

FLOYD L. ANDERSON, SR.

IBLA 76-426

Decided June 28, 1979

Appeal from decision of Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA-8052.

Affirmed.

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

A Native allotment applicant, who was 5 years old at the time when the land was withdrawn from all forms of appropriation, is properly deemed to be incapable as a matter of law of having exerted independent use and occupancy of the land to the exclusion of others prior to the withdrawal and consequently the allotment application is properly rejected.

2. Alaska: Native Allotments -- Settlements on Public Lands

An allotment right is personal to one who has complied with the laws and regulations. An applicant for a Native allotment may not rely or tack on use and occupancy of the land by his ancestors to establish his right.

3. Alaska: Indian and Native Affairs -- Alaska: Land Grants and Selections: Applications -- Indian Allotments on Public Domain: Lands Subject to -- Indian Allotments on Public Domain: Settlement

Settlement on land in Alaska which is subject to a grazing lease issued under the Alaska Grazing Act of March 4, 1927, 43 U.S.C. §§ 316, 316a-316o (1976), does not create any rights by virtue of such settlement under the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 to 270-3 (1970), repealed by 43 U.S.C. § 1617 (1976), since such land is segregated from adverse appropriation at least until the Department takes action to cancel the grazing lease pro tanto, but the grazing lease does not preclude the filing of a state selection application which, when filed, segregates the land from all appropriation based upon settlement or location.

4. Administrative Procedure: Hearings -- Evidence: Generally -- Hearings

Where legal conclusions are reached in an appellate decision upon undisputed facts, and there has been no proffer of further facts which could compel different legal conclusions, no useful purpose would be served for a hearing, and a request therefor is properly denied.

APPEARANCES: Mathew D. Jamin, Esq., Alaska Legal Services Corp., Kodiak, Alaska, for appellant.

#### OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Floyd L. Anderson, Sr., has appealed from a decision dated December 12, 1975, by which the Alaska State Office, Bureau of Land

Management (BLM), rejected his Native allotment application AA-8052, filed for fractional SW 1/4 NW 1/4 sec. 29, T. 26 S., R. 20 W., Seward meridian, Alaska, pursuant to the Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. § 270-1 (1970), (repealed, except for pending applications, by section 18(a), Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. § 1617 (1976)).

The BLM decision recited that the Native Allotment Act applies only to vacant, unappropriated and unreserved public lands in Alaska, and where lands have been segregated or withdrawn, allotment may only be made where the Native made substantial use and occupancy of the land for at least 5 years prior to the effective date of the segregation or withdrawal, and that the land sought by Anderson was withdrawn by Exec. Order No. 8344 of February 10, 1940, from appropriation under the public land laws. The Executive Order did not prohibit issuance of a grazing lease under the Act of March 4, 1927, 43 U.S.C. §§ 316, 316a-316o (1976); such a grazing lease, A 034760, was issued January 1, 1957, to one DeWitt W. Fields. PLO No. 2417 of June 26, 1961, revoked Exec. Order No. 8344, but did not open the land within any grazing lease to operation of the public land laws. Such lands remained as appropriated and segregated from entry until such time as they are classified as suitable for disposal under the public land laws.

The State of Alaska filed State selection application A 056426 and amended it as of October 29, 1963, to embrace all available land in T. 26 S., R. 20 W. The grazing lease of Fields did not preclude the State selection as the State would accommodate the existing Federal grazing lease by replacement with a State lease. Harold J. Naughton, 3 IBLA 237, 78 I.D. 300 (1971).

[1] As the land in issue has not been open to settlement at any time since February 12, 1940, Anderson could initiate no right thereto by settlement, use or occupancy commenced after that date, so his use and occupancy after 1961, as alleged in his application, may not be recognized. Further, it was pointed out that as Anderson was born May 28, 1934, he could not have made any recognizable use of the land before it was withdrawn in 1940. Even taking appellant's claim of occupancy at its face value, we cannot agree that it vested him with any rights to the land at issue. At the time of the withdrawal of February 12, 1940, appellant was 5 years old. We hold that as a matter of law he was too young to have exerted independent use and occupancy of the land to the exclusion of others prior to the withdrawal and consequently his application must be rejected. James S. Picnalook, Sr., 22 IBLA 191 (1975); Emma Moses, 21 IBLA 264 (1975).

In Susie Ondola, 17 IBLA 359 (1974), we held that: "Assertions to the effect that a child two years of age exerts independent control and use of land, to the exclusion of her parents, siblings and others

flies in the face of reason. Helen F. Smith, 15 IBLA 301 (1974); Arthur C. Nelson, 15 IBLA 76 (1974)."

In Minnie E. Wharton, 4 IBLA 287, 79 I.D. 6 (1972), rev'd on other grounds, 514 F.2d 406 (9th Cir. 1975), in discussing the capacity of an infant to be a holder of land in adverse possession, a concept similar to the one here in issue, we stated at 4 IBLA 300, 79 I.D. 12 as follows:

It does not comport with reason that John Wharton, who was born on the land in 1933 and purportedly lived there until 1966 was, in his childhood, aware of, or concerned with, the ownership of the land. To suggest that he, in 1933 or shortly thereafter, as a baby or young child, was holding the land in open notorious adverse possession, suggests a faculty for comprehension in a baby or young child which flies in the face of reason. The fact that the other appellants, apart from Minnie E. Wharton and John W. Wharton had been born on the land and lived there until they were emancipated, simply does not lend any persuasive force to the assertion that they held the land in open notorious adverse possession.

We recognize the existence of authority for the proposition that one who has not reached his majority may acquire title to land by adverse possession, 3 AM. JUR., Adverse Possession sec. 131. However, there must be an intention to disseise. . . .

While we recognize that in some circumstances a 5-year-old may be competent as a witness (see Annot., 81 ALR 2d 386, 398-9 (1962)), such a child would be regarded as incapable of committing a tort requiring malice, e.g., libel. Munden v. Harris, 153 Mo. App. 652,

134 SW 1076 (1911); Drane v. Pawley, 8 Ky. LR 530 (abstract) (1886). Cf. Annot. 2 ALR 2d 1329, 1330 (1948).

The statement of reasons argues that an applicant for a Native allotment may tack on ancestral use of the land to avoid the segregative effect of later withdrawals, such as Exec. Order No. 8344 made in this case; if tacking on is not permitted, PLO No. 2417 revoked Executive Order in 1961, and the failure of the State of Alaska to file a selection application within 6 months during the stated preference right period allowed appellant to establish his allotment, except for the existence of the grazing lease of Fields, which appellant contends could not affect the land he seeks because BLM did not determine the Native use and occupancy prior to the purported issuance of the grazing lease.

[2] At the outset, we point out that the issue of tacking is well settled. An allotment right is personal to one who has fully complied with the law and the regulations. An applicant for a Native allotment may not tack on use and occupancy of the land by his ancestors to establish his right. James S. Picnalook, Sr., *supra*; Emma Moses, *supra*; Louis P. Simpson, 20 IBLA 387 (1975); Anne McNoise, 20 IBLA 169 (1975); Larry W. Dirks, 14 IBLA 401 (1974). Cf. United States v. Arenas, 158 F.2d 730 (1947), *cert. denied*, 331 U.S. 842 (1947); Woodbury v. United States, 170 F.302 (8th Cir. 1909).

[3] Similarly, the Department has held that settlement on land in Alaska which is subject to a grazing lease issued under the Alaska Grazing Act of March 4, 1927, 43 U.S.C. §§ 316, 316a-316o (1976), does not create any rights, by virtue of such settlement, under the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1, 270-2, 270-3 (1970), repealed 43 U.S.C. § 1617 (1976), since such land is segregated from adverse appropriation at least until the Department takes action to cancel the grazing lease. Harold J. Naughton, supra. Although the existence of a grazing lease, issued under the Act of March 4, 1927, supra, is effective to bar settlement of the land covered thereby, it does not preclude the filing of a state selection application for the land which, when filed, segregates the land from all appropriations based upon application or settlement or location. Id.

[4] We note that appellant "demands a hearing to show his ancestral use and possession, to demonstrate his own use and to demonstrate generally that the decision of the Bureau of Land Management in rejecting his application was erroneous." He invokes Pence v. Kleppe 529 F.2d 135 (1976). See also Pence v. Andrus, 586 F.2d 733 (1978).

The legal conclusions reached in this decision are based upon undisputed facts. There has been no proffer of further facts which could compel different legal conclusions. It appears, therefore, that no useful purpose would be served by a hearing and the request

therefor is denied. Arthur C. Nelson, (On Reconsideration), 15 IBLA 76 (1974).

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:

Joan B. Thompson  
Administrative Judge

Douglas E. Henriques  
Administrative Judge

