

NORMAN OPHEIM
BILLY BOSKOFKY, JR., AS
HEIR OF
NICHOLAS BOSKOFKY

IBLA 76-109
IBLA 76-194

Decided July 11, 1979

Appeal from decisions of the Alaska State Office, Bureau of Land Management, rejecting Native allotment applications AA 7192 and 7571.

Affirmed.

1. Alaska: Native Allotments

The substantial use and occupancy as required by the Native Allotment Act must be by the Native himself 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.

2. Alaska: Native Allotments -- Alaska: Indian and Native Affairs -- Indian Allotments on Public Domain: Lands Subject to -- Alaska: Grazing -- Alaska: Statehood Act

Withdrawal of land in 1940, inclusion of the land in a grazing lease under authority of the Alaska Grazing Act of March 4, 1927, revocation of the withdrawal in 1961, and selection of the land by the State of Alaska under authority of the Statehood Act in 1963 effectively kept the land closed to the initiation of rights under the Native Allotment Act at all times during the period from 1940 to the revocation of the Allotment Act on Dec. 18, 1971, by sec. 18 of the Alaska Native Claims Settlement Act.

APPEARANCES: Matthew Jamin, Esq., Alaska Legal Services Corporation, Kodiak, Alaska, for appellant; David Wolf, Esq., for Ouzinkie Native Corporation.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

In 1975, Norman Opheim and Billy Boskofsky, Jr., as Nicholas Boskofsky's heir, filed appeals from decisions of the Alaska State Office, Bureau of Land Management (BLM), rejecting Native allotment applications AA-7192 and 7571. 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 two here under consideration, were continued pending decisions in the Ninth Circuit Court of Appeals. The recent decisions of the court in Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978), and Eluska v. Andrus, No. 77-2072 (9th Cir. Dec. 11, 1978), make it appropriate to resume consideration of appeals pending before this board, involving the rights of Native allotment applicants.

The Boskofsky application was filed with BIA apparently before the repeal of the Allotment Act and with BLM, in March 1972 for two parcels, A and B, located within protracted T. 26 S., R. 20 W., Seward meridian (Kodiak and Spruce Islands). Boskofsky claimed substantial use and occupancy from April 1958 to March 21, 1971. He listed his uses as berrypicking, fishing, and camping, and claimed improvements of clearing, tent frame, and foundation valued at \$1,000.

According to BLM records Boskofsky was born on May 5, 1939. He died on February 3, 1974, almost 3 years after the application was submitted to BLM.

The Opheim application was filed with BIA and then with BLM on April 1972 for lands within protracted sections 19 and 20, T. 26 S., R. 19 W., Seward meridian. Opheim claimed substantial use and occupancy from April 1965. He listed his uses as berrypicking, hunting, and fishing, and claimed improvements of a home, shed, and generator valued at \$9,500. Opheim was born on March 31, 1943.

The decisions appealed from rejected the applications because the lands were not open to appropriation during the period when the applicants claimed substantial use and occupancy. The lands described in the applications were withdrawn from appropriation by Exec. Order No. 8344, of February 12, 1940. That order withdrew all of Kodiak and Spruce Islands from settlement, location, sale, or entry and

^{1/} The Allotment Act was repealed by section 18 of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. § 1601 et seq. (1976).

reserved them for classification in aid of legislation. Thus at the time of the withdrawal Boskofsky was less than 1 year old and Opheim was not in esse. In addition, a portion of the lands described in the Opheim application were withdrawn and reserved for War Department use by Exec. Order No. 8877.

Exec. Order Nos. 8344 and 8877 ^{2/} did not prohibit the issuance of grazing leases for withdrawn lands, 43 CFR 4131.1-2. On January 1, 1957, a 20-year grazing lease, A-034760 covering the applied-for lands was issued to Dewitt W. Fields under authority of the Alaska Grazing Act of March 4, 1927, as amended, 43 U.S.C. § 316 et seq. (1970). On January 1, 1959, a grazing lease (A 050045) was issued to Edward N. Opheim.

Exec. Order No. 8344 was revoked on June 26, 1961, by Public Land Order (PLO) No. 2417. This order specified that lands included in grazing leases were considered appropriated, segregated, and unavailable for entry. It also gave the State of Alaska a preferred right to select the lands released from withdrawal. On October 29, 1963, the lands described in Opheim's application and parcel A of Boskofsky's application were included within an amended State selection application, A-056427.

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. (1976).

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 claimed use and occupancy.

Appellants assert that they can show ancestral use and occupancy to avoid the segregative effect of Exec. Order 8344 and the later

^{2/} This order was revoked on January 19, 1962, by PLO No. 2587.

withdrawals. Appellants contend that the valid existing rights of their ancestors can be tacked onto their own use which began in 1958 and 1965. They demand a hearing to show such ancestral use and possession.

[1] As we have stated earlier, appellant Boskofsky was less than 1 year old and appellant Opheim was not in esse when the lands were withdrawn in 1940. The substantial use and occupancy as contemplated by the Alaska Native Allotment Act must be by the Native himself. Therefore, appellant may not tack on the alleged ancestral use occurring prior to the commencement of his occupancy at a time when the lands were under withdrawal. Sandra M. Pestrikoff, 23 IBLA 197 (1976); Herman Haakanson, 23 IBLA 54 (1975); Lula J. Young, 21 IBLA 207 (1975); Warner Bergman, 21 IBLA 173 (1975).

Appellant Boskofsky further argues that he established use and occupancy on June 26, 1961, when the withdrawal was revoked by PLO No. 2417, that neither the grazing leases 3/ nor the subsequent State selection precludes the establishment of his occupancy in 1961, because it was subject to his prior settlement and occupancy; and that the fiduciary responsibility of the Department precluded the grant of a grazing lease on land used and occupied by an Alaska Native.

[2] All of these arguments were presented and disposed of in Haakanson, supra at 57, as follows:

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. Withdrawal

3/ We note that Dewitt Fields, by an instrument attested to on October 30, 1974, purported to "have agreed to and have recognized the reduction of my grazing lease by certain Native persons [including appellant] who have filed allotments within my grazing lease." However, such a release cannot operate on a retroactive basis, and in any event, does not appear to constitute a formal relinquishment to BLM of the grazing lease pro tanto.

of the subject land in 1940, inclusion of the land in the grazing lease in 1957, and selection of the land by the State of Alaska in 1963, have effectively kept the land closed to the initiation of rights under the Native Allotment Act at all times during the period from 1940 to December 18, 1971, when the Allotment Act was repealed by section 18 of the Alaska Native Claims Settlement Act, supra. See Arthur C. Nelson [On Reconsideration, 15 IBLA 76 (1974)].

As for the allegation concerning fiduciary responsibility, this Board said in Helena M. Schwiete, supra at 308:

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). * * *

A further argument presented in Haakanson, supra, and incorporated herein by reference, is that even if appellants could not establish a preference right on June 26, 1961, such right attached on December 26, 1961, since the State failed to make its selection until 1963, nearly 2 years after the 6-month preference right period afforded it by PLO 2417.

We stated in Haakanson at 58:

As pointed out above, the subject land was segregated from allotment at all times after February 12, 1940, so that appellant could not establish a preference right to an allotment of the land either on June 26, 1961, or on December 26, 1961. While P.L.O. 2417 provided a preferential period to the State of Alaska to select these lands, inter alia, the right of the State to select did not expire through its failure to submit an application during the preference period. When the State's application was filed on October 29, 1963, and posted to the BLM status records, the lands became segregated from further appropriation based upon application or settlement and location. 43 CFR 2627.4(b).

Appellant Boskofsky also challenges that portion of the decision in AA 7192 which held that the decedent's application was incomplete at the time of his death, that requested additional information was not submitted, that the right to allotment was not earned prior to death, and that, therefore, no rights could inure to the decedent's estate.

All of these questions are moot since the disposition of the appeals is governed by the legal issues set out herein above. There are no facts with respect to ancestral occupancy which, if adduced, would change the result herein. Accordingly, evidentiary hearings are not necessary and appellants' demands therefor are denied. Pence v. Andrus, supra.

Ouzinkie Native Corporation is granted the status of amicus curiae. In view of the disposition of the appeal, no useful purpose would be served by a hearing, and its request therefor is denied.

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.

Frederick Fishman
Administrative Judge

ADMINISTRATIVE JUDGE GOSS CONCURRING IN THE RESULT:

Neither Norman Opheim nor Nicholas Boskofsky claimed to have used and occupied the land during a period when the land was available for initiation of such use and occupancy. I therefore concur in the result, but do not agree with the approach in such cited cases as Herman Haakanson, supra, as to use and occupancy by a child in the company of now deceased older relatives. James S. Picnalook, Sr., 22 IBLA 191, 195-201 (1975) (dissent); see Pence v. Kleppe, 529 F.2d 135, 137, 140-42 (9th Cir. 1976).

The evolving Departmental policy favors a less restrictive approach as to Native allotments. In Joseph v. United States, No. F 76-20 CIV. (D. Alas.), the U.S. Attorney on October 31, 1978, filed a response stating the Department has decided to rescind the October 18, 1973, requirement of completion of the 5-year use and occupancy prior to a withdrawal. To the extent that the regulations are ambiguous they, like the statute which authorized them, should be construed in favor of the Native applicant. Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alas. 1977).

The Native Allotment Act was passed for the benefit of the Natives and regulations adopted pursuant thereto should be liberally construed.

Joseph W. Goss
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON CONCURRING:

While in agreement with Judge Fishman's opinion generally, I wish to add some comments. With its briefs and motions in these cases, counsel for the Ouzinkie Native Corporation (Ouzinkie) has indicated that Norman Opheim relinquished his Native allotment application. He has attached a signed relinquishment of the application by Opheim dated April 11, 1974, and submitted an affidavit saying relinquishment was not filed with BLM earlier because he was informed that it was not necessary. BLM issued its decision without being aware of this document. The appeal was filed by Alaska Legal Services Corporation in behalf of Opheim, but there is nothing in writing from Opheim authorizing its representation of him on this appeal. There is, however, an affidavit signed by Opheim on January 10, 1975, asserting his use of the land since 1964. Ouzinkie requests dismissal of Opheim's appeal relying on the purported relinquishment as well as other reasons. However, because the document was not filed with BLM by Opheim, and because there is a need for clarification of Opheim's intent in view of his subsequent statement, I believe consideration of the appeal on its merits is the appropriate procedure here, rather than dismissal.

Although Ouzinkie expressly entered its appearance in these cases as *amicus curiae*, it has a conflicting interest in the land involved in both applications, and would have standing as an intervenor-party if further proceedings were necessary. Thus, if the Native allotments were to be allowed, rather than rejected, the Native Corporation should be notified and afforded an opportunity to contest the conflicting allotment applications before final approval. *Cf. State of Alaska*, IBLA 76-639, etc. For example, Ouzinkie challenges the assertions concerning the use and occupancy of the Natives here, specifically challenging the argument that ancestral use can be tacked on to the individual's use. It points out that Opheim's father and grandfather have received their allotted acreage, and would be entitled to no further land. It has also submitted affidavits from other Natives disputing Opheim and Boskofsky's alleged use. As a conflicting claimant, it would also be afforded the right to a hearing to prove its assertions.

However, as the cases are disposed of here on undisputed facts shown on the BLM office status record, and the legal consequences thereof, there is no basis for a hearing for the Native allotment applications, and no need for one for Ouzinkie. This moots further consideration of its arguments and its requests for a hearing.

Joan B. Thompson
Administrative Judge

