentially exclusive of others," rather than as a dependent child accompanied by and under the supervision of a parent. 43 CFR 2561.0-5(a); see Andrew Petla, 43 IBLA at 192-93. According to his only detailed account of use before 1968, attached to the allotment application, Sheldon visited the land on only one occasion before 1968, when, at age 15 or 16, he accompanied his father to hike and picnic. Even in the account Sheldon provides in his later affidavit and the one included in his Reply, Sheldon used and occupied the land with his father beginning when he was under 10 years of age and continuing until he was 20 and not independently and potentially exclusive of others.

As all of the lands Sheldon applied for were unavailable for selection, we conclude that BLM properly denied Sheldon's allotment application. Furthermore, even assuming the truth of the relevant facts pertaining to use and occupancy, as described on appeal, we find no issues of material fact necessitating a hearing and conclude that Sheldon's application is deficient as a matter of law. Therefore, we reject appellant's claim for a hearing. See Boy Dexter Ogle, 140 IBLA 362, 371-72 (1992), and cases cited.

To the extent Sheldon has raised other arguments in this case, they have been considered and rejected.

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.

Christina S. Kalavritinos
Administrative Judge

I concur:

David L. Hughes
Administrative Judge