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United States Department of the Interior

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To: Division of Conveyance Management

From: State Director, Alaska

Subject: 1906 Native Allotments - Evidence of Use

The 1906 Native Allotment Act, implementing regulations, and case law set forth the requirements for qualifying use and occupancy by an applicant in order to receive an allotment. The Native Allotment Handbook, recent training by the Solicitor's Office, and IBLA decisions interpret and affirm the premise that the applicant must prove that he or she is entitled to receive an allotment. While fairness and accuracy are always essential, there is no specific trust responsibility to an allotment applicant. An allotment claim must be proven by the preponderance of evidence. Trust responsibility begins when the allotment is properly approved. This memorandum provides interpretative guidance in applying the correct law and weighing evidence.

Preponderance of the evidence is the only standard for all 1906 Native allotment cases. The supposition that there is a different standard of evidence depending on the agency managing the surface is an erroneous supposition. A statement in the Handbook at V.C.1. "Witness Statements" reads as follows: "The entire file must support the conclusion, especially if there is some type of conflict involved (e.g. located within an area administered by the National Park Service..." This statement is awkwardly worded, but it does not say, nor should one infer from this statement, that there is a different standard for parcels in the National Park System. Because this sentence is the source of confusion, the first sentence of the Handbook at V.C.1. "Witness Statements" is deleted and replaced with the following: "The entire file must support the conclusion." The rest of the paragraph remains unchanged.

The real issue appears to be what constitutes enough evidence to meet the preponderance standard as the case law in the attached cases, United States v. Estabrook, 94 IBLA 38 (1986) and Angeline Galbraith (On Reconsideration), 105 IBLA 333 (1988) require. The Native Allotment Handbook in Chapter III addresses the rules that govern how use and occupancy should be observed and reported in the field. As emphasized in the Handbook, the regulatory definitions in 43 CFR 2561.0- 5(a) are the “primary guidance.” The Handbook and other BLM guidance are interpretative of the Allotment Act and regulations. As stated in the Handbook, the land examination reports should address the necessary components of use and occupancy such as: location, age of applicant when use of parcel commenced, 5 years substantial and continuous use and occupancy, exclusivity or at least potential exclusivity of the use, and independent use. The conclusion in the field report must be supported by the information contained in the report as well as the rest of the file.

If the land report does not address the necessary aspects of use and occupancy, the adjudicator must attempt to get additional information, witness statements, etc. to address the outstanding issues in order to conclude whether or not the applicant's burden of proof has been met.

The evidence must also address such critical components of use and occupancy as location of parcel, age of applicant when use of parcel commenced, 5 years substantial and continuous use and occupancy, exclusivity or at least potential exclusivity of the use, and independent use. If an applicant is claiming multiple parcels, each piece of evidence needs to identify the parcel and the specific components of use and occupancy that were witnessed. If the witness statement is not sufficiently specific, the adjudicator needs to ask for clarification. Also necessary is an explanation of the extent of the witness's personal knowledge of the land under application and the use of the land. Based on examination of files, a large number of witness statements are vague and ambiguous. They must state clearly that a particular tract of land was used and not merely that there was use along a certain river or lake. The situation is further complicated when multiple applicants are in the vicinity or when the legal descriptions of several claims share common boundaries. Another frequently encountered problem is the occurrence of ambiguous pronouns and their antecedents such as the applicant was frequently seen “around there.”

The use and occupancy requirements as set forth below must be addressed in both the land report and any written evidence:

- Accurate legal description for the parcel: If there is no legal description of the parcel and an adjudicator has been unsuccessful in obtaining one, the application can be rejected. It is not necessary to ask multiple times as long as due process and proper service have occurred. If the land examiner re-describes a parcel and the applicant was present and agreeable to that re- description, then the land report should explain the reason why the original description was in error. If the land report does not address this, the adjudicator must investigate and then document the circumstances and draw a conclusion as to whether the amendment is acceptable. All amendments must be addressed by proper notice and a decision before adjudication can be finished. There is no wholesale right to re-describe applications after the repeal of the Native Allotment Act. Witness statements and other evidence must accurately describe the location of the parcel being addressed. The evidence must leave no ambiguity as to the location of the parcel.

- Age of the applicant when use of the parcel commenced: Case law has established that the applicant must have been at least 6 years of age or older for commencement of use and occupancy. Written evidence must show that commencement of use and occupancy began at an early age. Commencement of use and occupancy also had to have occurred prior to withdrawal or segregative action by at least 1 day.

- Five years substantial, continuous use and occupancy: The Angeline Galbraith (On Reconsideration)

decision sets forth an excellent analysis. Intermittent use is not enough. Land reports and all other evidence should specifically address both the substantial nature and the continuous nature of the use in order for such evidence to be credited with supporting the claim on these issues.

-Potential exclusivity of the use: The land report and written evidence should indicate that others recognized the land as the applicant's land. This is necessary to distinguish community use from potentially exclusive use. See Angeline Galbraith (On Reconsideration), supra.

-Independent use: An applicant must qualify for an allotment on the basis of his or her own personal use. Verification should indicate that use for the 5 year period started and continued while the applicant was an independent person who was not merely acting under the direction or supervision of a parent or other adult. This again needs to be substantiated specifically by the field report and/or witness statements. Use by family members should not be counted for or against an applicant.

-Information needs to be verified: To be credible and to receive appropriate weight, written evidence should include an explanation as to how the affiant or person giving information obtained or knows the information. Land reports should identify sources of information as specifically as possible.

A file containing no evidence conflicting with the applicant's claim does not show a preponderance of the evidence in favor of the applicant. Witness statements or other evidence confirming use and occupancy are needed. A bare statement in a BLM decision that the approval is based on information in the case file is not acceptable. A conclusion must explain what evidence was relied upon and why the evidence was deemed to meet the standard of proof.

Where the case file contains conflicting evidence, the applicable standard does not change. However, to meet the burden to prove entitlement by a preponderance of the evidence, an applicant has to submit more evidence of use and occupancy when existing evidence is put into question by conflicting evidence. This frequently requires the applicant to provide more specific or more detailed evidence.

All decisions must contain a thorough analysis of the facts of the case so that anyone looking at the file will know the basis of the approval decision. All decisions will contain at a minimum the following information:

- Description of the location of the parcel and the acreage.
- A concise history of the application.
- Analysis of the evidence. This must address location, age use commenced, 5 years of substantial and continuous use and occupancy, potential exclusivity of use, independence of the use, and how the information was verified.
- Conclusion. The specific finding must be supported by actual documents in the case file and not based on supposition.

The BLM is a keeper of the public trust. This includes the disposal of lands under the various public land laws. It is incumbent upon each adjudicator and supervisor that all pertinent information be considered and there is authority to convey before land is conveyed out of federal ownership.

Signed
Francis R. Cherry, Jr.
State Director

Authenticated
Tiffany Martinez
File Clerk

