

PATRICK L. PHILPOTT

IBLA 88-188

Decided January 29, 1990

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA-45064.

Affirmed.

1. Alaska: Native Allotments

A selection application filed by the Territory of Alaska pursuant to the Act of Jan. 21, 1929, formerly codified at 48 U.S.C. § 354a (1952), segregated the land from subsequent appropriations based upon settlement and location. A Native allotment application is properly rejected when the Native was born after the selection application was filed.

APPEARANCES: David S. Case, Esq., Anchorage, Alaska, for appellant; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Patrick L. Philpott has appealed the decision of the Alaska State Office, Bureau of Land Management (BLM), dated November 18, 1987, rejecting his Native allotment application AA-45064 on the grounds that the land was not vacant, unreserved, or unappropriated. The Bureau of Indian Affairs (BIA) filed the Native allotment application on behalf of Philpott on September 23, 1981, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 - 270-3 (1970) (repealed subject to applications pending on December 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1982)). The application covered 160 acres of land situated in sec. 27, T. 30 S., R. 58 E., Copper River Meridian.

The record indicates that Philpott was born on April 22, 1954. Previous to that date, on August 12, 1952, the Territory of Alaska filed selection application A-021680 for 4,921.48 acres, including the lands claimed by Philpott, pursuant to the Act of January 21, 1929, Ch. 92, 45 Stat. 1091-93, formerly codified at 48 U.S.C. § 354a (1952). That statute granted to the Territory of Alaska, for the benefit of the Agricultural College and School of Mines, now the University of Alaska,

100,000 acres of "vacant nonmineral surveyed [1] unreserved public lands in the Territory of Alaska, to be selected, under the direction and subject to the approval of the Secretary of the Interior * * *." On February 18, 1955, the Department approved the August 12, 1952, selection application subject to valid rights existing on the date of selection.

In its November 18, 1987, decision, BLM gave the following reasons for rejecting Philpott's application:

The Act of May 17, 1906, authorizes allotments of 160 acres or less of vacant, unappropriated, and unreserved nonmineral land in Alaska. Lands segregated by a State selection are not open to the initiation of Alaska Native allotment claims. No right may be initiated under the Act of May 17, 1906, by occupation and use of lands not open to appropriation. See James S. Picnalook, Sr., Mabel Bullard, 22 IBLA 191 (1975) and Andrew Gordon McKinley, Annie Bennett (On Reconsideration), 61 IBLA 282 (1982), and Annie Bennett, 92 IBLA 174 (1986). No Native may avail himself to any period of use and occupancy by his ancestors to establish a right to allotment. Where a Native was born after lands were withdrawn, the application must be rejected. See Arthur R. Martin, et. al., 41 IBLA 224 (1979).

Our records indicate the date of birth for Patrick L. Philpott to be April 22, 1954. As the lands within Native allotment application AA-45064 were segregated on August 12, 1952 by State selection application A-021680, more than a year before the applicant's birth, the application must be and is hereby rejected.

In his statement of reasons (SOR) for appealing BLM's decision, Philpott states that "A-021680 was a territorial application for University lands under authority of the Act of January 21, 1929 (45 Stat. 1091)," 2/ and that "[h]e can find no rule that such a territorial selection application would have had a segregative effect on lands so as to bar subsequent

1/ In its decision, BLM stated that Philpott's application covered 160 acres of unsurveyed land located in sec. 27, T. 30 S., R. 58 E., Copper River Meridian. However, Clear List No. 2, dated Feb. 18, 1955, which approved the Territory's selection of an aggregate of 4,921.48 acres, including the 160 acres claimed by Philpott, states that "[t]he selected land has been found to be subject to selection, being surveyed, unreserved, unappropriated public land of the United States * * *." (Emphasis added.)

2/ Philpott asserted that the file for State selection application A-021680 was in the Federal Archives in Washington, D.C., and that BLM had not reviewed that file prior to rejecting his application. On May 23, 1988, BLM submitted the case file for State selection application A-021680 to the Board, indicating that it had mailed a copy to Philpott and his attorney.

Native allotment claims" (SOR at 2). In his reply to BLM's answer, ^{3/} Philpott contends that "[a]ffidavits on file in support of appellant's allotment application attest to the fact these lands were in actual use and occupancy by appellant and members of his family in 1954 for camping, berry picking, hunting, and trapping on a regular and continuous basis" (Reply at 2). Accordingly, "it is evident the lands now claimed by appellant as his allotment were not vacant and not available for approval to the Territory under a grant of vacant lands in 1955" (Reply at 2). ^{4/}

[1] Philpott is incorrect in asserting that the Territory of Alaska's selection application, filed on August 12, 1952, did not segregate the land selected from subsequent appropriation by settlement or location. The regulation in effect in 1952, when the Territory of Alaska filed State selection application A-021680, and in 1954, when Philpott was born and when he claims to have begun use and occupancy of the land claimed in his Native allotment application, provided as follows:

Applications to select lands under the grant made to Alaska by the act of January 21, 1929, will be made by the proper selecting agent of the Territory and will be filed in the district land office of the district in which such selected lands are situated. Such selections must be made in accordance with the law, and with the regulations governing the selections of lands by States, set forth in §§ 270.1-270.16, insofar as such sections apply to "special grants" or "grants in quantity." [Emphasis added.]

43 CFR 76.6 (1949).

Although the regulations in 43 CFR Parts 76 and 270 (1949) do not contain a provision expressly segregating from appropriation lands selected by

^{3/} In its answer, BLM argues that title to the subject land "equitably vested" in the Territory when proof of publication was filed on Aug. 13, 1953, 8 months prior to Philpott's birth on Apr. 22, 1954 (Answer at 2). According to BLM, "Clear List No. 2 transferred title as effectively as a patent," citing State of Oregon v. Bureau of Land Management, 676 F. Supp. 1047, 1055 (D. Ore. 1987). In its May 23, 1988, supplemental pleading, BLM argued that "upon its issuance on February 18, 1955, the vesting of legal title related back to the filing of the selection on August 12, 1952, and cut off all intervening claimants, including the Appellant whose personal occupancy claim could not have commenced any earlier than the date of his birth on April 22, 1954." (Supplement at 3).

Because we rule that the selection application filed by the Territory of Alaska on Aug. 12, 1952, segregated the subject land from further appropriation, we need not address BLM's equitable title argument.

^{4/} We note Philpott's application states he commenced his exclusive use and occupancy in 1965.

the Territory of Alaska, the Department had long followed such a rule before it was formally promulgated as 43 CFR 76.16 in 1959. As promulgated, 43 CFR 76.16 provided as follows:

Lands desired by the State under the regulations of this part will be segregated from all appropriations based upon application or settlement and location, including locations under the mining laws, when the State files its application for selection in the appropriate land office properly describing the lands as provided in § 76.9(a), (3), (4), and (5). Such segregation will automatically terminate unless the State publishes first notice as provided by § 76.17 within 60 days of service of such notice by the appropriate officer of the Bureau of Land Management. [5/]

Circular 2020, 24 FR 4657 (June 9, 1959), and 24 FR 5757 (July 18, 1959).

In State of Alaska, 73 I.D. 1 (1966), the Deputy Solicitor applied 43 CFR 76.16. His discussion of the history of the rule embodied therein disposes of Philpott's argument that the Territory's selection application, filed on August 12, 1952, did not segregate the lands described in his Native allotment application:

The regulation is merely a formal restatement of a rule that the Department has long followed. Keeping in mind that the land office treated the State selection as regular, accepted it, recorded it, and posted it, we find that the Department has held:

* * * the Department has invariably adhered to the rule of long standing that a selection, regular on its face when filed, * * * has the same segregative effect as a homestead or other entry under the general land laws, as against all subsequent claims presented, other than those asserted by the Government, thus withdrawing the land in the meantime from appropriation by later applications * * * State of New Mexico (On Petition) 46 L.D. 217, 222 (1917), overruled on other grounds by Administrative Order, 48 L.D. 97, 98 (1921); Circular No. 768, 48 L.D. 172 (1921).

In a later decision in a case involving a school land indemnity selection, in which after filing it developed that the State had tendered defective base land, the Department reviewed its prior rulings and concluded:

The effect of filing and allowance of a school land indemnity selection is to segregate the land selected, even though it may thereafter be found that there are defects which render cancellation necessary, and such a

5/ The current version of this regulation, 43 CFR 2627.4(b), is identical in all material respects.

selection, even though erroneously received, segregates the land so that no other application therefor may be received or rights initiated by its tender. State of Arizona, 55 I.D. 249 (1935), syllabus.

The Department made a particularly relevant application of the rule in Youngblood v. State of New Mexico (On Rehearing), 46 L.D. 109 (1917). There the State had filed a school land indemnity selection for land on August 5, 1914. Youngblood alleged that he made settlement on the land on February 6, 1916, and on February 12, 1916, he filed a homestead application. Thereafter when it was discovered that a portion of the land assigned as base had already been used in another selection, the Commissioner of the General Land Office (now Bureau of Land Management) canceled the selection in part. The State then filed an application to amend in order to cure the defect.

The Department rejected Youngblood's homestead application and on rehearing stated:

In the former Departmental decision it was held that inasmuch as the selection was intact and prima facie valid at the time Youngblood filed his application, the land was not subject to such application, and, therefore, he gained no rights by filing the same. Furthermore, it was held that his alleged settlement on the land under date of February 6, 1916, was likewise invalid because of the pending State selection, which segregated the land from settlement and entry.

73 I.D. at 7-8.

An application for a Native allotment must be rejected if the alleged use and occupancy commenced after the time that a State selection application was filed for the land. Christine Hansen Monroe, 112 IBLA 181, 183 (1989).

Nor may Philpott rely on the use and occupancy of his parents to establish his right to an allotment:

A Native who applies for withdrawn lands must show that he himself complied with the law prior to the date of withdrawal. No Native may avail himself of any period of use and occupancy by his ancestors to establish a right to an allotment. * * * A fortiori, where an applicant was born after the land was withdrawn, the application must be rejected.

Arthur R. Martin, 41 IBLA 224, 226 (1979); see also Helen F. Smith, 15 IBLA 301 (1974). In Natalia Wassilliey, 17 IBLA 348 (1974), the applicant argued that she had occupied and used the land in the "traditional Native manner * * *, first alongside her parents, then later on her own

for berry picking and fishing." The Board rejected her argument that she qualified for an allotment, stating:

If she used the land alongside her parents or siblings, entitlement to allotment would not be demonstrated because "use and occupancy must be substantial, actual possession and use of the land at least potentially exclusive of others and not merely intermittent use." 43 CFR 2561.0-5; United States v. 10.95 Acres of Land in Juneau, 75 F. Supp. 841 (1949); United States v. State of Alaska, 201 F. Supp. 796 (1962). "Alongside her parents" does not fulfill the requirements "at least potentially exclusive of others." As this Board said in Arthur C. Nelson, 15 IBLA 76 (1974):

Substantial use and occupancy, as contemplated by the Alaska Native Allotment Act . . . must be by the native as an independent citizen for himself or as head of a family, and not as a minor child occupying or using the land in company with his parents.

17 IBLA at 350.

Thus, we conclude that BLM correctly ruled that Philpott may not rely upon "any period of use and occupancy by his ancestors to establish a right to allotment," and that "the lands within Native allotment application AA-45064 were segregated on August 12, 1952, by State selection application A-021680, more than a year before the applicant's birth * * *" and were therefore not open to appropriation.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is affirmed.

Will A. Irwin
Administrative Judge

I concur:

James L. Byrnes
Administrative Judge