

Editor's note: Reconsideration denied by order dated Feb. 12, 1975; distinguished by Kristeen J. Burke, 20 IBLA 162 (May 5, 1975)

HELENA M. SCHWIETE

IBLA 71-276

Decided February 1, 1974

Appeal from decision (AA-7120) of Alaska State Office, Bureau of Land Management, rejecting Native Allotment application.

Affirmed.

Alaska: Indian and Native Affairs--Indian Allotments on Public Domain: Lands Subject to--Indian Allotments on Public Domain: Settlement--Withdrawals and Reservations: Effect of

Under the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 to 270-3 (1970), no rights were acquired by an applicant who asserted commencement of settlement on land when it was included in a grazing lease issued under the Alaska Grazing Act of March 4, 1927, as amended, 43 U.S.C. §§ 316, 316a-o, (1970), because the land was segregated from adverse appropriation until the Department acted to exclude the land sought from the grazing lease.

Alaska: Statehood Act--Settlements on Public Lands

A settlement on public lands, initiated while the land was barred therefrom and continued after the proper filing of a state selection application under the Alaska Statehood Act, 72 Stat. 339, 340, which application segregates the land from settlement, is nugatory and does not preclude the disposition of the land pursuant to the state selection application.

APPEARANCES: Roy Peratrovich, Superintendent, Anchorage Agency, Bureau of Indian Affairs, United States Department of the Interior, for appellant.

14 IBLA 305

OPINION BY MR. FISHMAN

Helena M. Schwiete has appealed 1/ from a decision of the Alaska State Office, Bureau of Land Management, dated April 7, 1971, rejecting her application, filed pursuant to the Alaska Native Allotment Act of May 17, 1906, 34 Stat. 197, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed 1971) [formerly 48 U.S.C. §§ 357, 357(a) - (b) (1958)]. 2/

The Alaska State Office rejected the appellant's application because the 25-acre tract she sought was within a valid grazing lease, A-059264, on December 31, 1964, at which date she assertedly commenced her settlement on the land. The State Office also found that although the grazing lease was canceled during appellant's occupancy, a previously filed Alaska State selection application, AA 570, was tentatively approved upon the date of the lease cancellation. Thus, the State Office found the appellant did not commence occupancy when the tract was available under the Native Allotment Act and that her subsequent use was not authorized.

The appellant presently asserts: 1) her application was in effect a petition that the grazing lease be reduced in area pursuant to 43 CFR 4131.3-1; 2) the "settled government policy" is to protect occupancy such as hers during the requisite period; 3) lands occupied by Alaskan natives are not available for the State's selection; and 4) the occupancy of natives precludes the allowance of the State selection.

The tract in issue consists of 25 acres of unsurveyed land in T. 29 S., R. 19 W., S.M., Kodiak Island, Alaska, on the southeasterly shore of Kalsin Bay. On February 10, 1940, Executive Order 8344 withdrew Kodiak Island "from settlement, location, sale, or entry for classification and in aid of legislation * * *."

1/ The appeal was filed by Roy Peratrovich, Superintendent of the Anchorage Agency, Bureau of Indian Affairs. In Julius F. Pleasant, 5 IBLA 171 (1972), decided March 14, 1972, we held that Peratrovich is not eligible to practice before the Department. However, since the appeal in the case at bar was filed before that date, it will be considered. Edgar L. Cerday, 12 IBLA 270 (1973).

2/ This appeal was included in a previous decision by this Board, Isaac Mute, 6 IBLA 75 (1972), where Native Allotment applications pending and on appeal December 18, 1971, were remanded to give the appellant and others the opportunity to exercise the option selection offered by section 18(a) of the Alaska Native Claims Settlement Act, P.L. 92-203, 43 U.S.C. § 1617(a) (Supp. II, 1973). On January 18, 1973, appellant chose to have her Native Allotment application processed by the Bureau of Land Management.

Subsequently, on August 1, 1950, a grazing lease, A-011391, was issued to two parties, who later assigned it. This lease remained in effect through the revocation of Executive Order 8344 by Public Land Order 2417, 26 F.R. 5926 (June 26, 1961). In January of 1963, A-011391 was canceled, and a new grazing lease, A-059264, was issued to a party who shortly thereafter assigned it to O. Stratman, in whose hands it remained until canceled on April 4, 1967. ^{3/} On December 8, 1966, the State of Alaska filed state selection application AA-570, including the land in issue. On April 4, 1967, the State's application was granted tentative approval.

"* * * [S]uch traditional Native uses as berry picking, fishing sites, and woodcutting * * *" are said to have begun in 1964, and appellant claims her occupancy from that year. Thus, the threshold issue is whether the tract in issue, included within the grazing lease, A-059264, issued in January of 1963, was subject to settlement by a native in 1964.

The regulations provide in pertinent part:

Lands leased under the [Alaska Grazing] Act [44 Stat. 1452, as amended, 43 U.S.C. §§ 316, 316a-o (1970)] are not subject to settlement, location and acquisition under the nonmineral public land laws applicable to Alaska unless and until the authorized officer of the Bureau of Land Management determines that the grazing lease should be canceled or reduced in order to permit, in the public interest and without undue interference with the grazing operations, the appropriate development and utilization of the lands * * * and that the lands are suitable for and otherwise subject to the intended settlement, location, entry or acquisition * * *.
43 CFR 4131.3-1.

A governing principle found in the quoted regulation, in an opinion of the Associate Solicitor, M-36453 (July 23, 1957), and recently followed by this Board, Harold J. Naughton, 3 IBLA 237, 78 I.D. 300 (1971), is that when a grazing lease is issued it appropriates the leased lands and segregates them from the public domain. Unfettered entry is thus barred until action has been taken by the Bureau of Land Management to exclude the land from the lease.

^{3/} The regulations in effect both at the time lease A-011391 was issued and when lease A-059264 was issued provided for Alaskan grazing leases on withdrawn public lands. 43 CFR 63.5 (1949 Cum. Pocket Supp.); 43 CFR 63.4 (1954).

Appellant filed her application on February 11, 1970. In her appeal, filed June 7, 1971, she contends that her application was, in effect, a petition looking to excluding this 25-acre tract from the grazing lease. Appellant is correct that her application is tantamount to such a petition. 43 CFR 4131.3-1. However, the grazing lease was canceled April 4, 1967, and the land had been segregated from further appropriation by virtue of the filing of the State's application on December 8, 1966. 43 CFR 2627.4(b). The existence of the grazing lease did not bar the filing of the state's application. Harold J. Naughton, supra.

Appellant asserts that the Department steadfastly has adhered to the principle of protecting Indian occupancy on public lands, citing, inter alia, Cramer v. United States, 261 U.S. 219, 227-29 (1923) and Solicitor's Opinion, 56 I.D. 395, 397-98 (1938). We agree. The Department also has the responsibility of protecting rights of others to public land tenure, including persons who have been granted grazing leases under the Alaskan Grazing Act of March 4, 1927, as amended, 43 U.S.C. §§ 316, 316a-o (1970). Moreover, Indian occupancy commenced at a time when the land is not subject thereto gives rise to no rights. Donald E. Miller, 2 IBLA 309 (1971). Nor can occupancy in those circumstances, constituting a trespass, preclude other disposition of the land. We therefore find that the application was rejected properly.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is hereby affirmed.

Frederick Fishman, Member

We concur:

Anne Poindexter Lewis, Member

Edward W. Stuebing, Member

