

MYRTLE M. JENSEN SHANIGAN

IBLA 76-30

Decided March 25, 1977

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA-7210.

Affirmed.

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 pro tanto.

APPEARANCES: Matthew D. Jamin, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for appellant. Robert L. Hartig, Esq., Cole, Hartig, Rhodes, Norman, Mahoney & Goltz, Anchorage, Alaska, for City of Kodiak and Kodiak Island Borough.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Myrtle M. Jensen Shanigan has appealed from a decision of the Alaska State Office, Bureau of Land Management, dated May 27, 1975, rejecting her application for Native allotment AA-7210, because the lands for which the appellant applied were not vacant, unappropriated and unreserved public lands in Alaska as required by the Native Allotment Act, 43 U.S.C. §§ 270-1 to 270-3 (1970), repealed by the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (Supp. III, 1973). The application claimed use and occupancy since July 1966.

The State Office found that the land for which the appellant applied had been withdrawn from appropriation under the public land laws on February 12, 1940, by Executive Order No. 8344, and that the land was further segregated from January 1, 1957, by grazing lease A-034760, issued to Dewitt W. Fields under the authority of the Alaska Grazing Act of March 4, 1927, as amended, 43 U.S.C. §§ 316-316o (1970).

Appellant claims that her ancestors began to use the land before the turn of the century and were using the land at the time of the issuance of the executive order and grazing lease. She argues that by such use, her ancestors had acquired valid existing rights in the land which operate to avoid the segregative effects of the withdrawal and grazing lease, and that she must be allowed to tack her use and occupancy to that of her ancestors and thus establish her entitlement to a Native allotment.

[1] 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.

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. See Sandra M. Pestrikoff, 23 IBLA 197 (1976); Nadja Davis Gamble, 23 IBLA 128 (1975); Estate of Benjamin A. Wright, 23 IBLA 120 (1975); Louis P. Simpson, 20 IBLA 387 (1975).

Appellant's assertion that her ancestors acquired rights that operated to avoid the effects of the 1940 withdrawal is incorrect. Native use and occupancy of public land in Alaska were protected from disturbance (sec. 8 of Act of May 17, 1884, 23 Stat. 24; 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. 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.

[2] The issuance of the grazing lease also closed the land to use and occupancy that would qualify for a Native allotment. 43 CFR 4131.3-1, codifying Solicitor's Opinion, M-36453 (July 23, 1957), provides that lands leased under the Alaska Grazing Act "are not subject to settlement, location, and acquisition under the nonmineral public land laws applicable to Alaska * * *." See 43 CFR 2091.6-1.

An outstanding lease, whether void, voidable or valid, segregates the leased land until the lease is canceled, pro tanto. 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). The use and occupancy of the land by appellant's ancestors thus does not avoid the segregative effect of the grazing lease, nor does appellant's use and occupancy of land within the grazing lease give her a right to an allotment. Helena M. Schwiete, 14 IBLA 305 (1974); Harold J. Naughton, 3 IBLA 237, 78 I.D. 300 (1971). The State Office therefore properly rejected the appellant's application. Because this issue is dispositive of the case, we do not address ourselves to the other issues posed.

Appellant has requested a hearing in order to demonstrate that she and her ancestors had used the land. However, our holdings in this case make clear that proof of such facts would not entitle the appellant to an allotment. A hearing is not required where there is no offer of proof which would impel different legal conclusions. Arthur C. Nelson (On Reconsideration), 15 IBLA 76 (1974). Administrative Law, Cases and Comments, Walter Gellhorn and Clark Byse (5th ed. 1970), states at page 499 as follows:

A hearing to take evidence as is done in a trial at law is an obviously silly waste of time if facts are not in dispute. The courts, in their own proceedings, rule on motions to dismiss (or whatever may be the local equivalent of a demurrer); when they do so, they assume a set of facts, without receiving and passing upon evidence, and then decide whether the assumed facts add up to something or to nothing. The courts also enter summary judgments when the factual allegations of a party have not been materially controverted by his opponent. Trial hearings may permissibly be omitted in administrative proceedings at least as readily as in their judicial counterparts, when the only things to be determined are the legal consequences of uncontested facts. See, e.g., *Persian Gulf Outward Freight Conference v. Federal Maritime Commission*, 375 F.2d 335 (D.C.Cir. 1967); *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966); *Railway Express Agency, Inc. v. Civil Aeronautics Board*, 345 F.2d 445 (D.C. Cir.), cert. denied 382 U.S. 879 (1965); *National Labor Relations Board v. Simplot Co.*, 322 F.2d 170 (9th Cir. 1963); *Joe L. Smith, Jr., Inc.*, 1 F.C.C.2d 666 (1965); but cf. *Kirby v. Shaw*, 358 F.2d 446 (9th Cir. 1966).

Accordingly, appellant's request for a hearing is denied.

Therefore, 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.

Frederick Fishman

Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

I concur in the result:

Joseph W. Goss
Administrative Judge

