Morris Thompson Blasts New Allotment Rules

(Editor's note: The following is the text of a letter written by *Morris Thompson, Area Director* of the Bureau of Indian Affairs for Alaska. The letter was addressed to the Assistant Secretary for Indian Affairs in Washington, D.C. with a note for attention directed to the Real Estate Services section. The letter is dated July 26, 1973.)

By MORRIS THOMPSON
Area Director

You will find enclosed a copy of a memorandum dated June 6, 1973, to the Director, Bureau of Land Management from Jack O. Horton, Assistant Secretary – Land and Water Resources, in which he establishes new procedures for processing Native Land Allotment applications.

We take issue with and are opposed to some of the procedures contained in Mr. Horton's memorandum.

Under "Qualifications of applicant", we are in agreement with Items 1 and 2. Item 3 states that the applicant "Must be the head of a family or 21 years of age at time of filing." You will find enclosed a copy of a letter dated October 27, 1972 to Mr. E. Foster DeReitzes of Wilkinson, Cragun and Barker, Washington, D. C., from Charles M. Soller, Assistant Solicitor - Indian Affairs, in which he held that a Native did not have to be 21 years old when the allotment would be granted. There is nothing in the Allotment Act of May 17, 1906, as amended, or 43 CFR 2561 that requires the Native applicant to be 21 years old when he applied for a land allotment. It appears that this requirement is not consistent with the law and a previous opinion of the Associate Solicitor for Indian Affairs. Furthermore, the regulations under 43 CFR 2091.5 and 2091.6-3 protects Native occupancy by segregating the lands covered *thereby from appropriation* by others but imposes no age limitation requirements for such protection.

Item 1 under "Applications" states "Must have been pending before BIA or BLM on December 18, 1971, as evidenced by time stamp or other certification." If BLM will accept "other certification" such as an affidavit from our Agency Superintendents or our Area Office stating that all allotment applications filed with BLM by our Bureau for Native applicants were received by our agency offices or area office before December 18, 1971, we could then live with the requirement under Item 1 under "Applications". Since only a portion of the rough signed applications received by our Bureau have been date stamped, we cannot meet the requirement of BLM that we furnish such date stamped copies of all applications filed with our Agency Offices and Area Office. Mr. Horton should clarify this part of his memorandum so that BLM will accept affidavits as mentioned above.

Under "Land Status" lands occupied by Natives are not "vacant, unappropriated and unreserved" public lands available for selection by the State of Alaska and all Federal withdrawals are and have been subject to valid existing rights.

We have run into considerable trouble with "Field Examination Guidelines". Under Item 1, if BLM examiners are not familiar with the Native customs and way of life, they cannot "see sufficient" evidence of use and occupancy, and they don't believe affidavits or testimony. When the applicant and other Natives in the village say there is a cabin or other evidence of use and occupancy on the allotment entry, BLM field examiners should not fly over an area and say there is not. What we mean is that each entry should be examined on the ground and the field examination must be made when the ground is not covered with snow.

Under Item 2, the "Corners of the allotment must be clearly marked and posted." BLM's recent policy was for their field men to assist the Natives in marking and posting their allotment entries at the time of field examination. As previously only two corners were required to be marked, and it has been several years since they were originally staked, it is conceivable that the markers may be blown off or otherwise destroyed.

Now it appears that the policy has been changed. In the past, BLM only required the marking of two corners if the entry was located along a river or lake or the ocean. The BLM surveyors contended that two corners marked along the water side of an allotment entry was sufficient for them to complete an official survey on the ground. We don't have the realty personnel available to assist in marking and posting allotment entries. This will have to be done by the Native applicant. On village visits by our personnel, we will stress the importance of the applicants doing this and we will also encourage the Regional Corporations to stress this in their contacts and correspondence with the village.

Under Item 3, "Use and occupancy evidence", Mr. Horton states that "On the ground BLM examination must verify the applicant's claim with actual substantial physical evidence such as: a. Dwelling, b. Campsite - evidence or tent or temporary shelter, fire pits, cleared areas, c. Fish wheel, d. Dock or boat landing, and e. "Trails".

Actual substantial physical evidence of use is good, but because Natives don't always leave evidence of use, BLM wants to penalize them. This is clearly indicated by BLM's lack of knowledge of traditional or customary use and occupancy of lands by the Native people. Specifically, "Campsite – evidence of tent or temporary shelter, fire pits, cleared area."

How are you going to see a tent when the season of use is over and the tent has been taken home to the village? In much of this country, annual camping does not leave permanent marking on the ground. How can you expect to find fire pits when there is nothing to burn? Most of the Natives use Coleman stoves in the vast tundra areas. Cleared area on the tundra? Cleared of what? Snow?

Why would a Native trapping, hunting, fishing or living clear away the trees that provide shade in summer and protection from wind when the weather is cold as well as camouflage from animals and other Natives as well as white men? He wouldn't. Very few allotment entries contain a dwelling or cabin. Campsites – yes, but when ice and snow melts from winter camps nearly all evidence can be destroyed – yet it cannot be denied that there is much use made of the land in the winter which covers one-half or more of each year in most of Alaska.

In areas where trees are available, only a small area is used for wood cutting or building and certainly would not indicate the size of the area used. Tent frames and caches may also be used to substantiate use and occupancy. A fish wheel is a good indication of use but because it is sitting on a particular site the day of the field inspection by BLM is made, does not mean that it is the only area used. Anywhere that a fish wheel is used by a Native up and down an stream doesn't limit the use area.

A dock or boat landing is good evidence of use but don't look for concrete or logs – at most a sandy or grassy slope and a tree stump or large rock on which to tie up a boat.

Trails – yes, but winter trails leave no evidence of their use in summer. Also trappers do not leave a trail so that the animals will know that they have been there. Other evidence of use might be considered, such as animal bones, meat racks fur caches, stretch boards, sled dog spots, any sheds and holes, pits or spots that show human use. BLM should believe the circumstantial and substantiating testimony if there is ANYTHING in the field to back it up.

Item 4 "Native community use" will prevent the granting of a Native allotment entry within such area. It is our contention that the Native community in each case should make the determination as to possible conflict of use, not BLM.

Item 5 "Acreage limitation" this problem has been bouncing back and forth over the past twenty years. One time BLM would grant the full 160 acres to a Native applicant without questioning the area used and then a few years later would cut the size of allotments down to five acres or less. 43 CFR 2561.0-8(a) indicates that allotments may be granted covering not less than 40 acre tracts. Mr. Horton is now reverting back to the pre-1964 BLM policy of reducing allotments to "the acreage actually used," usually about 5 acres. This will help BLM keep within the 400,000 acres provided for in Subpart 2653.1(a) of Title 43 of the Code of Federal Regulations.

In Item 6, "Mineral in character" Mr. Horton states that sand and gravel is to be considered a mineral and would have the effect of preventing the granting of allotments on such lands. Sand and gravel is not a mineral. It is a material. Quantity, quality or scarcity will not change this fact. This is implied in 43 CFR 3601.1 wherein BLM is forbidden to dispose of materials where there is a valid claim under the Public Land Laws, i.e., a Native allotment.

Mr. Horton states that "Approval of a Native allotment application is strictly discretionary with the Secretary." This is nobly said, but not quite correct. The 1906 Act is is discretionary, but court decisions have required that where there is a history of the Secretary using his discretion in a certain manner, that manner becomes required. The Secretary may not act arbitrarily and capriciously. National and public needs have no bearing on the granting of a Native land allotment.

All we are asking for is a fair, just and equitable solution to the allotment applications pending in the Land Offices of BLM in Anchorage and Fairbanks, Alaska.

We feel that the Assistant Secretary's memo is at times inconsistent with intent of the 1906 Allotment Act-, departs from previous departmental policies, and is unnecessarily restrictive. The result, if not changed, will severly impair the rights of Alaska Natives to obtain land allotments.

We urge a reconsideration of the memo issued by the Assistant Secretary, Lands and Waters, for the reasons cited above.