

Editor's note: Appealed -- aff'd, Civ.No. F-27-71 (D.Alaska July 13, 1972)

ELSIE MAY PIKOK CROW

IBLA 70-89

Decided August 20, 1971

Alaska: Native Allotments

An application for an allotment under the Native Allotment Act of May 17, 1906, which on its enactment provided for the allotment of nonmineral lands, must be rejected where, prior to the alleged occupancy and use of the land, the land had been set apart by executive order as a naval petroleum reserve for oil or gas, and where, prior to the amendment of the Native Allotment Act authorizing the allotment of vacant, unappropriated and unreserved land in Alaska that may be valuable for coal, oil or gas deposits, all the lands within the naval petroleum reserve were and still are withdrawn by public land order from all forms of appropriation under the public land laws.

3 IBLA 114

IBLA 70-89 :

F 931

ELSIE MAY PIKOK CROW

: Native allotment application
: rejected

: Affirmed, as modified

DECISION

Elsie May Pikok Crow has appealed to the Secretary of the Interior from a decision dated August 27, 1969, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision dated January 2, 1969, of the Fairbanks land office, rejecting her native allotment application, F 931, filed April 1, 1968, pursuant to the Native Allotment Act of May 17, 1906, as amended, 48 U.S.C. § 357 (1958). The ground for rejection was that the lands applied for are located entirely within Naval Petroleum Reserve No. 4 (NPR 4), and are not subject to disposition because they are no longer under the jurisdiction of the Secretary of the Interior.

In her application, Mrs. Crow alleges that the three described parcels of unsurveyed land have been occupied by her from May 1939 to the present. With regard to actual residence, she stated her family has used and occupied this land historically and she has used and occupied the land all her life. As to improvements on the land, she states "Camp sites now. I wish to put housing on the land and must have clear title to arrange financing." Concerning other uses of the land, she states that from May 1939 to the present this property has been used for family trapping, hunting and fishing and is used by her for the same purposes.

On appeal to the Secretary, the appellant contends that the subject lands were appropriated by her prior to Public Land Order 82 (PLO 82), dated January 22, 1943, which withdrew the lands in Naval Petroleum Reserve No. 4 from all forms of appropriation. Appellant asserts the delay in filing her application occurred because she was unaware of the Native Allotment Act at an earlier date. She further contends that she is entitled to the allotment even though the land is presently under the jurisdiction of the Department of the Navy.

Executive Order No. 3797-A of February 27, 1923, described an area in Northern Alaska which was thereby set apart as a naval petroleum reserve (NPR 4) and provided that the reservation was established for oil and gas only. Public Land Order 82, 8 F.R. 1599 (February 4, 1943), issued by the Acting Secretary of the Interior, described the lands within NPR 4 and surrounding lands, and withdrew the entire area, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining laws and mineral leasing laws. Jurisdiction over the lands in NPR 4 remained in the Department of the Interior until the Congress vested jurisdiction over the properties in naval petroleum reserves in the Department of the Navy by sec. 1 of the Naval Appropriations Act of June 4, 1920, ch. 228 41 Stat. 813. ^{1/} Public Land Order 2215, 25 F.R. 12599 (December 8, 1960), revoked in part PLO 82 and reopened the lands to settlement and location; however, the order, after expressly describing the boundaries of NPR 4, stated the lands in NPR 4 were not affected by the revocation as jurisdiction over the land in NPR 4 was vested in the Secretary of the Navy by the act of August 10, 1956, 10 U.S.C. §§ 7421-38 (1958).

An unpublished opinion of the Associate Solicitor, Division of Public Lands, Department of the Interior, dated October 18, 1968, reviewed the various orders mentioned above and concluded that

[t]he Secretary of the Interior no longer has authority over the lands in NPR 4. By 10 U.S.C., § 7421(a), Congress has vested jurisdiction over them in the Secretary of the Navy who may not make any permanent disposition of the surface without further complying with the provisions of 10 U.S.C., § 7431(2).

^{1/} The provision is now embodied in 10 U.S.C. § 7421 (a) (1964).

The Departments of the Navy and the Interior recognized the joint nature of jurisdiction over the lands within NPR 4, and that efficient administration of the lands requires a mutual understanding of the areas of jurisdiction of the two Departments. Therefore, the Office of Naval Petroleum Reserves and the Bureau of Land Management, with approval of the Acting Secretary of the Interior, agreed that no rights would be granted by the Department of the Interior for an interest in lands within NPR 4 not terminable at will "without prior concurrence of the Office of Naval Petroleum Reserves and any rights so granted will be subject to such additional terms and conditions as such Office may specify." This agreement further provided that the Department of the Interior would retain its jurisdiction over the Indians and Eskimos within NPR 4 and the Departments of Interior and Navy would not disturb the natives in their traditional occupancy of the lands within the reserve or their traditional use of the mineral, surface, fish and wildlife resources therein.

It is true that the jurisdiction over the lands in NPR 4 has been transferred to the Department of the Navy as shown by 10 U.S.C. § 7421 (a) (1964). This alone is sufficient for the rejection of the appellant's native allotment application, in view of 10 U.S.C. § 7431(2) (1964). Nevertheless, we sustain the rejection of appellant's application on additional grounds.

Appellant's contention that she had a valid existing right entitling her to an allotment prior to the issuance of PLO 82, is without merit. The Native Allotment Act of 1906, supra, provided for the allotment of not to exceed 160 acres of "nonmineral land" to certain natives of Alaska. Consistent administrative interpretation of the act required that allotments be made only of vacant, unappropriated and unreserved land. The 1923 executive order set apart the land within the described boundaries for a naval petroleum reserve and established the reservation for oil or gas. Thus, from the date of that order, the lands were no longer unappropriated and unreserved. At the same time, they were thereby determined to be presumptively valuable for oil or gas and deemed to be mineral, all of which, thereafter, precluded the naval petroleum reserve lands from being appropriated under the provisions of the Native Allotment Act. It follows, therefore, that even if appellant's alleged occupancy and use of the lands within NPR 4 from May 1939 were corroborated, such occupancy and use could not have earned her any right in the applied for lands which would serve to effectively prevent the operation of PLO 82, withdrawing lands in NPR 4 from all forms of appropriation under the public lands laws.

The Native Allotment Act was amended, in pertinent part, by the act of August 2, 1956, ch. 891, 70 Stat. 954; 48 U.S.C. § 357 (1958), to further authorize the allotment of "vacant, unappropriated and unreserved lands in Alaska that may be valuable for coal, oil or gas deposits." The amendatory legislation affords no relief to the appellant. It cannot be retroactively applied here as the lands in NPR 4 had been closed to native allotments since the issuance of the executive order as shown above. It has no application prospectively because NPR 4 lands have remained and still are withdrawn from all forms of appropriation. Accordingly, for the reasons stated, appellant's native allotment application must be rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed, as modified.

Francis E. Mayhue, Member

Joan B. Thompson, Member, Concurring in the result.

Frederick Fishman, Member, Concurring.

Joan B. Thompson:

I would reject this application in the exercise of the Secretary's discretion under the Alaska Native Allotment Act, compelled by the strong Congressional policy of protecting the naval petroleum reserves. I refer to my opinion in Terza Hopson et al., 3 IBLA 134 (1971), decided today for my views on the legal issues posed by this appeal.

Frederick Fishman, concurring.

I agree with my brother Mayhue that Executive Order No. 3797-A constitutes a withdrawal of the lands from the operation of the public land laws. This issue warrants some further discussion. I also believe the decision should rest on additional grounds.

The terms of that executive order are less than crystal clear in their impact and warrant analysis. The President ". . . set apart as a Naval Petroleum Reserve all of the public lands within the following described area not now covered by valid entry, lease or application"

The order further provided:

Said lands to be reserved for six years for classification, examination, and preparation of plans for development and until otherwise ordered by the Congress or the President. (Emphasis supplied)

The reservation hereby established shall be for oil and gas only and shall not interfere with the use of the lands or waters within the area indicated for any legal purpose not inconsistent therewith.

The language that the "reservation is established for oil and gas only" would tend to indicate a non-reservation of the lands in issue. However, the language relating to the setting apart of the lands as a naval petroleum reserve and reserving them for six years for classification, examination, etc., and until otherwise ordered by the Congress or the President, tends to establish a reservation or withdrawal of the lands from the public domain.

The language pertaining to the reservation of the lands for six years was in effect until the promulgation of Public Land Order 289, 10 F.R. 19479 (July 31, 1945). In the meantime, Public Land Order 82, 8 F.R. 1599 (February 4, 1943) withdrew the lands "from sale, location, selection, and entry under the public lands laws" Although Public Land Order 2215, 25 F.R. 12599 (December 8, 1960) revoked Public Land Order 82, it left the lands in issue unopened and therefore not subject to the operation of the public land laws. This non-opening, as shown below, is fully consistent with the policies enunciated by the Congress.

Section 1 of the Naval Appropriations Act of June 4, 1920, ch. 228, 41 Stat. 813, provided in part as follows:

[T]he Secretary of the Navy is directed to take possession of all properties within the naval petroleum reserves as are or may become subject to the control and use by the United States for naval purposes, and on which there are no pending claims or applications for permits or leases under the provisions of [the Mineral Leasing Act of February 25, 1920, 30 U.S.C. §§ 181 et seq. (1964)]. . . .

The act of June 30, 1938, ch. 851, 52 Stat. 1252, amending the statute cited above, provided in applicable portion "That no lease of any portion of the naval petroleum reserves, no contract to alienate the use, control, or possession thereof from the United States . . . shall become effective until approved by the President . . ." These provisions with some modifications are embodied in present law. See 10 U.S.C. § 7421(a) and 10 U.S.C. § 7431 (1964) 1/. Thus Congress manifested a strong policy of non-disposition of any of the surface of lands in the naval petroleum reserves save under very stringent conditions.

The next element to consider is the impact of the Congressional policy upon the grant of Indian allotments in Alaska for lands in a naval petroleum reserve. The Native Allotment Act of May 17, 1906, ch. 2469, 34 Stat. 197, as it existed at the time of the settlement in 1939 and until the amendments of August 2, 1956, ch. 891, 70 Stat. 954, 48 U.S.C. §§ 357, 357a, 357b (1958), provides as follows:

[T]he 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

1/ This section in pertinent portion adds a requirement for consultation with the Committees on Armed Services before a contract is to be entered into to alienate a portion of any part of the naval petroleum reserve, but further states that Presidential approval and Committees' consultation "are not required in connection with the issuance of permits, licenses, easements, grazing and agricultural leases, rights-of-way, and similar contracts pertaining to use of the surface area of the naval petroleum and oil shale reserves." This clearly demonstrates the Congressional intention to bar disposals of fee simple interests except under the conditions prescribed.

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, and shall be inalienable and nontaxable until otherwise provided by Congress. 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.

It is clear that the Secretary, in the light of the foregoing, has discretionary authority 2/ to allow an Indian allotment. A preexisting settlement, even in accordance with the law, vests nothing more in the Indian than the right to be preferred over all others in the disposition of the land if the land is to be disposed of. See Udall v. Tallman, 380 U.S. 1 (1965).

The creation of a naval petroleum reserve had the effect of impressing the lands therein with a prima facie mineral character. See Solicitor's Opinion, 63 I.D. 346 (1956). This presumptive value has not been rebutted in the record. The appellant's settlement was purportedly initiated in 1939. Therefore, her occupancy of the land, even if substantiated as to nature and duration, was not in accord with the 1906 act until the 1956 amendments. It is true that the 1956 act authorized settlement and disposal under the 1906 act of land valuable for coal, oil or gas. However, in the meantime, Public Land Order 82 of January 22, 1943, closed the land to all forms of appropriation. Therefore, her settlement could not even give rise to a preference right to acquire the land.

One of the issues implicit in the appeal is whether this Department has authority to determine whether rights attached to the land under the public land laws. I believe the Department has that authority, despite the jurisdiction of the Navy over the naval petroleum reserve. In Standard Oil Co. of California, 107 F.2d 402 (9th Cir.), cert. denied, 309 U.S. 654, 673, rehearing denied, 309 U.S. 697 (1940), the court rejected the contention that because land was within a naval petroleum reserve and the Secretary of the Navy had

2/ The 1956 amendments did not affect the discretionary authority of the Secretary.

been given control over naval reserves by the act of June 4, 1920, such action removed the lands from the jurisdiction of the Department of the Interior. Rather, the court found that the Secretary of the Interior had jurisdiction to determine whether the lands were mineral in character and had passed to the state of California before they were placed within a naval petroleum reserve.

In her application, the appellant recited that her family has used and occupied this land historically. She further recites that she has used and occupied this land all her life.

It appears that the appellant is asserting not only her individual occupancy right, but also is suggesting that aboriginal rights vested some interest in her individually. The thrust of the above decision is to deny her a right to obtain a patent. It does not disturb her occupancy of the land. This view is buttressed by the provision in the Memorandum of Agreement between the Office of Naval Petroleum Reserves and the Bureau of Land Management, approved by the Acting Secretary of the Navy on April 2, 1957, and by the Acting Secretary of the Interior on March 15, 1957.

In pertinent portion, the agreement provides as follows:

The Department of the Interior will retain its jurisdiction over the Indians and Eskimos within Naval Petroleum Reserve No. 4, and the Department of the Interior and the Navy will not disturb such natives in their traditional occupancy of the lands within the reserve or their traditional use of the mineral, surface, fish, and wildlife resources therein.

This is in accord with the terms of Executive Order No. 3797-A, which states that the reservation "shall not interfere with the use of the lands or waters . . . for any legal purpose not inconsistent therewith."

This conclusion is not dissonant with the holding in Cramer v. United States, 261 U.S. 219 (1923), where the cancellation of a patent granted to a railroad was sought by the United States on behalf of several Indians. That decision rests upon the implicit reasoning that to permit the patent to stand would, in essence, deprive the Indians of their occupancy of the lands. However, in the instant

case, the appellant is not being deprived of her occupation of the land. Rather, all she is being denied is the right to obtain a patent for the land. In the case at bar there is no conflicting grant.

To the extent that the appellant may claim aboriginal rights in this land, it would appear that Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955), is dispositive of that contention. In that case, the court stated that Congress has never recognized any legal interest of Alaskan natives in Alaskan lands. By various acts Congress merely intended to retain the status quo until further Congressional or judicial action was taken. The Indians received only permissive occupation, not legal rights.

