

ARTHUR C. NELSON  
(On Reconsideration)

IBLA 71-301

Decided March 11, 1974

Appeal from decision of Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA 5876.

Affirmed.

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

Withdrawn lands and lands otherwise closed to non-mineral entry are not open to appropriation under the Alaska Native Allotment Act.

Alaska: Indian and Native Affairs--Alaska: Native Allotments

Substantial use and occupancy, as contemplated by the Alaska Native Allotment Act, must be by the native as an independent citizen for himself or as head of a family, and not as a minor child occupying or using the land in company with his parents.

APPEARANCES: Roy Peratrovich, Superintendent, Anchorage Agency, Bureau of Indian Affairs, United States Department of the Interior, for appellant. 1/

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1/ This 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 1, 1972, the Board held that Peratrovich is not eligible to practice before the Department. However, since this appeal was filed before that date, it will be considered. Edgar L. Cerday, 12 IBLA 270 (1973).

## OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

This appeal was among those included in Isaac Mute, 6 IBLA 75 (1972), which were returned to the Alaska State Office, Bureau of Land Management, to permit appellants the option of selection afforded by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (Supp. II, 1972). Arthur C. Nelson did not exercise his option. His original appeal has been returned for consideration of the question whether the lands applied for by Nelson under the Native Allotment Act, 43 U.S.C. § 270-1 (1970) [repealed by 43 U.S.C. § 1617 on December 18, 1971], were open to appropriation under that Act when his use and occupancy were initiated.

Although appellant's application, filed January 27, 1970, recited that he had occupied and used the land he is seeking since 1952 when he was 21 years of age, he has furnished additional information to the effect that he first became acquainted with the land in 1938 at the age of 8 years while salmon fishing with his father, that since 1944 he has dug clams and hunted rabbits and deer, that since 1963 he has picked berries, and that since 1964 he has cut firewood and used this land for other purposes. For this decision we accept these statements at face value.

The land covered in this appeal was included in the withdrawal effected by Executive Order 8344 of February 10, 1940, and remained in withdrawn status until 1961. At that time, however, the land was covered by a lease issued under the Alaska Grazing Act, 43 U.S.C. §§ 316 et seq. (Supp. II, 1972). The leased lands were subsequently opened in accordance with 43 CFR 4131.3-1 only for selection by the State of Alaska under section 6 of its Statehood Act of July 7, 1958, 72 Stat. 339. The State Office rejected appellant's application because the land had not been open to settlement or appropriation since 1940. This appeal resulted.

This Board has previously considered substantially similar facts and circumstances. An allotment right is personal to one who has fully complied with the law and regulations, and a native who applies for withdrawn lands must show that he complied with the law prior to the effective date of the withdrawal; he may not tack on his deceased parent's use and occupancy to establish a right for himself prior to the withdrawal. Larry W. Dirks, Sr., 14 IBLA 401 (1974). A person who has initiated rights under the public land laws but has not fully complied with the law is subject to having his claim defeated where the land is withdrawn under statutory authority. David Capjohn, 14 IBLA 330 (1974); United States v. Norton, 19 F.2d 836 (5th Cir. 1927). 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, 34, which application segregates the

land from settlement, is nugatory and does not preclude the disposition of the land pursuant to the state selection application. Helena M. Schwiete, 14 IBLA 305 (1974).

Withdrawal of the subject land by E. O. 8344 in 1940, inclusion of the land in a grazing lease in 1950, and selection of the land by the State of Alaska in 1966, have effectively kept the land closed. Initiation of occupancy or use rights under the Native Allotment Act was precluded at all times during the period from February 10, 1940, to December 18, 1971, when the Allotment Act was repealed by section 18 of the Alaska Native Claims Settlement Act, supra.

Appellant asserted that he had been on the land in 1938, at the tender age of 8 years. The substantial use and occupancy contemplated by the Native Allotment Act must be by the native as an independent citizen for himself or as head of a family, and not as a minor child occupying or using the land in company with his parents. Cf. Larry W. Dirks, supra.

These legal conclusions are based on appellant's showing of the facts. There has been no offer of further facts which could compel different legal conclusions. Therefore, no hearing is required to permit appellant to establish the facts. Thomas A. Reeder, 9 IBLA 56 (1973). Accordingly, the request by appellant for a hearing is denied. 43 CFR 4.415.

Therefore, pursuant to the authority delegated by the Secretary of the Interior to the Board of Land Appeals, 43 CFR 4.1, the decision rejecting appellant's Native allotment application is affirmed.

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Douglas E. Henriques  
Administrative Judge

We concur:

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Newton Frishberg  
Chief Administrative Judge

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Joan B. Thompson  
Administrative Judge

