

INTERIOR BOARD OF LAND APPEALS

United States

v.

Heirs of Thomas Bennett

144 IBLA 371 (June 25, 1998)

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UNITED STATES
v.
HEIRS OF THOMAS BENNETT

IBLA 94-872

Decided June 25, 1998

Appeal of a Decision by Administrative Law Judge John R. Rampton, Jr., holding a Native allotment applicant entitled to an allotment. A-0842.

Reversed, Native allotment application rejected.

1. Alaska: Native Allotments

Although a Native filing an allotment application for vacant, unreserved public lands prior to 1935 was not required by statute or regulation to establish 5 years of substantially continuous use and occupancy, when the land was withdrawn at the time the application was filed the applicant was required to establish occupancy prior to withdrawal of the land to establish a preference right.

2. Administrative Authority: Generally—Alaska: Native Allotments

As long as legal title to public lands remains in the United States, the Secretary of the Interior is not estopped by principles of res judicata or finality of administrative decision from correcting or reversing an erroneous decision by his subordinates or predecessors.

3. Alaska: Native Allotments—Evidence: Preponderance—Evidence: Prima Facie Case

In a Government contest of a Native allotment application, the Government bears the burden of presenting sufficient evidence to establish a prima facie case of invalidity, and the Native applicant bears the burden of proof by a preponderance of the evidence once a prima facie case is established.

4. Alaska: Native Allotments

In order to establish a preference right to an allotment of land previously withdrawn for a national forest, a Native applicant must establish prior occupancy of the land. Such occupancy necessarily requires substantially continuous use and occupancy at least potentially exclusive of others. Use by a Native of land occupied by third parties, who erected and used the structures thereon under claim of title, does not establish Native occupancy at least potentially exclusive of others.

APPEARANCES: Regina L. Sleater, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management; Robert A. Maynard, Esq., Office of the General Counsel, U.S. Department of Agriculture, Juneau, Alaska, for the U.S. Forest Service.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Bureau of Land Management (BLM) has appealed from an August 8, 1994, Decision of Administrative Law Judge John R. Rampton, Jr., finding that the heirs of Thomas Bennett are entitled to a certificate of allotment pursuant to the Alaska Native Allotment Act of May 17, 1906 (Native Allotment Act), as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed December 18, 1971, Alaska Native Claims Settlement Act, § 18(a), 43 U.S.C. § 1617(a) (1994), subject to pending applications). Judge Rampton's Decision was issued after an evidentiary hearing. ^{1/}

This appeal involves a Native allotment application filed by Thomas Bennett (A-0842) with the General Land Office (GLO), predecessor to BLM within the U.S. Department of the Interior, in August 1909. (Ex. 1.) The application described unsurveyed lands withdrawn for the Tongass National Forest on February 16, 1909, by Presidential Proclamation No. 846. (Ex. 3.) The applicant claimed Native occupancy since 1900 on the application form. The application was initially approved by the Secretary of the Interior on June 13, 1910. (Ex. 2.)

A survey of the allotment was subsequently made in 1914 (Ex. 4) and the applicant was later notified that certain land would be excluded from the allotment subject to the right of appeal. (Ex. 8 at 4.) It appears that the applicant, acting through his attorney, consented to this exclusion. (Ex. G.) Subsequent to the report by the Chief of the Field Division on February 27, 1922, that the allotment had been surveyed, the Commissioner of the GLO directed the Field Division to have an investigation made and prepare a report as to whether the application should be

^{1/} Exhibits introduced into evidence at the hearing are identified by consecutive numbers (BLM exhibits) and consecutive letters of the alphabet (Contestee's exhibits).

allowed, citing the recently published regulations at 48 L.D. 70. (Ex. 7.) In a report to the Commissioner dated August 16, 1922, which was approved by the Chief of the Field Division on September 16, 1922, the field examiner noted that "[t]he improvements on this allotment consist of three buildings, all of them unoccupied, being erected by a cannery or saltery which was located there many years ago." (Ex. 8 at 2.) Finding that none of the improvements were erected by the applicant, who had a "substantial dwelling house" in Sitka, the report concluded that Bennett had not made sufficient use of the allotment to entitle him to approval and recommended that the application be held for rejection. *Id.* at 2-3. Thereafter, by letter dated November 22, 1922, the Commissioner directed the Register and Receiver at the local land office at Juneau, Alaska, to notify Bennett that the allotment application was held for rejection pending an opportunity for Bennett to show cause within 60 days why it should not be rejected. (Ex. 5.) It appears that no action was taken by the applicant in response to the show cause notice (Ex. 10) and that, hence, the approval of the allotment application was revoked and the application was rejected by Decision of March 12, 1923, signed by the Commissioner and approved by the First Assistant Secretary. (Ex. 11.)

The Bennett Native allotment application was subsequently reinstated by BLM in March 1981 in view of the issue in this case of the sufficiency of Bennett's occupancy and the fact that no opportunity for a hearing had been provided in accordance with the due process rights of the applicant. *See Pence v. Kleppe*, 529 F.2d 135, 143 (9th Cir. 1976). ^{2/} A contest was

^{2/} Section 905(a) of the Alaska National Interest Lands Conservation Act (ANILCA) provides generally that Native allotment applications pending before the Department on or before Dec. 18, 1971, are either approved or, in certain situations, subject to adjudication under the Native Allotment Act. 43 U.S.C. § 1634(a) (1994). This Board has noted that the legislative history of section 905 of ANILCA indicates that the phrase "or before" was added to clarify that "applications which were erroneously rejected by the Secretary prior to December 18, 1971, without an opportunity for a hearing shall be approved or adjudicated by the Secretary pursuant to the terms of the section." *Frederick Howard*, 67 IBLA 157, 160 (1982), citing S. Rep. No. 413, 96th Cong., 1st Sess. 238 (1979), reprinted in [1980] U.S.C.C.A.N. 5182; *see Mary Olympic v. United States*, 615 F. Supp. 990 (D. Alaska 1985). Because Bennett's allotment lies within the Tongass National Forest which was withdrawn prior to 1968, it was not actually subject to legislative approval or adjudication under ANILCA, as a prerequisite for approval of Native allotments under that Act is that the lands were unreserved as of Dec. 13, 1968. *See* 43 U.S.C. § 1634(a) (1994).

The location of the allotment on lands within the Tongass National Forest does not itself require rejection of the application where, as here, occupancy was assertedly commenced prior to withdrawal. It is well settled that a Native applicant may be granted an allotment on withdrawn land if all other requirements have been met and the applicant commenced the required use and occupancy prior to the withdrawal. *United States v. Heirs of Elsie Hansen Wilson*, 128 IBLA 252, 254 (1994); *United States v. Estate of George D. Estabrook*, 94 IBLA 38, 42 (1986); Circular 491, 50 L.D. 27, 48 (1923).

initiated by BLM to provide an opportunity for a hearing. See Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978). The Board has held that a hearing may be required even if an applicant was notified of an earlier rejection and no appeal was taken, since lack of compliance with the due process requirements of Pence vitiates the administrative finality that would otherwise attend the rejection. See United States v. Heirs of Jake Yaquam, 139 IBLA 376, 380 (1997); Heirs of George Titus, 124 IBLA 1, 4 (1992). ^{3/}

Accordingly, on September 23, 1992, BLM initiated a contest of Bennett's allotment application, claiming that Bennett did not make satisfactory proof of substantially continuous use and occupancy of the claimed allotment land for a period of 5 years; that Bennett did not make "substantial actual use and occupancy of the claimed allotment land that was at least potentially exclusive of others;" that Bennett's heirs did not provide sufficient evidence of use and occupancy in response to BLM's July 31, 1990, notice "apprising him of the need to file additional evidence of use and occupancy;" and that the official case file for the Native allotment application of Bennett, Serial No. A-0842, "does not contain satisfactory proof to establish that he made substantially continuous use and occupancy of the allotment claim." Administrative Law Judge Rampton conducted a hearing in the matter in Juneau, Alaska, on June 10, 1993.

After the conclusion of the contest hearing, the Administrative Law Judge issued his decision in this case. Rather than ruling on the merits of the sufficiency of Bennett's use and occupancy under the Native Allotment Act, the Administrative Law Judge found that the Department had already exercised its discretion to approve the allotment at the time it was approved in 1910, that Bennett had obtained equitable title to the allotment as a result of the approval, and that only the ministerial act of issuing a certificate of approval remained to be performed. Accordingly, he held that the allotment should be issued.

As a threshold matter, BLM has challenged this finding on appeal and asserts that until the time that legal title is conveyed the Department has the duty to review the prior conclusion that Bennett qualified for an allotment when questions arise as to the validity of the application. With respect to the merits of Bennett's claim of use and occupancy of the allotment prior to February 1909, BLM asserts that the application must be rejected because there is no evidence of record to support such occupancy

^{3/} We have also recognized that not every allotment which was rejected without a hearing was erroneously rejected in violation of the applicant's due process rights thus requiring reinstatement for purposes of a hearing. Heirs of George Brown, 143 IBLA 221, 228-29 (1998). No hearing is required, e.g., when an allotment application is legally insufficient on its face. Thus, the Board has held that when "BLM determines a claim or application must be rejected as a matter of law, assuming the truth of all relevant matters stated in the claim or application, it may reject the claim or application without a hearing." Donald Peters, 26 IBLA 235, 241 n.1, 83 I.D. 308, 311 n.1 (1976), reaff'd, Donald Peters (On Reconsideration), 28 IBLA 153, 83 I.D. 564 (1976).

other than the application itself. It is contended by BLM that the record contains substantial evidence of occupancy by non-Natives until at least 1910 when the Brady family ceased using their cabin. Further, BLM asserts that any evidence of Native use from 1900 to 1910 involves community use of the tract for fishing and other activities rather than qualifying use by the applicant.

The Administrative Law Judge's ruling was issued in response to Contestees' contention at the hearing that the 1910 approval of the allotment application was final for the Department and that thereafter the Department had no discretion to reject the application. Contestees cited the opinion in Frances Degnan v. Hodel, A87-252 Civ. (D. Alaska, Feb. 16, 1989), reaffirmed (May 6, 1989), rev'g. Clarence Lockwood, 95 IBLA 261 (1987), in support of their position. Although the Degnan case was cited by the Administrative Law Judge in his decision for the principle that Departmental approval of an allotment application vests equitable title in the applicant and deprives the Department of discretion to diminish that title, we find this case to be distinguishable from the present appeal. In a recent decision we noted that the Degnan ruling reversing the imposition on a Native allotment of a right-of-way for part of the Iditarod Trail, a National Historic Trail, pursuant to the National Trails Systems Act, 16 U.S.C. § 1242 (1994), was predicated on a finding that the allotment applicant had established a vested preference right by demonstrating compliance with the use and occupancy requirements of the Native Allotment Act. Edward N. O'Leary, 132 IBLA 337, 349 (1995) (A.J. Burski concurring). The finding that a qualifying Native allotment applicant establishes a right which cannot be diminished by imposition of a right-of-way is properly distinguished from a holding that the Department lacks jurisdiction to reconsider the factual basis for approval of the Native allotment itself. Id. at 349-51.

[1] The Administrative Law Judge found that once the allotment was approved the Department retained only the ministerial authority to issue a certificate of approval of allotment and had no further adjudicative authority on the basis of a reading of contemporaneous regulations governing Native allotments. See 37 L.D. 615, 616 (1909). The regulatory proviso cited by the Administrative Law Judge made no direct reference to adjudication of the occupancy of the allotment applicant, noting that those "found correct in form, and without valid adverse claims, will be placed on a schedule which will be submitted to the Department for approval." 37 L.D. at 616, ¶ 8. This is understandable when it is recognized, as we noted in Heirs of George Brown, 143 IBLA 221 (1998), "that it was not until 1935 that the Department required the completion of 5 years use and occupancy as a precondition for obtaining any allotment of land. See 55 L.D. 282, 285 (1935)" and "it was not until 1956 that the statute was changed 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.' See § 3 of the Act of Aug. 2, 1956, 70 Stat. 954, 43 U.S.C. § 270-3 (1970)." Heirs of George Brown, 143 IBLA at 229 &

n.9. 4/ Thus, in 1909 the allotment applicant could claim almost any tract of land not withdrawn, segregated, or subject to adverse claim. The Native Allotment Act, however, also provided that: "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." Alaska Native Allotment Act of 1906, 34 Stat. 197. Because the land described in Bennett's application had previously been withdrawn for the Tongass National Forest in February 1909, Bennett had to rely on the assertion of a preference right based on his alleged occupancy commencing in 1900. Accordingly, it was necessary to adjudicate the application.

[2] Where the Department discovers that a pending public land grant may not be in accordance with the terms and conditions set forth by Congress, the Department's authority to reverse such an erroneous decision, so long as legal title remains in the Government, is well-established, and the Secretary is not estopped by principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors. Hawley v. Diller, 178 U.S. 476, 489-90 (1900) (timber land entry); Orchard v. Alexander, 157 U.S. 372, 381-82 (1895) (homestead entry); Knight v. United Land Association, 142 U.S. 161, 178 (1891) (erroneous survey); Schade v. Andrus, 638 F.2d 122, 124-25 (9th Cir. 1981) (purchase of Alaska lands for "productive industry"); Ideal Basic Industries v. Morton, 542 F.2d 1364, 1367-68 (9th Cir. 1976) (mining claim patent); United States v. U.S. Borax Co., 58 I.D. 426 (1943) (whether land was valuable for sodium borate rather than calcium borate, subjecting the land in question to leasing under the Mineral Leasing Act of 1920 rather than location under the Mining Law of 1872). This remains so even where "equitable title" has purportedly passed. United States v. Shearman, 73 I.D. 386, 434 (1966), aff'd sub nom. Reed v. Morton, 480 F.2d 634 (9th Cir.), cert. denied, 414 U.S. 1064 (1973) (desert land entry); Edward N. O'Leary, 132 IBLA at 343, 348-352 (Burski, A.J., concurring) (Native allotment); Ramona Field, 110 IBLA 367 (1989) (Native allotment); see Anne Lynn Purdy, 128 IBLA 161 (1994). Accordingly, in the context of this case, we find that BLM properly initiated a contest of Bennett's allotment application and we proceed to review the evidence of record presented at the hearing.

It appears from the record that Bennett's allotment application claims approximately 20 acres of land located on the western shore of Baranov

4/ As originally enacted, the Alaska Native Allotment Act of May 17, 1906, Ch. 2469, 34 Stat. 197, provided in pertinent part: "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 * * *. 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."

Island, about 12 miles south of Sitka, Alaska. The allotment is situated along the northern bank of a series of rapids comprising a channel which is bounded on either side by promontories of Baranov Island. The channel carries fresh water from an interior lake, Redoubt Lake (also known as Deep Lake), into Redoubt Bay, which empties into Sitka Sound and the Pacific Ocean.

The bay and the lake derive their name from the term for a fort, i.e., a "redoubt." Russians settled the location as early as 1809; their community became known as the "Ozerskoi Redoubt." (Tr. 110-11.) The Ozerskoi Redoubt became a support community for fur traders (Tr. 111), and eventually sustained a sawmill, facilities for salting and curing fish, a tannery, a flour mill, and other supporting enterprises for a community that swelled to about 300 people during fishing seasons. (Tr. 111, 115-17.)

The Russian settlement declined in the late 1850s. Prior to the purchase of Alaska by the United States from Russia, the buildings and improvements on the site were sold to the American/Russian Company of San Francisco in 1867. (Tr. 118-19.) At the time of this transfer, the Ozerskoi Redoubt encompassed 160 acres located on both northern and southern promontories of Baranov Island that bound the channel between the lake and the bay, including several islands located in the channel. (Ex. 26, Figures 3 and 4.) Bennett's 20-acre allotment falls within Ozerskoi Redoubt boundaries on the northern side of the channel, and comprises about 12 percent of the total acreage within the Ozerskoi Redoubt.

Between 1867 and 1900 three separate commercial enterprises successively occupied the Ozerskoi Redoubt, and maintained facilities for processing and packing salmon there. (Tr. 121-22; Ex. 26 at 13-14.) In 1900, the Baranov Packing Company deeded its interest in the Ozerskoi Redoubt to the Territorial Governor, John Brady. (Tr. 122-24, 126-28; Ex. 26, App. B.) John Brady's heirs eventually conveyed his interest in the property to Sheldon Jackson College. (Tr. 129; Ex. 16.) Fee title to the land has been found by BLM to exist in the Federal Government (Ex. 16) and Sheldon Jackson College has relinquished any claim of title to the Ozerskoi Redoubt. (Ex. 23.) ^{5/}

^{5/} In a letter to the President of Sheldon Jackson College dated Jan. 23, 1990, the Acting State Director of the Alaska State Office, BLM, took the position that fee title to the Ozerskoi Redoubt resides in the United States, rather than the College. According to that letter,

"Documents in the form of a certificate were issued to individuals who received fee-simple title to their property in 1867. These properties were listed on Inventory 'C' which was made a part of the transfer of Alaska to the United States. (H.R. Ex. Doc. No. 125, 40th Cong., 2d Sess. (1868)). The Redoubt property was not included in Inventory 'C.'"

"In similar situations, the courts held the occupants had, at best, only a possessory right to the buildings and no title whatsoever in the land."

(Ex. 16 (citations omitted).) See Pan Alaska Fisheries, Inc., 74 IBLA 295 (1983).

The allotment was surveyed in September 1914 by U.S. Surveyor JNO. P. Walker. Walker located the allotment "on the east side of Redoubt Bay near its south end, and north of Deep Lake and also north of the north channel of the outlet to the lake, * * *." The field notes of the surveyor disclosed the following improvements:

[A] cheap frame house about 12 X 20 ft., situated on the S.W. end of the claim, around which is a small clearing. A board walk-way, on framing anchored in piles of rock, about 60 ft. long forming a dock for the landing of small boats.

The clearing of the point, on which the house is situated, was done many years ago by a company, of which ex-Governor Brady was the head, at which time a cannery was operated at this point. The cannery was situated where Bennett's house now stands, and was destroyed by fire six or seven years ago.

(Ex. 4 at 9-10.) ^{6/} Walker assessed the land as chiefly valuable for "possible water power which could be developed from the water fall where it empties from Deep Lake into the bay, and from the fishing privileges in Redoubt Bay, Deep Lake, and the passage way for salmon from the bay to the lake." Id. at 10. According to Walker's notes, Redoubt Lake was "an ideal spawning place for salmon, and the short swift streams from the lake to the bay are favored passage-ways, and afford excellent fishing during the summer season." Id. He surmised that Bennett valued the allotment for its fishing privileges. Walker described Bennett as follows: "Thomas Bennett, the allottee, is an Indian native of Alaska, about 55 years old, speaks little English, has a stiff knee, owns a gas boat and lives at Sitka. He uses the house on the claim for temporary quarters in the fishing season. Bennett bears a good reputation and is a thrifty Indian." Id.

The August 16, 1922, report of George Parks, Chief of the Juneau, Alaska, Field Division, prepared in response to the request of the Commissioner, GLO, provided further background on the Bennett application:

^{6/} On Jan. 31, 1914, the Commissioner, GLO, issued a circular which expressly required that, before the applications could be placed on the schedule for approval, survey of the allotment should be completed. In addition to surveying the lands in the allotment application, the surveyor was given certain additional responsibilities:

"Such surveys may be made by authorized surveyors under salary, designated by the surveyor general or supervisor. The errors of a preliminary survey or description will be corrected in the final one, and before executing the latter the surveyor shall satisfy himself as to the good faith and qualifications of the allottee at that time, to hold the same, and shall report thereon in his returns; and if the native be found no longer entitled under said law, the surveyor general will notify the register and receiver, who will then require the allottee to show cause within 60 days why the allotment should not be cancelled by the department."

43 L.D. 88, 89 (1914) (emphasis supplied).

Redoubt Lake, shown on the chart, is considered one of the finest red salmon spawning lakes in that part of Alaska. There is an outlet from the Lake to Redoubt Bay in the form of a creek approximately 250 feet long, having four different branches at its outlet. This creek has a fall of some 15 feet from the lake to high tide on Redoubt Bay. * * *

The improvements on this allotment consist of three buildings, all of them unoccupied, being erected by a cannery or saltery which was located there many years ago. None of the improvements were built by the allottee. No land is in cultivation and if there is any residence maintained on the land it must be at infrequent intervals. Mr. Bennett has a substantial dwelling house and is known to make his home at Sitka, Alaska. I endeavored to get in touch with Mr. Bennett while in the vicinity but was unsuccessful as he was away fishing.

* * * I do not believe Mr. Bennett has made sufficient use, if any, of the allotment to entitle him to an approval thereof. I therefore respectfully recommend that the application be held for rejection and the survey canceled.

(Ex. 8 at 2-3.)

Stanley Davis, a Forest Service archaeologist and former head of the cultural source management program in the Chatham area of the Tongass National Forest, which includes the Ozerskoi Redoubt, testified on behalf of BLM. (Tr. 78.) From 1979 up to the time of the hearing, Davis had intermittently conducted archaeological and historical work pertaining to the Ozerskoi Redoubt; he is responsible for compiling much of the data and information pertaining to its history during the 19th century. In 1982, Davis and a colleague, Ty Dilliplane, wrote a research paper pertaining to the "Historic Ozerskoi Redoubt: Background Information and Archeological Testing." (Ex. 22.) More recently, Davis completed a research paper entitled "Russian America's Ozerskoi Redoubt." (Ex. 26.)

Davis identified the area of the Ozerskoi Redoubt on Exhibit 24 (which is a copy of the master title plat identifying the location of Native allotment application A-0842) as an area surrounding the area identified as Native Allotment Application A-0842. (Tr. 137.) Figure 4 of Exhibit 26, entitled "Project Area Map," reveals a more detailed map of the Redoubt area which indicates that, in addition to lands located north of the channel, the area crosses the channel to include the Baranov Island promontory south of the channel, and includes three islands located in the middle of the channel. (Tr. 138.) Figure 4 also reveals that the part of the Redoubt area north of the channel actually contains two points which jut out into the water, one west of the rapids entering Redoubt Bay and one east of the rapids leaving Redoubt Lake.

Davis also testified concerning communications he had with Hugh Brady, son of John Brady, Sr., former Territorial Governor of Alaska. Davis testified that in 1980, when Brady was in his late eighties,

Brady and he traveled by boat from Sitka to the point at Ozerskoi Redoubt Brady remembered as the location where he spent summers with his father. (Tr. 131-36, 152.) According to Davis, they anchored the boat in the out-flow from a fresh water lagoon along the point of land "occupied by the Russians and later the canneries and salteries." (Tr. 131.) Brady told Davis that his father built a cabin on that spot about 1901, and the family spent summers there until about 1910. (Tr. 132-33.) Brady also told him that "many" people from Sitka would fish and pick berries at the point. (Tr. 133-34.) Describing use and occupancy of the tract, Brady indicated to Davis that "nobody specifically used it. Everybody * * * from Sitka; and there was sport fishing people, people collecting berries, but no particular person." (Tr. 136.) Davis testified that Brady told him the house "was on the Russian site itself." Id.

In support of Bennett's use and occupancy of the land, Contestees introduced five affidavits taken from heirs of Thomas Bennett, who were unable to attend the hearing due to death in the family or illness. (Tr. 158-59.) Two of Thomas Bennett's grandchildren, both children of his son Charles, signed affidavits in June 1993 attesting to their memory of their father's and grandfather's subsistence use of the land on Redoubt Bay.

Joseph Bennett, born in 1918 and the oldest living son of Charles Bennett, remembered fishing and hunting with his father and grandfather as a young boy, "for subsistence purposes." His affidavit states:

During the late 1920's and early 1930's, I would fish and hunt with my father and my grandfather as a young boy, for subsistence purposes. We would go to my grandfather's land at the opening of Redoubt Bay and fish for sockeye during the summer and trap mink during the winter. * * * My grandfather would live on the land in a cabin during the summer months. He would dry and salt the fish that he caught. He would also kill deer and dry the meat to eat during the winter. He used that land up until his cabin began to deteriorate and the Government took the land that he owned away from him in 1922. * * * Everyone knew that the land at Redoubt Bay was my grandfather's land and treated it with respect. My grandfather controlled the fishing in that area. It is my understanding that my grandfather would control the amount of fish taken from the streams near his land.

(Ex. A at 1-2.)

The affidavit of Elsie Bennett John, born in 1916, generally corroborates her brother's affidavit, and states:

I was born June 16, 1916, near the cannery in Chatham Straits. I am the granddaughter of Thomas Bennett and the daughter of Charles Bennett. I know that my grandfather used the land that he applied for as his Native Allotment. He used the land all his life.

I remember my father going back and forth from Redoubt Bay to the Chatham Cannery in his fishing boat, the Redoubt. My father often helped my grandfather hunt and fish for subsistence food for our family. I remember my father and grandfather going to the land at Redoubt Bay to fish for sockeye. They also killed deer and fur seal at Redoubt Bay. My family would then salt and dry the meat to eat during the wintertime. In addition, my father built his boat to help my grandfather bring the fish he caught in Redoubt Bay to the Chatham Cannery.

In the fall, my grandfather and father put up most of our subsistence food at the allotment. During this time, they would salt and dry the fish for the winter. In the spring, when I was very young, maybe 5 or 6 years old, I would go with my parents, my brother and sisters, and my grandparents to the land at Redoubt Bay. I remember staying in a tent on my grandfather's land. When my family went to my grandfather's land there was not room enough for all of us to stay in my grandfather's cabin. That is why my parents and I would sleep in the tent. * * * My father continued to use my grandfather's land after my grandfather's death because it was our family's traditional fishing and hunting area. * * * Although I was never at this land in the winter, I heard many stories about my grandfather trapping mink and other animals at his land during the wintertime. My father also trapped there during the winter.

(Ex. B at 1-2.)

Present at the hearing to testify on behalf of the Bennett heirs was Eugene King, Charles Bennett's nephew. (Tr. 179.) At the time of the hearing King was 75 years old. (Tr. 178.) During his teen years (which would have been during the mid-1930's), King fished with Charles Bennett for about 3 years in many areas, including Redoubt Bay. (Tr. 180.) King testified that, while fishing in Redoubt Bay, Bennett had pointed out to him where Thomas Bennett's house had been, on the left shore as they were boating towards Redoubt Lake. Further, King indicated Bennett spoke of the land as "our land," and talked of asking trappers who were unknown to him to leave. (Tr. 182.) According to King, Bennett did not acknowledge "white ownership" or "white occupation" of the land where the cabin had been. (Tr. 182-83.) King indicated he never heard him mention that Brady had a claim to the land. (Tr. 184.) King stated that the Bennetts used the land both for fishing and for trapping beaver and mink, as well as for picking salmon berries. (Tr. 184-85.)

[3] In a Government contest of a Native allotment application, the Government bears the burden of presenting sufficient evidence to establish a prima facie case of invalidity, and the Native applicant bears the burden of proof by a preponderance of the evidence when a prima facie case has been established. United States v. Heirs of David F. Berry, 127 IBLA 196, 205 (1993); United States v. Estabrook, 94 IBLA 38, 45, 51-53 (1986). The Department has consistently ruled that, in order to establish entitlement under the 1906 Act, the applicant must affirmatively show that he or

she has met the requirements of the Act and its implementing regulations. United States v. Galbraith, 134 IBLA 75, 100-101, 102 I.D. 75, _ (1995). Under 1956 amendments to the Native Allotment Act which enacted into law "the substance of the Department's * * * regulations on the subject," (H.R. Rep. No. 2534, 84th Cong., 2d Sess. 4 (1956), the Act now requires an applicant to "make proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years in order to obtain an allotment." Allotment of Land to Alaska Natives, (Solicitor's Opinion, M-36662), 71 I.D. 340, 354-55 (1964).

Such use and occupancy contemplates substantial actual possession and use of the land, at least potentially exclusive of others. United States v. Rastopsoff, 124 IBLA 294 (1992). Departmental regulation 43 C.F.R. § 2561.05(a) defines the phrase "substantially continuous use and occupancy" as follows:

The term "substantially continuous use and occupancy" contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

[4] To establish such use and occupancy, an applicant need not have barred the use of his land by others. Rather, his use must be shown to have been potentially exclusive of others, meaning that his use has (or should have) resulted in a public awareness and acknowledgement of his superior right to the land, even in circumstances where others used it. United States v. Heirs of Jake Yaquam, 139 IBLA 376, 384 (1997); United States v. Heirs of David F. Berry, *supra*, at 209; United States v. Estabrook, *supra*, at 53. ^{7/}

Reviewing the evidence of record presented at the hearing, we find that BLM has submitted evidence that the principal occupants of the site from the early 1800's through 1910 were non-Native people who constructed the buildings and other improvements that were located on the site in that time period. Prior to acquisition of Alaska by the United States in 1867,

^{7/} In the Yaquam case the Board rejected the argument that in adjudicating, pursuant to section 905 of ANILCA, an allotment application which predated the regulatory and statutory amendments requiring 5 years of substantially continuous use and occupancy a different evidentiary standard should be used. 139 IBLA at 382-83. Indeed, section 905 of ANILCA, by its terms, requires adjudication of allotments pursuant to the terms of the Native Allotment Act of 1906, as amended. 43 U.S.C. § 1634 (1994). Although Bennett's application is not adjudicated pursuant to section 905 of ANILCA as noted above, we find the requirement of substantially continuous use and occupancy compelling in this case where, as noted above, the viability of the allotment application filed after withdrawal of the land requires establishment of a preference right based on occupancy.

the land within the application was part of a Russian settlement known as the "Ozerskoi Redoubt" which dated back to the early 1800's. This settlement included a sawmill, facilities for salting and curing fish, a tannery, a flour mill, and other supporting enterprises for a community that swelled to about 300 people during fishing seasons. (Tr. 111, 115-17.) In 1867, the buildings and improvements on the site were sold to the American/ Russian Company of San Francisco. (Tr. 118-19; Ex. 26 at 15.) It appears from the record that the tract was subsequently occupied by a succession of commercial fish processing facilities which acquired title to the improvements by deed from 1867 to 1900. (Tr. 121-22; Ex. 26 at 13-14.) In 1900, the last of these enterprises, the Baranov Packing Company, deeded its interest in the Ozerskoi Redoubt to the Territorial Governor, John Brady. (Tr. 122-24, 126-28; Ex. 26, App. B.)

There was testimony from archaeologist Stanley Davis that in 1980 he visited the site in the company of Hugh Brady, son of the former Governor, who was in his late eighties at the time. Hugh Brady remembered that his father built a cabin on the site about 1901 and that the family spent summers there until about 1910. (Tr. 132-33.) Hugh Brady also related that many people from the Sitka area would use the site for fishing and berrypicking, but that no particular person used it. (Tr. 133-34, 136.) Substantially continuous use and occupancy at least potentially exclusive of others is not generally established when the land is occupied under claim of title by a third party who has constructed improvements on the land. Evelyn Alexander, 45 IBLA 28, 35 (1980); see State of Alaska, 85 IBLA 196, 202 (1985); cf. United States v. O'Leary, 125 IBLA 235 (1993) (contest of Native allotment properly dismissed where allotment applicant provided evidence that he acquired the preexisting improvements on the tract). Thus, we find that BLM presented a prima facie case that the applicant and his heirs did not establish substantial actual use and occupancy at least potentially exclusive of others prior to withdrawal of the land in February 1909 for the Tongass National Forest.

The case for Contestees consisted of affidavits and testimony. The affidavit of Joseph Bennett, grandson of the applicant, introduced into evidence by Contestees, described his experiences fishing and hunting on the site with his father and grandfather as a young boy in the late 1920's and early 1930's. (Ex. A.) Elsie Bennett, granddaughter of the applicant who was born in 1916, related in her affidavit that she remembered her father and grandfather going to the land at Redoubt Bay to fish for salmon and hunt deer and seal. (Ex. B.) She recalled traveling to the allotment as a young child of 5 or 6 years of age. Id. She also remembered her grandfather's cabin on the land. Id. Eugene King, nephew of the applicant's son, testified to having fished in the vicinity of the land at Redoubt Bay in the 1930's with the applicant's son, Charles Bennett. (Tr. 180.) King also indicated that Charles Bennett showed him where Thomas Bennett's cabin had been located. (Tr. 181.)

Based on the evidence, we are unable to find that Contestees have overcome the prima facie case that Bennett did not occupy the allotment to the potential exclusion of others prior to the withdrawal of the land in 1909. Structures erected on the land prior to 1910 were constructed by

settlers at the Russian settlement, the fish processing firms which occupied the site subsequent to acquisition of Alaska from Russia, or the former Territorial Governor. Although there was Native use of the land prior to that time, it appears from the record that it was communal use and not potentially exclusive. This is not rebutted by Contestees' evidence of use and occupancy by Bennett in the 1920s and 1930s.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is reversed and the allotment application is rejected.

C. Randall Grant, Jr.
Administrative Judge

I concur.

Will A. Irwin
Administrative Judge