

HERMAN ANDERSON, JR.
NICHOLAS PESTRIKOFF
ANTHONY DRABEK

IBLA 76-105
IBLA 76-106
IBLA 76-133

Decided June 29, 1979

Appeal from decisions of the Alaska State Office, Bureau of Land Management, rejecting Native allotment applications AA 7147, AA 7370, AA 7346.

Affirmed.

1. Act of March 4, 1927 -- Alaska: Native Allotments -- Grazing Leases: Cancellation or Reduction -- Withdrawals and Reservations: Effect of

A grazing lease issued under the Alaska Grazing Act, 43 U.S.C. § 316 et seq. (1970), appropriates the lands and segregates them from the public domain, barring them from use and occupancy for Native allotment purposes until the Department takes action to exclude lands from the lease.

2. Alaska: Native Allotments

The substantial use and occupancy as required by the Native Allotment Act must be by the Native independently for himself or as head of a family prior to the effective date of withdrawal, and he may not tack on use and occupancy by his parents or ancestors to establish a right for himself prior to the withdrawal.

APPEARANCES: Matthew D. Jamin, Esq., Alaska Legal Services Corporation, Kodiak, Alaska, for appellants; David Wolf, Esq., Keane, Harper, Pearlman, and Copeland, Anchorage, Alaska, for Ouzinkie Native Corporation, amicus curiae.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

In 1975, Herman Anderson, Jr., Nicholas Pestrikoff, and Anthony Drabek filed appeals from decisions of the Alaska State Office, Bureau of Land Management (BLM), rejecting their Native allotment applications, AA-7147, AA-7370, and AA-7346, respectively. The applications were filed pursuant to the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970), 1/ and the pertinent regulations in 43 CFR 2561.

Native allotment appeals, including the three here under consideration, were stayed pending decisions in several cases in the Ninth Circuit Court of Appeals. The recent decisions of the court in Pence v. Andrus, 586 F.2d 733 (1968), and Eluska v. Andrus, No. 77-2072 (9th Cir. Dec. 11, 1978), make it appropriate to resume consideration of appeals pending before IBLA involving the rights of Native allotment applicants.

We have consolidated these three appeals because they contain substantially similar fact patterns and identical legal issues.

The applications here at issue were rejected because the lands were not open to appropriation during the period when the applicants claimed substantial use and occupancy. Anderson claimed substantial use and occupancy from April of 1953 to April 2, 1971, the date of his application. Pestrikoff claimed use and occupancy from May of 1951 to June 25, 1971, the date of his application. Drabek claimed use and occupancy from May of 1961. His application was dated May 17, 1971. 2/ All applicants claimed the lands for fishing, hunting, and berry picking. Pestrikoff and Drabek claimed improvements of a small cabin and tent frames valued at \$200.

The records show that the lands described in appellants' applications were originally withdrawn from appropriation by Exec. Order

1/ The Allotment Act was repealed by section 18 of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. § 1617 (1976).

2/ Though the applications are dated 1971, the BLM stamp thereon indicates a filing date of March 1972. See note 4, infra.

No. 8344 of February 12, 1940. That order withdrew all of Kodiak Island from settlement, location, sale, or entry and reserved it for classification in aid of legislation.

The withdrawal of Kodiak Island did not prohibit the issuance of grazing leases for the withdrawn lands, 43 CFR 4131.1-2. ^{3/} On August 1, 1950, and January 1, 1957, 20-year grazing leases (A-011391 and A-034760 covering the subject lands were issued under the authority of the Alaska Grazing Act of March 4, 1927, as amended, 43 U.S.C. §§ 316, 316a-316o (1970). These leases were still in effect in 1972 when appellants' Native allotment applications, filed in 1971 with the Bureau of Indian Affairs, were received by BLM. ^{4/} The grazing lessees did not petition the authorized officer of the BLM pursuant to 43 CFR 4220.7(2) to relinquish the subject lands from their grazing leases until November 18, 1974.

On October 29, 1963, the lands described within appellants' Native allotment applications were included within an amended State selection application, A-056427. The subject lands were also withdrawn from all forms of appropriation on December 18, 1971, by the provisions of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 et seq. (Supp. III, 1973).

The Alaska Native Allotment Act, supra, authorized the Secretary of the Interior to allot not more than 160 acres of land in Alaska to an Indian, Aleut, or Eskimo who is both a resident and a Native of Alaska and who is 21 years old or the head of a family. The Act authorized allotment only of "vacant, unappropriated and unreserved" public lands in Alaska. 43 CFR 2561.0-3. Further, an allotment applicant was obliged to make satisfactory proof to the Secretary of the Interior of "substantially continuous use and occupancy of the land for a period of five years."

From our review of the history of the status of the lands in question, it is clear that these lands have never been open to appropriation by Native allotment during the periods in which appellants have claimed use and occupancy.

^{3/} A subsequent PLO No. 2417, of July 26, 1961, revoked Exec. Order No. 8344. However, that order did not open the lands previously included in grazing leases. The order specified that such grazing lands are considered to be appropriated and segregated and unavailable for entry until the grazing leases are cancelled.

^{4/} Applications filed with the Bureau of Indian Affairs prior to December 18, 1971, and transmitted thereafter to BLM are not thereby to be regarded as untimely filed.

[1] A grazing lease issued under the Alaska Grazing Act of March 4, 1927, as amended, 43 U.S.C. § 316 et seq. (1970), appropriates the leased lands and segregates them from the public domain, barring them from settlement, location and acquisition under the nonmineral public land laws applicable to Alaska, including use and occupancy for Native allotment purposes, until the Department takes action to exclude the lands from the lease. Edward F. Naughton, 23 IBLA 134 (1975); Helena M. Schwiete, 14 IBLA 305 (1974); 43 CFR 4131.3-1; 5/ Harold J. Naughton, 3 IBLA 237, 242, 78 I.D. 300, 302-03 (1971).

The grazing leases in question have never been canceled. Nor had action been taken to exclude the lands from the leases prior to subsequent segregations and withdrawals of the land. Appellants' challenge to the validity of the leases is of no consequence. Once the leases had been issued, whether valid or not, the lands were thereafter segregated. Sandra M. Pestrikoff, 23 IBLA 197 (1976). Accordingly, appellants have gained no rights by their past use and occupancy.

Appellants also argue that BLM cannot assert the alleged segregative effect of the leases because of its failure to follow its own regulations and the Department's fiduciary responsibility to Alaskan Natives. It is true that Natives have traditionally been protected in their occupancy of lands in Alaska. However, that policy does not dictate that any occupancy or use, regardless of the status of the lands in issue 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. Sandra M. Pestrikoff, supra at 202. In these cases, as we have previously pointed out, at no time during appellants' asserted occupancy have the lands been open to initiation of rights under the Native Allotment Act. Appellants' initial occupancy of withdrawn lands was not protected and did not preclude the issuance of the grazing leases.

While considering similar circumstances this Board emphasized that the Department's responsibility is not limited solely to the protection

5/ 43 CFR 4131.3-1 provides, in pertinent 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 office of the Bureau of Land Management determines that the grazing lease should be cancelled or reduced * * *."

of Native occupancy. Quoting from Helena M. Schwieta, *supra* at 308, we stated:

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).

[2] Appellants contend that they can tack on the occupancy and use of the land by their ancestors prior to the date of the 1940 withdrawal or the subsequent actions affecting the availability of the land. This Board has repeatedly rejected this argument.

The record indicates that appellant Anderson was born in 1941 and was, therefore, not *in esse* when the lands were withdrawn in 1940. Drabek was born on November 21, 1947, and also was not *in esse* at the time of the withdrawal. Appellants may not tack on the alleged ancestral use occurring prior to the commencement of their occupancy at a time when the lands were under withdrawal. Sandra M. Pestrikoff, *supra*.

Pestrikoff states in his October 22, 1975, affidavit: "In 1951 I began use of the land." Exec. Order No. 8344 had withdrawn the land from such appropriation on February 12, 1940, and was revoked by PLO No. 2417 on June 26, 1961, leaving intact the grazing lease affecting the land. It is clear that the land was not subject to the initiation of rights by him in 1951.

Appellants have also requested a hearing to show their ancestral use and possession; to demonstrate their own use, and to show wherein the State office decision is erroneous. The decision in Pence v. Andrus, *supra*, does not require a hearing on Native allotment applications where it is clear that the claim or application must be rejected as a matter of law. The cases herein are of such a complexion. Therefore, the requests for a hearing are denied.

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Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Frederick Fishman
Administrative Judge

We concur:

Joan B. Thompson
Administrative Judge

Douglas E. Henriques
Administrative Judge

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