

PAUL D. TONY

IBLA 76-413

Decided October 10, 1979

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA-5730.

Affirmed.

1. Alaska: Native Allotments -- Withdrawals and Reservations: Power Sites -- Withdrawals and Reservations: Revocation and Restoration

Settlement upon a tract of land withdrawn from entry is a trespass and provides no basis for any claim to the land under the Alaska Native Allotment Act of May 17, 1906, 34 Stat. 197. Any subsequent revocation or modification of the withdrawal and the restoration of the land to entry will not validate an application for a Native allotment. An application for land withdrawn from entry is nugatory and cannot be given life, even by restoration of land during the pendency of an appeal from its rejection.

2. Alaska: Native Allotments -- Withdrawals and Reservations: Generally

Although this Department recognizes a fiduciary relationship of the United States to Alaska Natives, this relationship does not authorize the Secretary to ignore the terms of 43 U.S.C. § 270-1 (1970) limiting Native allotments to those lands which are "vacant, unappropriated, and unreserved."

3. Alaska: Native Allotments

The preference right authorized by the Alaska Native Allotment Act is a personal

one and does not survive the death of the applicant unless the applicant has complied with the law and regulations as to a specific parcel of land available for allotment.

APPEARANCES: Bruce C. Twomley, Esq., Alaska Legal Services Corp., Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Paul D. Tony timely appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated December 10, 1975, rejecting Native allotment application AA-5730. His death was reported in 1978.

On October 10, 1969, the Bureau of Indian Affairs filed the above application on behalf of appellant for certain lands located within protracted secs. 23 and 26, T. 4 S., R. 5 E., Copper River meridian, Alaska. Application was made under the Act of May 17, 1906, 34 Stat. 197, authorizing the Secretary of the Interior

to allot not to exceed one hundred sixty acres of nonmineral 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 the 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. The Act was repealed on December 18, 1971, with the passage of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 (1976), subject to applications pending on that date.

By decision of December 10, 1975, BLM rejected appellant's application, because the lands sought by appellant had been segregated from all forms of appropriation under the public land laws by Power Project Withdrawals 2138 and 2215, dated July 20, 1953, and August 13, 1956, respectively. The decision referred to section 24 of the Federal Power Act of June 10, 1920, 16 U.S.C. § 818 (1976), which provides:

Any lands of the United States included in any proposed projection under the provisions of this subchapter shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the commission or by Congress.

Appellant alleges that his use and occupancy of the subject lands began in October of 1965. Hence appellant's use and occupancy began at a time when the lands sought by appellant were reserved from entry, location, or other disposal under the laws of the United States. These lands remain subject to Power Project Withdrawals 2138 and 2215.

In his statement of reasons on appeal, appellant makes three basic arguments:

1. The subject lands have never been used for the purpose of the withdrawal, and the bases for the withdrawal no longer exist;
2. Rejection of appellant's Native allotment application is a breach of the fiduciary duty owed to him by the United States;
3. Appellant's application should not be rejected, because the subject lands may at some future date be open for settlement by appellant.

In his first argument, appellant refers to a Departmental memorandum, dated July 25, 1961, requesting that lands subject to Power Project Withdrawals 2138 and 2215 be restored to entry. The memorandum discloses that Departmental records contain an order from the Federal Power Commission dated October 2, 1956, accepting surrender of the preliminary permit for Power Project 2138. The memorandum further discloses that the preliminary permit for Power Project 2215 expired on June 1, 1960.

Appellant also calls to our attention a letter from the Department's Legislative Counsel to the Land Director of the Ahtna Regional Corp., dated March 5, 1976, setting forth BLM's assurances that action on Native allotment applications for lands within the withdrawals at issue would be suspended pending certain determinations by the Federal Power Commission.

[1] Despite these two communications, no action has been taken to revoke Power Project Withdrawals 2138 and 2215 or to restore to entry lands affected by these withdrawals. Appellant's settlement upon a tract of land withdrawn from entry is a trespass, and such settlement does not provide a basis for any claim to the land. Donald E. Miller, 2 IBLA 309, 314 (1971). Moreover, any subsequent revocation or modification of the withdrawals at issue and the restoration of the land to entry will not validate appellant's application for a Native allotment. An application for land withdrawn from entry is nugatory and cannot be given life, even by a restoration of land during the pendency of an appeal from its rejection. Donald E. Miller, *supra* at 314; Roy Leonard Wilbur, 61 I.D. 157 (1953).

[2] In his second argument on appeal, appellant asserts that the denial of his application below is a breach of the fiduciary duty owed to him by the United States. Similar arguments have been before this Board previously. While the Department recognizes a fiduciary relationship, it is not free to ignore the terms of 43 U.S.C. § 270-1 (1970), restricting the Secretary's authority to grant allotments to those lands which are "vacant, unappropriated, and unreserved" (emphasis supplied).

In Helena M. Schwiete, 14 IBLA 305, 308 (1974), we considered the Department's fiduciary duty:

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). Moreover, Indian occupancy commenced at a time when the land is not subject thereto gives rise to no rights. Donald E. Miller, 2 IBLA 309 (1971). Nor can occupancy in those circumstances, constituting a trespass, preclude other disposition of the land. We therefore find that the application was rejected properly.

[3] As a third basis for appeal, appellant argues that his application should not be rejected because the existing withdrawals may at some future date be revoked and the lands restored to entry. Our discussion above of appellant's first argument on appeal disposes of this final argument. Assuming, arguendo, that the subject withdrawals were revoked and the lands restored to entry, appellant's application would not thereby be validated. His alleged use and occupancy of the land during the period of withdrawal constituted a trespass and provided no basis for an allotment. Donald E. Miller, supra at 314.

The record discloses that appellant died on August 7, 1978. At no time during appellant's lifetime did he qualify for the grant of a Native allotment to the subject lands, because they were not available when he initiated his occupancy. The preference right authorized by the Alaska Native Allotment Act is a personal one and does not survive the death of the applicant unless the applicant had complied with the law and regulations as to a specific parcel of land available for allotment. Cf. Thomas S. Thorson, Jr., 17 IBLA 326 (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 rejecting Native allotment application AA-5730 is affirmed.

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Douglas H. Henriques  
Administrative Judge

We concur:

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Newton Frishberg  
Chief Administrative Judge

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Joan B. Thompson  
Administrative Judge

