

MILTON R. PAGANO

IBLA 76-237

Decided June 27, 1979

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting appellant's application for a Native Allotment AA-7077.

Affirmed.

1. Alaska: Grazing -- Alaska: Homesites -- Alaska: Native Allotments -- Indian Allotments on Public Domain: Lands Subject to

Native occupancy and use commenced at a time when land is withdrawn from settlement, location, sale, or entry provides no basis for a Native allotment. Withdrawal of the land in 1940 by Exec. Order No. 8344, inclusion of the land in a grazing lease and homesite, and the subsequent selection of the land by the State of Alaska in 1966 have effectively kept the land closed to the initiation of rights under the Act of May 17, 1906, at all times during the period from 1940 to Dec. 18, 1971, when the Act was repealed by the Alaska Native Claims Settlement Act.

Although the Department has adhered to the principle of protecting Indian occupancy on public lands, it also has the responsibility of protecting rights of others to public land tenure, including persons who have been granted grazing leases under the Alaska Grazing Act of Mar. 4, 1927, as amended, 43 U.S.C. § 316, 316a-316o (1976).

APPEARANCES: Matthew D. Jamin, Esq., Alaska Legal Services Corporation, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Milton R. Pagano appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated August 8, 1975, rejecting his application for Native Allotment AA-7077. The lands involved in this application are located within protracted secs. 33 and 34, T. 26 S., R. 21 W., Seward meridian.

On March 13, 1972, the Bureau of Indian Affairs filed a Native Allotment application and evidence of occupancy for the appellant. 1/ Use of the land asserted by appellant was for seasonal fishing and hunting since 1955. Appellant did not allege that he had constructed any improvements on the land. The application was filed pursuant to the Act of May 17, 1906, 34 Stat. 197, authorizing the Secretary

to allot not to exceed one hundred sixty acres of non-mineral land in the district of Alaska to 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.

Regulations implementing this Act restrict such allotments to "vacant, unappropriated, and unreserved nonmineral land in Alaska upon which the applicant can show substantially continuous use and occupancy for a period of five years." 43 CFR 2561.0-3, 2561.2 (1978).

The lands described in appellant's application were withdrawn from "settlement, location, sale, or entry for classification and in aid of legislation" by Exec. Order No. 8344, signed by President Franklin D. Roosevelt on February 10, 1940. In June 1955, appellant claims to have begun his use of the lands. Thereafter, on January 1, 1957, the lands were leased to Dewitt W. Fields for a term of 20 years pursuant to the Alaska Grazing Act of March 4, 1927. 43 U.S.C. § 316, 316a-316o (1976) (Lease No. A-034760). 2/

1/ Categorically, the Regional Director, Bureau of Indian Affairs, had advised this Board that every application for a Native allotment submitted by his office to BLM had been filed with his office, for certification, prior to the enactment of the Alaska Native Claims Settlement Act, December 18, 1971.

2/ Regulations implementing the Alaska Grazing Act of March 4, 1927, are set forth in part at 43 CFR 4230.1, 43 FR 29062, July 5, 1978: "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 * * *."

Exec. Order No. 8344 was revoked on June 26, 1961, by PLO No. 2417 which specified:

Of the areas released from withdrawal * * * considerable areas are under grazing lease as authorized by the act of March 4, 1927 (44 Stat. 1452); 48 U.S.C. 471, 471a-471o). Lands included in such leases are considered to be appropriated and segregated and unavailable for entry under the * * * public laws relating to vacant, unappropriated lands, unless and until they have been determined to be suitable for such purpose and appropriate action has been taken to cancel the lease to the extent necessary and to classify the lands for other use or disposal.

On September 9, 1966, Haakon O. Olson filed a homesite for a portion of the lands within Fields' lease. (Homesite AA-248). By decision of October 26, 1966, BLM amended Fields' lease to exclude these lands described in the homesite notice of location.

Shortly thereafter on November 1, 1966, the State of Alaska filed State selection application A-056366 encompassing those lands in appellant's allotment application.

With the enactment of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 (1976), on December 18, 1971, the subject lands were again withdrawn from all forms of appropriation under the public land laws.

On November 18, 1974, Dewitt W. Fields filed a statement of waiver with BLM asking that the subject lands be withdrawn from his grazing lease.

Such was the state of affairs on August 8, 1975, when the Chief, Branch of Lands and Minerals Operations, BLM, rejected appellant's application for a Native allotment.

Pagano appeals from this decision and sets forth the following arguments in his statement of reasons:

1. Appellant established his exclusive use and occupancy when PLO No. 2417 revoked Exec. Order No. 8344 on June 26, 1961.
2. Issuance of a homesite to Haakon O. Olson on lands previously used and occupied by appellant is of no effect.

Appellant's arguments on appeal challenge the issuance of grazing lease A-034760 to Dewitt W. Fields on January 1, 1957, at a time

when Exec. Order No. 8344 had withdrawn the subject lands from settlement, location, sale, or entry. Appellant cites to us case law, regulations, and Departmental circulars prohibiting entry upon lands in the possession, occupation, and use of Alaska Natives. The import of this authority, appellant argues, is to create a duty in the Department to search the lands for preexisting uses before issuance of a grazing lease. Appellant asks this Board to order BLM to retroactively reduce the size of the grazing lease issued to Fields or, in the alternative, find that BLM be estopped to assert the segregative effect of the lease.

None of the authority offered to us by appellant is persuasive, however, because the instant case involves land which was withdrawn from settlement, location, sale, or entry at the time of appellant's use. Appellant's use during the life of Exec. Order No. 8344 was unauthorized by the terms of Exec. Order No. 8344 and constituted a trespass. Donald E. Miller, 2 IBLA 309, 314 (1971). Such use does not provide a basis for any claim to the land. Ibid. By its terms Exec. Order No. 8344 did not bar issuance of a grazing lease, it barred only those types of entry which might lead to disposal of fee title by patent, e.g., bid, sale, settlement, allotment selection.

Thereafter, the lands were considered to be appropriated, segregated, and unavailable for entry by the award in 1957 of the grazing lease to Dewitt W. Fields and by the subsequent homesite and State selection applications.

Similar arguments and facts were before this Board in Herman Haakanson, 23 IBLA 54 (1975). Therein, we said at 57:

Appellant overlooks the fact that his claim is a nullity because it was commenced at a time when the land was withdrawn from settlement and acquisition by Executive Order No. 8344. Thus, when the withdrawal was revoked in 1961 the land was still segregated under the principle laid down in Harold J. Naughton, 3 IBLA 237, 78 I.D. 300 (1971), and Helena M. Schwiete, 14 IBLA 305 (1974). Native occupancy commenced at a time when the land is not subject thereto gives rise to no rights. Cf. Donald E. Miller, 2 IBLA 309 (1971). Nor can occupancy in those circumstances, constituting a trespass, preclude other disposition of the land. Helena M. Schwiete, supra.

Appellant's argument that BLM's award of a grazing lease in 1957 violated the Act of May 17, 1906, supra, is without merit, because no Native rights were affected. Withdrawal of the subject land in 1940, inclusion of the land in grazing lease A-034760 in 1957 and homesite AA-248 in 1966, and selection of the land by the State of Alaska

(A-056366) in 1966 have effectively kept the land closed to the initiation of rights under the Act of May 17, 1906, at all times during the period from 1940 to December 18, 1971, when the Act was repealed by the Alaska Native Claims Settlement Act.

Appellant argues that the fiduciary duty of the Department towards Native Americans required the Secretary to affirmatively search the lands sought to be leased by Fields and, upon finding appellant's alleged use, delimit Fields' lease to exclude the lands used by appellant. This argument was also made in Haakanson, supra, and therein we said:

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).

Further, the purported waiver of his grazing lease by Fields in 1974 cannot avail appellant anything, as the action by Fields was taken several years after repeal of the Native Allotment Act by the Alaska Native Claims Settlement Act on December 18, 1971, and in no way could the waiver be made retroactive so as to benefit this applicant for an allotment.

Accordingly, we find that appellant's application was properly rejected. 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.

Douglas E. Henriques
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

Joan B. Thompson
Administrative Judge

