

SANDRA M. PESTRIKOFF

IBLA 76-27

Decided January 6, 1976

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA-7357.

Affirmed as modified.

1. Alaska: Native Allotments--Settlements on Public Lands--Withdrawals and Reservations: Effect of

An Alaska Native allotment applicant may not use the occupancy of public land by forebears to qualify herself for an allotment, nor does the use and occupancy of public land by a forebear, while the land was open to settlement, create any right that excepts the land from a withdrawal in favor of an applicant who initiated independent use and occupancy subsequent to the withdrawal.

2. Alaska: Grazing--Alaska: Native Allotments--Segregation: Generally

Whether or not a lease issued under the Alaska Grazing Act, 43 U.S.C. § 316 et seq. (1970), was properly issued, the land in such a lease is segregated from settlement, location or entry, including the acquisition of rights under the Alaska Native Allotment Act, 43 U.S.C. § 270-1 et seq. (1970), until the lease is canceled of record.

3. Alaska: Grazing--Alaska: Land Grants and Selections:
Applications--Segregation: Generally

The filing of an Alaska State selection for land in an Alaska grazing lease constitutes a petition for determination under 43 CFR 4131.3-1, and upon favorable determination and cancellation of the lease, the State's rights, including segregation of the land in its favor, relate back to the filing of the selection.

4. Alaska: Grazing--Alaska: Land Grants and Selections:
Applications--Alaska: Native Allotments--Segregation: Generally

Native use and occupancy of land within an Alaska grazing lease does not preclude the State from selecting the land as "vacant and unappropriated" land within the meaning of the Alaska Statehood Act, 72 Stat. 339, 48 U.S.C. notes prec. § 21 (1970). The initiation of use and occupancy subsequent to the segregation of the land in favor of the State gives an applicant no rights to an allotment.

APPEARANCES: Matthew D. Jamin, Esq., of Alaska Legal Services Corp., Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Sandra M. Pestrikoff has appealed from the decision of the Alaska State Office, Bureau of Land Management, dated May 30, 1975, which rejected her Native allotment application AA-7357, filed under the provisions of the Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970). The application claimed substantial use and occupancy of the land from July 1965.

The State Office decision found that appellant did not complete 5 years' substantial use and occupancy of the land while it was "vacant, unappropriated, and unreserved" as required by the

Act and the Secretarial Instruction of October 18, 1973, constructing the Act. Susie Ondola, 17 IBLA 359 (1974); Thomas Akootchook, 17 IBLA 345 (1974). The State Office found that the land was continuously withdrawn or segregated from the public domain throughout the period of claimed use and occupancy: from February 12, 1940, until June 26, 1961, by Executive Order 8344; from January 1, 1957, by a grazing lease issued under the authority of the Alaska Grazing Act of March 4, 1927, as amended, 43 U.S.C. §§ 316-316o (1970); 1/ and from October 29, 1964, by State selection application A-056420 filed under section 6 of the Alaska Statehood Act, 72 Stat. 339, 48 U.S.C. notes prec. § 21 (1970). 2/ The State Office thus rejected the application because the lands applied for were not open to the initiation of settlement rights under the Alaska Native Allotment Act. Appellant had been notified of the deficiency in her proof and afforded the opportunity to demonstrate 5 years' substantial use and occupancy prior to the withdrawal and the segregations, but she did not respond.

In her brief, appellant makes two arguments: (1) that she should be allowed to show substantial use and occupancy of the land prior to the 1940 withdrawal by "tacking on" the use and occupancy of her grandfather, Aleck Chichenoff, Sr.; and (2) that neither the grazing lease nor the State selection segregated the lands applied for from settlement and the acquisition of a preference right under the Alaska Native Allotment Act.

[1] Appellant asserts that because her grandfather used the land from the early 1900's until she began use in 1965, the 1940 Executive Order withdrawal and subsequent segregations did not attach to the land. In Larry W. Dirks, Sr., 14 IBLA 401, 402 (1974), this Board held:

An applicant for native allotment must be qualified under the statute in his own right. An allotment applicant may not tack on the residency of his forebears to the use and occupancy which he may claim as his own.

1/ 43 CFR 4131.3-1, codifying Solicitor's Opinion, M-36453 (July 23, 1957), provides that lands leased under the Act "are not subject to settlement, location, and acquisition under the nonmineral public land laws applicable to Alaska * * *." See 43 CFR 2091.6-1.

2/ 43 CFR 2627.4(b) (1974), formerly 43 CFR 76.16 (1963), provides: "Lands desired by the State under the regulations of this part will be segregated from all appropriations based upon application or settlement and location * * * when the State files its application * * *." See 43 CFR 2091.6-4.

Appellant argues that Dirks is an erroneous construction of the Alaska Native Allotment Act, in that it denies inheritance patterns long prevalent among Alaska Natives. Whether Congress was properly sensitive to Native lifestyles is not at issue; Congress in the Alaska Native Allotment Act chose to recognize some forms of Native occupancy as an entitlement to allotment and not recognize others. Its authority to so legislate is unquestioned. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279-80 (1955). Appellant's arguments are not persuasive that Dirks is an erroneous construction of the Act, and we follow it.

Appellant argues as well that Dirks is inapplicable in this case, as she completed 5 years of use and occupancy in her own right. She argues, however, that the use and occupancy of her grandfather established a "valid existing right" which precluded attachment of the withdrawal and succeeding segregations to the land.

Native use and occupancy of public land in Alaska was protected from disturbance (sec. 8 of the Act of May 17, 1884, 23 Stat. 24, 26; sec. 27 of the Act of June 6, 1900, 31 Stat. 321, 330; Metlakatla Indian Community v. Egan, 369 U.S. 45, 58 (1962)), but not from a conflicting withdrawal that might preclude allowance of an allotment. Such use and occupancy would not establish a valid existing right protected against withdrawal or segregation unless an allotment application had been filed for the land. Regulations 43 CFR 2561.1(e), formerly 43 CFR 67.9 (1938), and 43 CFR 2091.6-5 provide that an acceptable Native allotment application segregates that land from subsequent acquisition. The regulations also provide that a Native may file his application prior to his use and occupancy in order to protect the land while he qualifies for the allotment. 43 CFR 2561.1(f), formerly 43 CFR 67.10 (1938). Land within an allowed or an allowable Native allotment application is covered by a valid existing right that would have been excepted from the 1940 withdrawal. In the absence of such an application, however, the withdrawal attached.

In addition, appellant argues that tacking was allowed by the Department in some cited State Office adjudications, and that she is denied her right to equal protection of the laws if her request to tack on her grandfather's use is denied. The Department of the Interior is not bound to follow a rule, however long standing, which it presently feels to be erroneous and not in compliance with law. E.g., McDade v. Morton, 494 F.2d 1156 (D.C. Cir. 1974), aff'g 353 F. Supp. 1006, 1012 (D.D.C. 1973). See Automobile Club of Michigan v. Commissioner of Internal Revenue, 353 U.S. 180, 183 (1957). An equal treatment issue would have been raised only if appellant's application had been adjudicated when those referred to

were being adjudicated. In any event, State Office decisions do not uniformly and unvaryingly reflect the position of the Department, since they have not necessarily been subject to Departmental review. Appellant argues that by ruling that the segregations preclude allotment of the land, "the Executive Branch of government could completely negate the effect of the Allotment Act by withdrawing all land from settlement * * *." The short answer to this argument is that Congress with the Alaska Native Allotment Act did not establish any absolute right to an allotment.

First, it explicitly provided that the Act could apply only to settlement on "vacant, unappropriated, and unreserved" public land. Act of August 2, 1956, 70 Stat. 954, 43 U.S.C. § 270-1 (1970). Second, Congress reserved to the Secretary the discretion to grant or not to grant allotments. Terza Hopson, 3 IBLA 134, 143-44 (1971); Frank St. Clair (On Petition), 53 I.D. 194, 195 (1930). See Pence v. Morton, Civ. No. A-74-138 (D. Alaska, April 8, 1975), appeal pending, Civ. No. 75-2144 (9th Cir.). This discretion is exercised by the Secretary in the acts of withdrawing public lands and promulgating regulations regarding segregation of public lands. See Herman Joseph (On Reconsideration), 22 IBLA 266 (1975).

We affirm the holding that appellant's grandfather's use and occupancy of the land neither qualified her for an allotment nor prevented the withdrawal of the land from attaching.

[2] Appellant argues that her use and occupancy, from 1965 until application, occurred while the land was open to such settlement and the establishment of a preference right under the Act. She argues: that the grazing lease outstanding from 1957 to 1966 on the land was improperly issued; and that the State selection application was prematurely filed and of no effect--thus neither could segregate the land from settlement and the establishment of a preference right under the Alaska Native Allotment Act.

Grazing lease A-056420 was issued to Kizhuyak Bay Cattle Company on January 1, 1957, and terminated for late payment of rent by decision of June 20, 1966. Appellant argues that the issuance of the lease was improper because the land was then occupied by appellant's grandfather, and lands occupied by Natives were not subject to lease, citing 43 CFR 63.4 (1954), now 43 CFR 4131.1-2 (1974), and Circular No. 749, 48 L.D. 70, 77-78 (1921). She argues that the Board should retroactively cancel the lease and declare that it could not preclude her from initiating her 5 years' use and occupancy prior to its termination.

The fact that the lease might have been improperly issued for the lands used by appellant's grandfather does not vitiate the segregative effect of the lease when issued. An outstanding lease, whether void, voidable or valid, segregates the leased land until the lease is canceled, whether it be by administrative action, after protest (43 CFR 63.12 (1954), now 43 CFR 4131.5-1 (1974)), or upon favorable adjudication of a conflicting application (43 CFR 63.19 (1954), now 43 CFR 4131.3-1 (1974)). Duncan Miller, 66 I.D. 388, 391-92 (1959); Joyce A. Cabot, 63 I.D. 122, 123 (1956); United States v. U.S. Borax Co., 58 I.D. 426, 444 (1943). See McMichael v. Murphy, 197 U.S. 304 (1905); Hodges v. Colcord, 193 U.S. 192 (1904).

Section 8 of the Act of May 17, 1884, 23 Stat. 24, 26, provided that "the Indians * * * in said district [Alaska] shall not be disturbed in the possession of any lands actually in their use or occupation * * *." This policy was reaffirmed in section 27 of the Act of June 6, 1900, 31 Stat. 321, 330, and Congress in section 4 of the Alaska Statehood Act, 72 Stat. 339, 340, similarly protected Native rights, "including, in the case of land, mere possession or occupancy." Metlakatla Indian Community v. Egan, *supra* at 58. These and similar protections did not, however, establish that any such possession must be credited toward an allotment under the Alaska Native Allotment Act. The terms of the Act itself, by only recognizing allotments based on use and occupancy of vacant, unappropriated and unreserved lands, specifically negate such a conclusion. 43 U.S.C. § 270-1 (1970). Appellant initiated no right to an allotment by her use and occupancy of land segregated by the grazing lease. Helena M. Schwiete, 14 IBLA 305 (1974); Harold J. McNaughton, 3 IBLA 237, 78 I.D. 300 (1971).

[3] Appellant next argues that the State selection application could not have segregated the land during the period of appellant's use and occupancy because the land was not "vacant, unappropriated, and unreserved at the time of [its] selection," as required by sec. 6(b) of the Alaska Statehood Act, 72 Stat. 339, 340, 48 U.S.C. notes prec. § 21 (1970).

The State first filed selection A-056380 on October 29, 1964, at which time the land was appropriated by the grazing lease as discussed above. An Alaska grazing lease is subject to cancellation during its term to allow other application for or disposition of the land in the public interest. 43 CFR 4131.3-1 provides, in relevant part:

Lands leased under the act 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 cancelled

or reduced in order to permit, in the public interest * * *, the appropriate development and utilization of the lands (see § 4131.2-7(e)) and that the lands are suitable for and otherwise subject to the intended * * * acquisition. An application on the appropriate form or a notice on a form approved by the Director if applicable to the class of entry contemplated, will be accepted and treated as a petition for determination. Upon [a favorable] determination * * * the petitioner will be accorded a preference right to settle upon or enter the lands in accordance with the determination.

Thus the filing of a State selection application is properly treated as a petition to cancel the grazing lease. As such, the State's right may date from the filing of the 1964 application. To hold the State selection ineffective here would be to negate the preference right afforded by regulation to the applicant on whose petition the grazing lease is canceled. The termination of the grazing lease for failure to pay rental timely mooted the 43 CFR 4131.3-1 determination in this case, but the State is still entitled to have its priority and the segregative effect of its application relate back to the 1964 filing date. Because the application constituted a petition for determination, the land at issue was segregated in favor of the State of Alaska in 1964. 43 CFR 2627.4(b). ^{3/} It is thus unnecessary to treat the 1966 reselection by the State.

[4] Appellant asserts that the State selection, like the grazing lease, could not segregate the land because appellant's grandfather's use of the land up through the 1964 season rendered the land not "vacant" for purposes of State selection. We reiterate what we held above, that whether or not the prior grazing lease was properly issued for the land involved, it segregated the land from the acquisition of any rights until canceled of record except under the petition for determination provision of 43 CFR 4131.3-1 and the doctrine of relation back. The State established its priority by filing such an application-petition in this case.

^{3/} Because of the operation of 43 CFR 4131.3-1 in this case, it is unnecessary to treat the issue of segregation in favor of the State by virtue of the filing of its application alone. See Gonzales v. Udall, Civ. No. A-128-68 (D. Alaska, June 21, 1972).

It is the operation of 43 CFR 4131.3-1 that establishes that the land is segregated in favor of the State selection, rather than the State Office's conclusion that, "The existence of a grazing lease is no bar to the filing of a State selection application since the State of Alaska would accommodate an existing Federal lease by replacing it with a State permit."

In State of Alaska v. Udall, 420 F.2d 938, 940 (9th Cir. 1969), cert. denied, 397 U.S. 1076 (1970), the Ninth Circuit Court of Appeals held that Native use could render land not "vacant" for purposes of State selection. See also Lucy S. Ahvakana, 3 IBLA 341, 344 (1971). However, in neither case is there any implication that Native use and occupancy of land not subject to acquisition under the public land laws, or the creation of allotment rights in the Native users, can render land not "vacant" for purposes of State selection. The Department has consistently held that Native use and occupancy of land not open therefor cannot lead to the acquisition of any rights under the Native Allotment Act. Helena M. Schwiete, supra; Harold J. McNaughton, supra. We hold that, in the case of individual use and occupancy, only use and occupancy of land that could be credited toward allotment can render land not "vacant" so as to defeat a State selection.

For the reasons stated, appellant never initiated use and occupancy of the land while it was open thereto, and the rejection of the allotment application on the ground that the lands have been continuously closed to qualifying use and occupancy is affirmed.

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 affirmed as modified.

Frederick Fishman
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

