INTERIOR BOARD OF LAND APPEALS

Erling Skaflestad and Bonnie Skaflestad

155 IBLA 141 (June 27, 2001)

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ERLING SKAFLESTAD
BONNIE SKAFLESTAD

IBLA 98-33 Decided June 27, 2001

Appeal from a decision of the Alaska State Office, Bureau of Land Management, reinstating and approving a previously rejected Native allotment application. A-02494.

Reversed.

1. Public Lands: Special Use Permits-Title: Generally

Bona fide purchaser protection is generally limited to a purchaser of title to the land in good faith, for value, and without notice of an earlier unrecorded equitable interest or claim. A party holding a special use permit authorizing use of Federal lands for a specific purpose, subject to valid claims, has no claim of title to the land and, hence, is not entitled to protection as a bona fide purchaser against adjudication of outstanding claims of title.

2. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Res Judicata

Under the doctrine of administrative finality--the administrative counterpart of the doctrine of res judicata--when a party has had an opportunity to obtain review within the Department and no appeal was taken, or an appeal was taken and the decision was affirmed, the decision may not be reconsidered in later proceedings except upon a showing of compelling legal or equitable reasons, such as violations of basic rights of the parties or the need to prevent an injustice.

3. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

A decision rejecting a Native allotment application in 1928, after notice to the applicant and an opportunity to provide further information, on the basis of a field examination which disclosed no evidence of occupancy of the tract by the applicant

prior to withdrawal of the land, becomes a final Departmental decision when no appeal is taken. A request for reinstatement of the application filed in 1985, after valuable improvements have been placed on the land by a third party pursuant to a special use permit, alleging use and occupancy by the applicant 100 years previously which does not appear from the record to have been at least potentially exclusive, does not establish a fundamental injustice or inequity justifying an exception to the doctrine of administrative finality. In these circumstances, a BLM decision reinstating the application and approving the allotment is properly reversed.

APPEARANCES: William G. Ruddy, Esq., Juneau, Alaska, for the 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 GRANT

Erling and Bonnie Skaflestad have appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated August 8, 1997, approving the Native allotment application (A-02494) of the heirs of David Lawrence. Appellants are the holders of a special use permit (SUP) issued by the United States Forest Service (FS) which conflicts with the Native allotment. They own a cabin constructed on the land within the SUP.

On September 7, 1915, David Lawrence, who resided in Hoonah, Alaska, filed Native allotment application A-02494, seeking 160 acres of land, described by metes and bounds and marked on the ground with stakes, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970). 1/ The tract of land was described as being on the north shore of Neka Bay approximately 1 and 1/2 miles from the mouth of Neka Bay (on Chichagof Island). A survey of Lawrence's allotment claim (U.S. Survey (USS) No. 1183, Alaska) totaling 47.62-acres in section 13, T. 44 S., R. 59 E., Copper River Meridian, Alaska, was undertaken in 1920, approved by the Surveyor General's Office on March 25, 1921, and accepted by the General Land Office (GLO) on April 27, 1921.

The land had been withdrawn on August 20, 1902, subject to "valid right[s]," as part of "The Alexander Archipelago Forest Reserve" by Presidential Proclamation No. 37, and later incorporated into the Tongass National Forest. 32 Stat. 2025 (1902). 2/ On the face of his application,

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1/ Repealed effective Dec. 18, 1971, subject to pending Native allotment applications, by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1994).

2/ Since the land was withdrawn in 1902 and has remained withdrawn since that time, it could not be considered "unreserved on December 13, 1968." Consequently, Lawrence's application was not subject to legislative

Lawrence claimed that he had "occupied" the land, as the head of a family, beginning in 1895, when he was 16 years old. This occupancy was corroborated by the September 1, 1915, affidavit of William S. Sheakley and of Jack Moore. The latter affiant had a nearby allotment claim (A-02492). In a statement attached to the application, Charles W. Hawkesworth, Superintendent of Schools, Alaska School Service, U.S. Department of the Interior, noted that Lawrence "uses the land for garden purposes, but lives in the village of Hoonah." He also stated that "[n]o buildings are on the land aside from the remains of old houses used for smoking fish."

The GLO initially approved the application on October 11, 1917. Despite initial approval, there is no evidence that Lawrence's application was ever finally approved or an allotment issued pursuant to the 1906 Act as to either the 160 acres applied for or the 47.62 acres within the approved survey.

Thereafter, GLO undertook to further investigate the validity of Lawrence's claim. On June 29, 1924, J. A. Ramsey, a GLO special agent, interviewed Lawrence, who worked in a cannery at Port Althorp, about 60 miles from the claim: "The applicant stated that he had been unable to build a house on the land but that he had a foundation for a house and a garden thereon and that he expected to use the land for garden purposes." (Letter to Commissioner, GLO, from Ramsey (Ramsey Report), dated July 14, 1924, at 2.) Ramsey also examined the claim on the ground. He found no evidence of a foundation, but stated:

> [T]here were a few remaining poles of what appeared to have been a very old shack, and the vegetation indicated that there might at one time have been a small tract used for garden purposes; but there is no evidence of any occupation or use of the land for many years past.
>
> The greater part of the area is covered with a good growth of spruce timber, the garden spot being on a small sand spit on the south side of the tract along the shore of Neka Bay.

Id. In addition, Ramsey reported that he was unable to find anyone else "who knew of this applicant ever having occupied or improved this land in any manner whatever." Id. Among those interviewed was G. E. Good, a local teacher, who indicated that he had helped Lawrence "step off" the boundaries of his claim before his application was filed and indicated there were no improvements on the land at that time. Id. at 3. Based on all this, Ramsey recommended that Lawrence's application be rejected.

(fn. 2 continued)
approval pursuant to section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(1) (1994). United States v. Heirs of Bennett, 144 IBLA 371, 373 n.2 (1998); United States v. Rastopsoff, 124 IBLA 294, 299-300 (1992).

Subsequently, GLO notified Lawrence on November 18, 1924, that his allotment application was being held for rejection, subject to the right of appeal within 30 days. In the absence of any response by Lawrence, the Commissioner revoked GLO's earlier approval and finally rejected the application by decision approved by the First Assistant Secretary of the Interior on November 10, 1928. Lawrence died on January 17, 1935.

On April 1, 1985, the Bureau of Indian Affairs (BIA) asked BLM to reinstate the subject application. A form in the file indicates that BLM informally reinstated the application in January 1987 on the ground that applicant's asserted date of use and occupancy predated withdrawal of the land and that the application was previously rejected without a hearing for lack of evidence of use and occupancy. Subsequently, BLM received four affidavits, executed in 1989 and 1990, which attested to Lawrence's use and occupancy of the claimed land.

An affidavit was provided by William Osborne who declared that he learned of David Lawrence's use of the land from the elders of Hoonah and his family. Uses described included hunting and fishing and smoking of fish and game in a smokehouse, as well as growing food in a garden on the land beginning in the early 1890's. The affidavit of James Osborne, Sr., born November 30, 1920, states that David Lawrence was his grandfather, that affiant's mother (Fannie Fulton Osborne) told him of David's use of the land at Neka Bay. 3/ Further, affiant recites that David had a smoke house where he smoked fish and "a garden with potato[es], rutabaga[s], and carrots." In addition to the presence of salmonberries, blueberries, and high bush cranberries, James Osborne indicates that his grandfather had a special way to get food from the hemlock tree. An affidavit executed by Martha Davis indicates that her mother was Fannie Fulton Osborne. Affiant states that her grandfather was about 16 or 17 when he started to use the land at Neka Bay. 4/ Martha Davis' affidavit also states that her grandfather had a garden with potatoes and that the land was plentiful with salmon berries, blueberries, and high bush cranberries. Her affidavit also refers to use of the land to dig roots and "caucles" and to use of part of the hemlock trees in preparation of food. The affidavit of Deborah A. Dalton, born December 23, 1925, relates that she is the granddaughter of David Lawrence and can remember when her mother, Fannie (Fulton) Osborne, and grandfather, David Lawrence, told her how David had used the land at Neka Bay. Uses specifically mentioned in the affidavit include berry

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3/ The record casts doubt on the status of several affiants as descendants of David Lawrence. The BIA Order Determining the Heirs of David Lawrence, issued May 5, 1953, determined the heirs of David Lawrence on the basis of a hearing held on February 5, 1953, in Hoonah, Alaska. The descendants shown include two sons and the children of a deceased daughter. The names Osborne and Fannie Fulton do not appear on the list of heirs.

4/ There is some apparent inconsistency in the Martha Davis affidavit to the extent that she refers to her mother as the niece of David Lawrence, yet refers to the allotment applicant as her grandfather.

picking, using hemlock for food, and gardening to raise rutabagas, turnips, and potatoes. Other food-gathering activities on the land described include harvesting salmon, "caucles," and clams. She also stated that David Lawrence had taken us up there "every year to gather food." (Dalton Affidavit, dated Oct. 13, 1989, at 2.)

Thereafter, by notice dated April 9, 1990, BLM formally reinstated the application for lands containing approximately 160 acres including the 47.62 acres within U.S. Survey No. 1183. The BLM notice afforded the State of Alaska and other interested parties an opportunity, for 60 days from the date of the notice, to file a protest pursuant to section 905(a)(5) of ANILCA, 43 U.S.C. § 1634(a)(5) (1994). 5/

On July 1, 1993, Mary L. Figarelle, a BLM realty specialist, accompanied by Winifred Smith, daughter of Lizzie Williams (David Lawrence's sister), examined the subject allotment claim on the ground. She found no structures or other signs of use other than appellants' cabin erected pursuant to the SUP issued by FS. (Land Report, dated July 20, 1993, at 2.) However, Figarelle concluded that Lawrence had satisfied the use and occupancy requirements of the 1906 Act. Id. at 3. She based her finding on the affidavit submitted by the superintendent of schools, the affidavits submitted by Lawrence's relatives, and the statements by Winnie Smith which had confirmed his use of the land for gardening, hunting, fishing, and berrypicking. She found that resources supportive of such use were present on the land.

In its August 1997 decision, BLM initially reconfirmed its 1990 reinstatement of the subject allotment application. It concluded that the application was properly reinstated since it had originally been rejected on the basis of a disputed question of fact regarding compliance with the use and occupancy requirements of the 1906 Act and the Department had not afforded the applicant an opportunity for a hearing, as required by Pence v. Kleppe, 529 F.2d 135, 142-43 (9th Cir. 1976). After considering the entire record, BLM approved the application, concluding that the evidence established that Lawrence had satisfied the use and occupancy requirements of the 1906 Act.

It appears from the record that appellants were not initially served with a copy of the BLM decision or advised of that decision. Upon learning of the BLM decision, the Skaflestads, residents of Hoonah, appealed from BLM's August 1997 decision. Appellants are the current holders of the SUP originally issued by FS to Frank See on January 29, 1957. The permit was issued for the purpose of constructing, operating, and maintaining a hunting/fishing lodge on 4.5 acres of National Forest land, all of which is

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5/ On April 20, 1990, the Forest Service, U.S. Department of Agriculture, which administers the Tongass National Forest, objected to reinstatement. This objection was withdrawn on September 3, 1997, following issuance of BLM's August 1997 decision.

included within the subject Native allotment claim. 6/ The permit was transferred to appellants on November 24, 1995. They also own the cabin, which was built by See on the permitted lands in 1957 and transferred to appellants, pursuant to a January 21, 1993, "Bill of Sale."

In their notice of appeal/statement of reasons for appeal (NA/SOR), appellants challenge BLM's August 1997 decision to the extent that BLM approved the subject allotment application for the 4.5 acres of land encompassed by their SUP (otherwise referred to as the "See/Skaflestad Cabin Site"). Appellants argue that BLM improperly concluded that Lawrence had satisfied the use and occupancy requirements of the 1906 Act. They specifically assert that the record, including the affidavits, fails to establish that Lawrence had engaged in substantial actual possession and use of the land encompassed by the SUP to the potential exclusion of others for a period of 5 years, as required by 43 CFR § 2561.2(a). (NA/SOR at 3-4.) Appellants contend that the record does not demonstrate that there was ever physical evidence of use and occupancy of the land by Lawrence sufficient to put a third party on notice of such activity. Id. at 5. Further, they challenge the affidavits filed in support of the application as hearsay evidence of events occurring 100 years ago. Id. at 4 n2. Appellants recognize that, at one time, the remains of an old shack existed "somewhere" on the allotment claim, but note that it was not within the cabin site. Id. at 4. They also contend that there is no evidence that Lawrence ever hunted or trapped on the land, including running a trap line. Id. Appellants also assert that, absent an appeal by Lawrence from the original 1928 GLO decision rejecting his application, "[t]hat should end the process." (NA/SOR at 4 n.1.) Appellants request that the cabin site be "deleted from any award to the heirs of David Lawrence." Id. at 6.

Appellants also assert that they qualify as bona fide purchasers of the cabin site and, hence, "their interests in the cabin site take precedence over [the] Native allotment claim." (NA/SOR at 6.) They contend that they acquired the site in good faith and without any knowledge, either actual or constructive, that there was an outstanding allotment claim to the land:

> There is nothing about the property which would charge [appellants] with constructive knowledge requiring them, as reasonable persons, to inquire further as to the status of the land. There was not, for example, any proof of the existence of or evidence of former improvements to the land other than Frank See's cabin * * *. The land records did not indicate that there was any claim or other cloud on the title. In short, there was no visible evidence of any Native use and no record of the Lawrence claim which Frank See or [appellants] or anyone else had received or which by due diligence they could have obtained.

6/ It appears from the record that the SUP for the cabin site is situated within the bounds of the 1920 survey of the David Lawrence claim, U.S. Survey No. 1183.

Id. at 5-6.

Counsel for BLM has filed an answer in this case. It is argued by BLM that appellants have no claim of ownership of title to the land at issue and, hence, their interest is not subject to the protection of the bona fide purchaser doctrine. (Answer at 2.) Further, BLM notes that the SUP held by appellants is expressly conditioned on Federal Government ownership of the land and was expressly made subject to revocation if required due to approval of a Native allotment application. Id. at 3-4. Additionally, BLM contends that the evidence in the record is sufficient to support approval of the allotment application. Id. at 4. Noting appellants' contention that they found no evidence of the applicant's use and occupancy of the SUP tract, BLM points out that the land has been withdrawn since 1902 and the applicant died in 1934. Thus, the lack of physical evidence today is asserted to be irrelevant to Lawrence's use and occupancy prior to withdrawal as signs of use would have been eradicated. Id. at 4-5.

Appellants have subsequently filed a Request for Hearing and Supplemental Response. In the event the allotment claim is not denied, appellants request an evidentiary hearing "where the Lawrence claim can be proven up if it has any merit." In addition, appellants have submitted a supplemental affidavit of Frank See stating that the smokehouse which had existed long ago on the Neka Bay property belonged to the Chookaneidi Clan and not to David Lawrence. Frank See indicates in the affidavit that the property belonged to the Clan and that David Lawrence "had no personal interest in this property." Further, Frank See asserts that the Neka Bay property was conveyed to him by the Clan in 1965 acting through his maternal uncle, Jim Young. In support, Frank See has filed a transcript of a statement by Jim Young (translated from Tlingit to English) which is asserted to support a conveyance of the Neka Bay property to Frank See.

[1] As a threshold matter, we find that the protection of bona fide purchasers, which appellants seek to invoke, generally applies only to protect the holder of title to the land acquired in good faith, for value, and without notice of an earlier unrecorded equitable interest or claim. IV American Law of Property § 17.1 (1952); see Walter S. Fees, Jr., 110 IBLA 377, 380 (1989) (holder of overriding royalty interest in oil and gas lease, as distinguished from record title interest, not entitled to assert bona fide purchaser status). Appellants hold an SUP for the cabin site, which conveys no title to the land, but authorizes them to use and occupy the land for specified purposes. See 36 CFR § 251.55; 36 CFR § 251.1 (definition of "permit"); Mardelle M. Smith, 42 IBLA 136, 138 (1979), aff'd, Smith v. Andrus, No. A80-050 (D. Alaska May 8, 1981), aff'd, No. 81-3299 (9th Cir. Aug. 23, 1982). It does not constitute ownership of the land. Nor will it ever lead to acquisition of title to the land. 7/

7/ Recognizing Frank See's claim to the land at Neka Bay as a result of a purported verbal conveyance from a representative of the Chookaneidi Clan, we are unable to conclude that this constitutes a claim of title which

Appellants are the successors-in-interest to the SUP issued in 1957 which was expressly made "subject to all valid claims" and provided that it "will be revoked, at any time it may be determined that title to the land is not vested in the Government." (SUP at clause 28; 36 CFR § 251.55(c) (SUP's are subject to outstanding valid rights).) 8/ We find that the holder of an SUP which authorizes use of the land for specified purposes and which is expressly made subject to valid claims of title and to transfer of title to the land does not qualify as a bona fide purchaser of the land free of outstanding claims of title. 9/

[2] Appellants argue that the failure of David Lawrence to appeal from the 1924 decision holding his application for rejection and the subsequent 1928 decision revoking the prior acceptance of his Native allotment application and rejecting his application should preclude reinstatement of Lawrence's claim. Under the doctrine of administrative finality--the administrative counterpart of the doctrine of res judicata--when a party has had an opportunity to obtain review within the Department and no appeal was taken, or an appeal was taken and the decision was affirmed, the decision may not be reconsidered in later proceedings except upon a showing of compelling legal or equitable reasons, such as violations of basic

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(fn. 7 continued)
could support a bona fide purchaser claim. Section 8 of the Organic Act of May 17, 1884, 23 Stat. 24, 26, provided that Alaskan Natives should "not be disturbed in the possession of any lands actually in their use or occupation" until such time as Congress should legislate further. See State of Alaska, John Nusunginya, 28 IBLA 83, 85 (1976). In 1971, Congress enacted ANCSA. Section 4 of ANCSA abolished claims of aboriginal title to those lands based on use or occupancy of the lands subject to pending Native allotment applications. 43 U.S.C. § 1603 (1994). Thus, we find that a claim of title cannot be recognized solely on the basis of the Clan's conveyance of lands historically used by the clan.

8/ A check of the BLM public land records at the time appellants purchased the See cabin in 1993 and when the Forest Service issued them the SUP in 1995 would have disclosed the outstanding allotment claim by Lawrence's heirs. The record contains a copy of the Historical Index for the township (T. 44 S., R. 59 E., Copper River Meridian, Alaska), which notes that allotment application A-02494 was reinstated by BLM on Jan. 16, 1987. See "Case File Abstract" (A-02494), dated Sept. 30, 1988. The fact that the land was subject to the application was also reflected on an Apr. 16, 1990, Master Title Plat (MTP) for the township.

9/ In the case of an interest such as an SUP, allotment of the land pursuant to the 1906 Act may be made subject to the permit when its issuance is found to predate initiation of use and occupancy under the Native Allotment Act. See Golden Valley Electric Association (On Reconsideration), 98 IBLA 203, 206-08 (1987) (right-of-way). That is not the case here, since Lawrence's use of the allotment was initiated in 1895, long before the permit was originally issued to See in 1957.

rights of the parties or the need to prevent an injustice. Melvin Helit v. Goldfields Mining Corp., 113 IBLA 299, 308-09, 97 I.D. 109, 114 (1990);
Lloyd D. Hayes, 108 IBLA 189, 192-93 (1989). The Board has held in several Native allotment cases that the failure to provide an opportunity for a hearing on an application which presents a factual issue as to the sufficiency of the applicant's use and occupancy under the Allotment Act may constitute a violation of due process which would justify reinstatement of the application as an exception to the doctrine of administrative finality, even if a Native allotment applicant was notified of an earlier rejection and no appeal was taken. See United States v. Heirs of Jake Yaquam, 139 IBLA 376, 380 n.6 (1997).

Courts and this Board have also recognized that the failure to provide a hearing prior to rejection of a Native allotment claim does not always justify reinstatement of an application which has been finally rejected. Thus, when a Native allotment application on its face disclosed that use and occupancy commenced after the land was withdrawn and the applicant failed to appeal from the rejection, the court found no error in the failure to reinstate an application based on an affidavit of the applicant filed 14 years later contradicting his own prior statement regarding the date of commencement of use and occupancy without explanation as to why such evidence was not available earlier. Silas v. Babbitt, 96 F.3d 355, 358 (9th Cir. 1996). 10/

This Board had occasion to reexamine the question of when a Native allotment application previously rejected for lack of evidence of occupancy is properly reinstated in another case involving an allotment application filed in the early days of the Allotment Act (1909) and rejected decades ago (1924). Heirs of George Brown, 143 IBLA 221 (1998), overruling Ellen Frank, 124 IBLA 349 (1992), to the extent inconsistent. In that case we quoted the Pence decision holding that as a matter of due process an allotment applicant was entitled to notice of proposed grounds for rejection of an allotment application and an opportunity to present written evidence to the contrary as well as an opportunity to request an oral hearing before the trier of fact to present evidence and testimony of witnesses. 143 IBLA at 226-27, quoting Pence v. Kleppe, 529 F.2d at 143. Similar to the Lawrence case, the 1924 decision in the Brown case rejecting the application for lack of evidence of occupancy was not appealed. The field examiner's report in the Brown case disclosed that he could not locate anyone who was aware the applicant occupied or made improvements to the land. Further, the examiner found that the applicant lived in a cabin built for him at a cannery on patented land. We noted that the preference right granted by the Native Allotment Act was limited to lands occupied by the Native. 143 IBLA at 230. Finding that no objection was made to the rejection of the application in 1924, nor was the propriety of the decision challenged for the ensuing 50 years, we found no basis for concluding that rejection of the application violated due process or created an injustice which could justify reinstating the application. 143 IBLA at 230. This

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10/ Affirming, Franklin Silas, 117 IBLA 358 (1991), as clarified on judicial remand, 129 IBLA 15 (1994).

conclusion necessarily overruled precedent which held that a hearing was a sine qua non of due process.

We find the Brown precedent to be compelling on the facts of the present appeal. Although at the time Lawrence's application was filed the allotment applicant could claim almost any tract of nonmineral land not withdrawn, segregated, or subject to adverse claim, the land embraced in his application had been withdrawn in 1902. The Native Allotment Act also provided, however, 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 (Emphasis added). Hence, in order to sustain his application Lawrence was required to establish a preference right based on occupancy of the land 11/ from prior to the 1902 withdrawal to the filing of his application. United States v. Bennett, 144 IBLA at 376. 12/

The statement of Charles W. Hawkesworth, Superintendent of Schools, filed with the Lawrence application noted that the applicant used the land for garden purposes, but lived in the Village of Hoonah. Further, that statement indicated there were no buildings on the land other than the remains of old houses used for smoking fish. Hawkesworth stated that "[t]he place can be made a good permanent home for the applicant and his family." Further, he recommended "that the allotment be granted David Lawrence in order that he may have the permanent use of the land as a future home for himself, wife and children." GLO special agent J. A. Ramsey, who interviewed Lawrence on June 29, 1924, at a cannery where he worked in Port Althorp, about 60 miles from the allotment, prepared a report of his investigation. His report disclosed that the applicant acknowledged that he had been unable to build a house on the land, although he asserted that he had a foundation for a house and a garden on the tract and intended to use the land for gardening. Upon examining the land itself in 1924, Ramsey found no evidence of occupation or any use of the land for many years past. Ramsey found no foundation

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11/ 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 I.D. 282, 285 (1935), and it was not until 1956 that the Native Allotment Act 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." Act of Aug. 2, 1956, § 3 70 Stat. 954, 43 U.S.C. § 270-3 (1970); Heirs of George Brown, 143 IBLA at 229 and n.9.

12/ In the present case, the finding on the issue of qualifying occupancy is complicated by the fact that the relevant time frame is from the time the claimant asserted he commenced occupancy in 1895 through the time the allotment application was filed. While qualifying occupancy rights could be lost by cessation of occupancy prior to filing an allotment application, United States v. Flynn, 53 IBLA 208, 235, 88 I.D. 373, 388 (1981), the filing of an application generally served to vest the preference right which related back to the time occupancy was initiated. State of Alaska, 124 IBLA 386, 391 (1992).

on the land, although he found a few poles believed to be remnants of a very old shack and vegetation which indicated there might have been a small garden plot at one time. Ramsey was unable to find anyone who knew of Lawrence ever having occupied or improved the land. A local teacher interviewed by Ramsey indicated that there were no improvements on the land at the time he helped Lawrence step off the boundaries of his claim before filing his application.

[3] The Allotment Act of 1906 was by its own terms a homestead act for Native Alaskans. Native allotment applications were generally sustained when the evidence established residential occupancy of the land prior to withdrawal of the land in early decisions resolving conflicts with applications filed under the Allotment Act. Thus, when the evidence revealed that a Native applicant had his home on the tract involved and had resided there continuously since prior to withdrawal of the land in 1909 for the Tongass National Forest and through the time his application was filed, the Department upheld a decision finding the Native had established a prima facie right to the land. Yakutat and Southern Railway v. Harry, 48 L.D. 362, 364 (1921). Establishment of a full-time residence on the land to the exclusion of a residence elsewhere was not required when occupancy in the form of frame houses or shacks, including one equipped with sleeping bunks and a stove, evidencing use of the land as a home base in support of fishing operations prior to withdrawal of the lands for the Tongass National Forest. Frank St. Clair, 52 L.D. 597 (1929), on petition, 53 I.D. 194 (1930).

In the Lawrence case, by contrast, the record disclosed that no structures were erected on the land by the applicant and he made no assertion to the contrary. The only structure found on the property was the remains of an old smokehouse. The record indicates that this had belonged to the Chookaneidi Clan and not to the applicant. In addition to the affidavit submitted by Frank See on appeal, the 1983 Cultural Resources Management Inventory attached to the BLM Native Allotment Field Report disclosed communal and village use by the clan. Uses specified included fishing, hunting, gathering berries, and use of large smokehouses to prepare the food. (1983 Cultural Resource Management Inventory at 2-3.) Such communal use is inconsistent with use at least potentially exclusive of others. See United States v. Pestrikoff, 134 IBLA 277, 288-89 (1995).

The relevant regulation governing Native allotments provides that qualifying use and occupancy "must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use." 43 CFR § 2561.0! 5(a). 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 Native 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 in some way that assertion. See United States v. Pestrikoff, supra. Ramsey, however, was unable to locate anyone who was aware that the applicant had occupied the land. Although vegetation on the land was consistent with the existence of a small garden at one time, there

was no evidence of occupation or use of the land for many years past. When the applicant was advised of the proposed rejection of his application, no protest was made or appeal filed. In this context, we are unable to find that the applicant was denied due process of law in the adjudication of his application or treated unjustly. Indeed, the BLM action reinstating the Lawrence application pursuant to a request filed more than 56 years after rejection of the application and decades after substantial improvement to the land by a third party pursuant to a SUP threatens to create an injustice. Accordingly, we find BLM erred in reinstating the Lawrence Native allotment application. 13/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR § 4.1, the decision of BLM to reinstate and approve the Native allotment application of David Lawrence is reversed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Lisa Hemmer
Administrative Judge

13/ We are aware that Archie Lawrence, a relative of the applicant, filed a Native allotment application for a nearby tract of land which was also reinstated and approved by BLM decision affirmed by this Board. Forest Service, USDA, (Heirs of Archie Lawrence), 128 IBLA 393, 396 (1994), citing Heirs of Ellen Frank, supra. We think the present case is distinguishable on the facts to the extent reinstatement was undertaken before valuable improvements were placed upon the land by a third party. Further, we note that the 1983 cultural resources inventory made different findings as to the two sites. We also note that Archie Lawrence died before his application was rejected while David Lawrence lived several years after rejection of his application without appealing it. To the extent the Archie Lawrence case holds, in reliance upon Frank, that reinstatement is automatically required whenever a hearing was not held, that case has been overruled by the Brown case.