

Editor's note: Petition for review by Director, OHA, denied -- See In the Matter of Franklin Silas, 9 OHA 173 (1992); appeal filed, Civ.No. A93-035 (D.Alaska Jan. 29, 1993) clarified on judicial remand -- 129 IBLA 15 (March 14, 1994); affirmed --Civ.No. A93-035 CV (JKS) (D.Alaska July 31, 1995); Affirmed Silas v. Babbitt, 96 F.3rd 355 (9th Cir. 1996)

FRANKLIN SILAS

IBLA 89-440

Decided January 31, 1991

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying reinstatement of Native allotment application No. F-14533.

Affirmed as modified.

1. Alaska: Native Allotments

The party seeking reinstatement of a previously rejected Native allotment application must support that request with evidence of a significant error in the original application. A request for reinstatement of a Native allotment application will be denied if the party seeking reinstatement does no more than speculate that an error may have been committed, fails to appeal from the initial determination, and does nothing regarding the rejected application for a period of 15 years.

2. Alaska: Native Allotments

It is not necessary to reinstate a Native allotment application to afford an opportunity for a hearing if the initial BLM determination was based upon the applicant's declaration of material facts which demonstrate conclusively that the application must be rejected as a matter of law and the applicant fails to tender sufficient evidence of a significant error on the face of the original application. If no hearing is called for and the Native applicant had been afforded an opportunity to appeal to this Board, there is no compelling legal or equitable reason to reinstate the application merely to afford an opportunity for a hearing.

APPEARANCES: Kathy J. Keck, Esq., Fairbanks, Alaska, for appellant; E. John Athens, Esq., Assistant Attorney General, Fairbanks, Alaska, for the State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

117 IBLA 358

Franklin Silas (Silas) appeals from a March 10, 1989, decision of the Alaska State Office, Bureau of Land Management (BLM), denying reinstatement

of Native allotment application F-14533. The facts giving rise to this appeal are not in dispute.

On November 11, 1971, Silas filed a Native allotment application pursuant to the provisions of the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970). ^{1/} The two 40-acre tracts he sought (the first in secs. 11 and 14, T. 3 N., R. 10 W., and the second in sec. 13, T. 4 N., R. 10 W., Fairbanks Meridian, Alaska) were identified by BLM as parcels A and B of application F-14533. In his application Silas stated that he had used and occupied the lands since September 1, 1965.

On July 18, 1972, BLM rejected Silas' Native allotment application. The reason for rejection was that State selection applications F-028018 (filed June 23, 1961) and F-031492 (filed August 5, 1963) predated Silas' claimed use and occupancy. Signed registered return receipt cards in the record indicate that Silas was properly served with a copy of BLM's July 18, 1972, decision. No appeal ensued, and on December 27, 1982, BLM made an interim conveyance of the lands embraced by the applications to Seth-de-ya-ah Corporation (IC No. 587).

On August 8, 1986, Alaska Legal Services Corporation (ALSC), acting on Silas' behalf, sought reinstatement of Silas' Native allotment application pursuant to Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), and Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). In support of the request, ALSC enclosed Silas' affidavit stating that his use and occupancy commenced in 1960 or 1961 rather than the 1965 date appearing on the face of his application. The affidavit states:

I helped my father hunt and trap in the area west and southwest of what is now Minto from as long as I can remember. When I got older I had my own trapline, too, and after my father quit trapping I took over his trapline as well.

During my school years in Minto I went to the areas of my two Native Allotment applications on weekends and vacations. We went by dog team in winter and by boat in spring. In 1964 I went to school at Mt. Edgecumbe but returned on vacation and holidays and again returned to hunt, trap and fish on my allotment parcels.

I was drafted in 1969 but returned to Minto in 1971 and that has been my home ever since. I was sent to Vietnam but returned home on leave during those two years. There has never been a long period of time when I did not go hunting, trapping or fishing on my allotment.

^{1/} The Alaska Native Allotment Act was repealed by the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. § 1617 (1988), with a savings provision for applications pending on Dec. 18, 1971.

My earliest memories of running my own trapline on my allotment are in 1960 and 1961. I did this on my own but traveled to the area with members of my family. I was about eleven or twelve years old at the time. I also hunted on this land during these years.

The land is located in two parcels. [Parcel A] is at the West end of Rock Island Lake and it is 40 acres. I had a trap-line there as early as 1960 and my father used it before me. I still trap there. There's an old cabin near there but it is falling down now and I use a tent when I go there.

[Parcel B] is also 40 acres and it is located on the edge of an old air strip and it is a good hunting place. I use a tent when I stay there. It is especially good for moose.

My application, dated November 4, 1971, states I began to use my land in 1965. I don't know who wrote that in or why it says I began to use my land in 1965 since I had been using it all my life. I know I hunted and trapped on my own by at least 1960. It is not uncommon for young boys of my generation to be hunting and running a small trapline independently from an early age such as 10 or 11 years old.

I still use my Native Allotment parcels every year for hunting and trapping. The fishing is not so good and I no longer make a spring camp there because it is getting too shallow and dry.

On November 7, 1986, BLM directed Silas to furnish evidence that he independently used and occupied the land (rather than as a dependent child in the company of his parents), citing this Board's decision in Andrew Petla, 43 IBLA 186 (1979), as support for its request. No immediate response was received.

On June 9, 1988, BLM notified Silas that his Native allotment application could not be legislatively approved pursuant to section 905(a)(4) of ANCSA, 43 U.S.C. § 1634(a)(4) (1988), because the land he sought was validly selected by the State of Alaska (Alaska). It further explained that his request would be adjudicated pursuant to the Native Allotment Act, as amended, 43 U.S.C. § 270-3 (1970) (Native Allotment Act). BLM also advised Silas that he would be required to show "substantially continuous use and occupancy of the land for a period of five years" and that he had not met this requirement. BLM afforded 60 days for Silas to submit additional evidence in support of his claim. The decision concluded: "If you fail to submit the supporting evidence in the time allowed, or if the information received is not sufficient to meet the requirements of the regulations, action will be taken to allow for an oral hearing in accordance with Pence v. Kleppe."

On August 9, 1988, Silas filed three affidavits stating that in 1960 Silas had been observed using lands which, according to BLM, are in

"Parcel A," and that at the same time the land was being used by "Minto people" year-round to hunt and fish. BLM issued a decision on January 19, 1989, notifying the State and Seth-de-ya-ah Corporation that Silas' application for parcel A had been proposed for reinstatement. The notice stated further:

The State of Alaska and interested parties have 60 days from the date of this notice to file a protest as allowed in subsection 905(a)(5) of [ANILCA] and to submit comments regarding acceptance or rejection of the allotment application reinstatement.

After the 60-day comment/protest period, an appealable decision accepting or rejecting the proposed reinstatement will be issued.

(BLM Notice dated Jan. 19, 1989). There is no evidence in the file that Alaska or any other interested party filed a protest.

On March 10, 1989, BLM issued its decision denying reinstatement and finding Aguilar inapplicable because BLM's rejection of the 1972 application had been based solely upon a legal defect, and therefore no hearing was necessary. Invoking the doctrine of administrative finality, BLM asserted that Silas' collateral attack of an appealable decision issued 15 years prior to his request for reinstatement would not be permitted by the courts, and the doctrine of administrative finality bars any further consideration by the Department. Relying on United States v. Jones, 106 IBLA 230 (1988), and Turner Brothers, Inc. v. OSMRE, 102 IBLA 111, 121 (1988), BLM concluded that administrative finality precludes reconsideration of an agency decision if a party either fails to exercise the opportunity for Departmental review or appeals and the decision is affirmed (Decision at 2).

Silas filed a timely appeal from the March 10, 1989, decision. Alaska filed a motion to intervene and sought additional time to file an answer to Silas' statement of reasons (SOR). The Board granted Alaska's motion to intervene and extension of time. Alaska filed its answer (Answer), and a reply (Reply) was filed on behalf of Silas.

Silas insists that BLM's failure to provide an opportunity to present evidence before rejecting his application, its failure to advise him that he could present new evidence on appeal, and its refusal to reinstate his application and order a hearing, as required by Pence v. Kleppe, deprived him of due process and violated a basic right (SOR at 4). He further avers that his request for reinstatement brought the error to BLM's attention, thereby raising an issue of material fact. Id. at 5. Pence v. Kleppe, supra; Eleanor H. Wood, 46 IBLA 373 (1980). Silas states that the question of the date he commenced his use and occupancy is a factual issue, and BLM should have afforded him an opportunity to offer additional evidence to confirm or correct his Native allotment application before rejecting the application. Silas notes that, notwithstanding the affidavits supporting the 1960 date, BLM refused to grant a hearing. Silas asserts that to be afforded due process he must have notice of the specific reasons for the

proposed rejection, an opportunity to submit written evidence, and the opportunity for an oral hearing to permit submittal of evidence and testimony of favorable witnesses (SOR at 7). Pence v. Kleppe, *supra*.

Silas alleges that BLM failed to employ any of the 43 CFR 4.450-2 contest procedures adopted by the Department to comply with Pence v. Kleppe and designed to guarantee due process. Id. at 8. Silas insists that his request for reinstatement contains allegations which, if true, entitle him to a hearing pursuant to Aguilar v. United States, *supra*, and would impose a duty on the Government to recover the land, if he were ultimately successful. Thus, he urges that he must be given an opportunity to prove his claim through procedures mandated in Pence and subsequent Board cases before his claim can be denied. He further contends that, to the extent that it holds that an applicant must provide more information to be granted a hearing, the Petla decision undermines Pence v. Kleppe, and should therefore, be overruled. Id.

Silas maintains that he has shown sufficient explanation for the error in his application. He specifically states that his allotment application should not be defeated because he traveled to the claimed lands with his family, because it is not "uncommon for boys of his age (11 or 12 years) to run their own traplines." Silas contends that the mere fact that he traveled to the allotment with his family does not negate his exclusive use of the land. Id. In support of this contention, he refers to this Board's decision in William Bouwens, 46 IBLA 366 (1980), requiring BLM to initiate a contest when minor children eight and older assert independent use and occupancy. Id. at 8-9.

Silas stresses that the original proceeding was prior to Pence v. Kleppe and he was denied due process because he did not have an opportunity to present evidence regarding the date his use and occupancy began to a fact-finder, and because BLM did not permit an opportunity to submit additional evidence to support his application in 1972, when it summarily denied his claim. Id. Silas refers to BLM's procedure for handling cases after a finding that a State selection predated the claimed use and occupancy and asserts that the procedures were not followed in his case. Id. at 5 n.2. Silas relates that BLM procedure requires that when a State selection predates the claimed use and occupancy on an application, BLM must allow the applicant 60 days to submit evidence verifying the date of use and occupancy. Exhibit A describing the procedure states:

2. State Selections. The information in this section pertains only to pending selection applications not to tentative approvals or patents.

a. Selection predates claimed use and occupancy. Allow the applicant 60-days to provide witness statements or other evidence verifying date of use and occupancy. Use Illustration 6 as a guide. If witness statements show that use and occupancy began

prior to the selection filing date, follow "b" below. If not, reject the Native allotment application. (Refer to Chapter V, E, Rejections.)

b. Use and occupancy (but not filing date) predate selection. Issue decision "Native Allotment Held for Approval" giving the State 60 days to initiate a private contest, followed by 30 days in which to appeal. (Illustration 9, paragraphs e, k, aa and bb). [Emphasis added.]

The right hand corners of printed pages of the document display the date "1/29/87." The source of the document is not shown.

Silas contends that if BLM had followed the procedure outlined in Exhibit A, it would have discovered that Silas' use and occupancy began in 1960 or 1961, which was prior to the State selection, and would have issued a decision holding his application for approval. Id. at 5. He notes that it was only after Pence v. Kleppe that he was entitled to a hearing on factual issues, and asserts that Pence v. Kleppe was not limited to Native allotment applications pending when that decision was handed down, but included Natives eligible to apply for allotments prior to the repeal of the Native Allotment Act. Silas, thus contends that he is entitled to the procedural safeguards guaranteed under Pence v. Kleppe because his request for reinstatement and the affidavits submitted in support of reinstatement raised the factual issue regarding when his use and occupancy commenced. Id. Silas notes that BLM initially recognized that he had raised a factual issue and stated that "action will be taken to allow for an oral hearing in accordance with Pence v. Kleppe," but, subsequently denied reinstatement without ordering a hearing. Id. at 6.

Alaska reasons that the "world does not stop in anticipation that Mr. Silas might decide in 10, 20, or 30 years that he wants to reactivate his Native allotment application" (Answer at 3). Alaska claims that third parties have relied on BLM's decision and Silas' election not to appeal, the State has long since built the road to the village of Minto, and the ANCSA land selection and conveyance has long since become final. The State notes that there is no public domain land left for rerouting the highway, and rerouting would be expensive. Even assuming Pence and Aguilar could be relied upon, Alaska argues that Silas provides no justification for his waiting 10 years after Pence and 7 years after Aguilar before attempting to take advantage of those holdings. Alaska suggests that his failure merely confirms that there was no compelling reason for reconsideration. It also urges that the basis for the reinstatement bespeaks an absence of compelling reasons, as Silas was responsible for the error he now claims. Alaska notes the fact that the date appeared not once, but, three times on the application, and the number of times it is repeated militates against a subsequent claim of error. Alaska argues that Silas cannot now claim that he does not know who entered the date on the application given his certification that the statements made on the face of the certificate are true, complete, and correct to the best of his knowledge.

In his reply, Silas denies the equities lie with Alaska, contending that while Alaska may have to pay damages, it need not move the highway. He then argues that, in contrast, if reinstatement is denied, he will lose the opportunity to acquire land he has used over 25 years. Id. at 2-3.

Silas postulates that the date of commencement found on the application may have been placed on the application by someone other than himself and insists he does not know who put it there. He asserts "[i]t is equally likely that the date was inserted by a BIA [Bureau of Indian Affairs] employee, who chose the date in question because it would fulfill the requirement that an allotment applicant use and occupy the land for a five year period" (Reply at 1). Moreover he urges that the speculation that Alaska undertakes to explain who put the date on the application proves the existence of factual issues entitling him to a hearing to present evidence that he began use and occupancy in 1960 or 1961. Id. at 1-2.

[1] Silas' reliance on Pence v. Kleppe lacks merit because it pre-sumes that Pence v. Kleppe mandates a hearing as a matter of right whenever a Native allotment application is rejected. No Pence v. Kleppe hearing is required if, when taking the factual averments of the application as true, the application is insufficient on its face, as a matter of law, and thus affords no relief under the Alaska Native Allotment Act. ^{2/} Pence v. Kleppe addressed an actual dispute of fact regarding the accuracy of factual averments made by the applicant in the Native allotment application. In 1972, when BLM issued its decision regarding Silas' application, it did so on the assumption that each and every averment in Silas' application was correct. Silas now attempts to create a dispute by claiming that a statement in his application was untrue. No issue of fact existed until Silas claimed error in his petition for reinstatement.

To be entitled to reinstatement in such cases, the party seeking reinstatement must offer evidence that clearly demonstrates that the original application contained a significant error. Donald Peter, 107 IBLA 272 (1989); William Carlo, Jr., 104 IBLA 277 (1988). The sole evidence that an error was committed when the Silas application was completed (i.e., some other date was intended) are Silas' self-serving statements that he does not know who inserted the date of the commencement of use and occupancy. His affidavit does not state that a specific person at BIA inserted that date, or even that BIA inserted it, and there is nothing in the record corroborating his assertion that when the application was completed he intended to have some other date inserted in the application. In fact, there is nothing to allow a conclusion that he did not. His intimation in his reply brief that some unnamed official in BIA may have unilaterally selected the date found on the application because that date satisfied the 5-year period is purely speculative. ^{3/}

^{2/} 43 U.S.C. §§ 270-1 to 270-3 (1970).

^{3/} Compare Mitchell Allen, 117 IBLA 330 (1991). Allen alleged an error in the land description on the Native allotment application submitted on his behalf by BIA. In support of his contention he submitted a copy of the application signed by him but having no legal description of the applied for

Silas offers no explanation of his reason for waiting 15 years before addressing the alleged error. He is not seeking a hearing to demonstrate the existence of error, he seeks to have us presume the existence of error and order a hearing to support that assumption. Silas' failure to timely appeal BLM's decision, the passage of 15 years before any action whatsoever was taken, and the lack of persuasive evidence supporting the existence of an error in the original application militate against any argument that an error existed on the original application. ^{4/} We find this to be the proper basis for rejecting the petition for reinstatement, rather than administrative finality, and BLM's decision is therefore modified.

The only application that could be considered pending before the Department on December 18, 1971, and thus falling within the ambit of the ANCSA savings provision, was the application alleging use and occupancy commencing in 1965. This application was rejected by BLM on August 18, 1972, because the land described in the application was subject to an Alaska selection predating the claimed commencement of the use and occupancy. Taking all statements in the application as true, as a matter of law, the application is properly denied. ^{5/}

Silas insists that the Secretary retains authority to review a matter previously decided and correct or review an erroneous decision. Silas also maintains that under Turner Brothers, Inc. v. OSMRE, *supra*, administrative finality does not apply if a party shows compelling legal or equitable reasons, such as violations of basic rights or the need to prevent injustice. Thus, Silas reasons that administrative finality cannot be used to bar the reinstatement of his application because he had been denied due process (Silas SOR at 4, 7). He contends that the cases cited by BLM do not support applying the doctrine of administrative finality to this case (SOR at 6).

fn. 3 (continued)

lands. BLM had rejected his application relying upon the legal description found on the face of the application filed by BIA.

^{4/} This decision is consistent with our holding in Andrew Petla, 43 IBLA 186 (1979). On appeal from BLM's decision denying his Native allotment application Petla alleged that there was an error in the application. We stated:

"Where an application is rejected by BLM for the reason that the applicant's own declaration of material facts demonstrate conclusively that the application must be rejected as a matter of law, an effort on appeal to revise, amend or deny such facts will not be considered by this Board absent a persuasive explanation of error in the application." Id. at 192.

^{5/} If we were to reach Silas' argument that BLM violated the statement of procedure dated "1/29/87," found in Exhibit A to his SOR, we would reject this argument. The record fails to disclose that BLM violated any guideline or procedure when it rejected Silas' application in 1972. BLM was not required to "test" the accuracy of the alleged date of commencement of use and occupancy after finding that a State selection predated the alleged date of commencement. Further, there is nothing that would show that this unidentified procedural statement was in force and effect when Silas' Native allotment application was rejected.

Silas notes that the court's decision in Gabbs Exploration Co. v. Udall, 315 F.2d 37, 40 (D.C. Cir. 1963), is distinguishable because that case rested on a finding that the original applicants had been afforded due process, including an opportunity for a hearing. In a further attempt to distinguish Gabbs, Silas contends that in this case the passage of time has not made it difficult for the Secretary to determine the facts in issue, as Silas is alive, and as recently as 1988, witnesses had executed statements in support of his claim.

Alaska points to Silas' failure to appeal BLM's original decision denying the allotment, and failure to protest BLM's interim conveyance of the land to Seth-de-ya-ah Corporation. It states that the public was given notice of the proposed conveyance pursuant to 43 CFR 2650.7, and interested parties were given an opportunity to object or protest in 1982 (Answer at 3). Citing several of our decisions, Alaska urges application of the doctrine of administrative finality "absent compelling legal or equitable reasons for reconsideration." Alaska maintains that no such circumstances exist in this case, and considers the fact that Silas voiced no complaint when the road was constructed or at any time during a 14-year period to be significant to this determination. Alaska urges that this extended period of inaction is a strong basis for application of the doctrine of administrative finality. Alternatively the State relies on Etalook v. Exxon Pipeline Co., 831 F.2d 1440 (9th Cir. 1987), and Armstrong v. Maple Leaf Apartments, LTD., 436 F. Supp. 1125, 1147-50 (D. Okla. 1977), aff'd in part, 622 F.2d 466 (10th Cir. 1979), cert. denied, 449 U.S. 901 (1980), for the proposition that the doctrines of estoppel and laches should be invoked to preclude reinstatement.

In a reply, Silas argues that the Etalook case did not involve adjudication of a Native allotment application and relied on estoppel only for a holding that the allotment holder was estopped from seeking damages from Exxon or Alyeska for improvements made on the allotment (Reply at 2). Because the right-of-way across Silas' lands was made subject to valid existing rights, Silas insists estoppel cannot be employed to negate rights denied due to a lack of due process. Id.

[2] As noted above, reinstatement does not lie if the initial BLM determination was based upon the applicant's own declaration of material facts, and those facts demonstrate conclusively that the application must be rejected as a matter of law. An exception to this general statement of the law is applied if the applicant is able to tender sufficient evidence of a significant error on the face of the original application. BLM initially determined that, based on the statements made on the face of the application, Silas' application should be rejected as a matter of law. For that reason, no Pence v. Kleppe hearing is required. Silas now presents nothing which clearly demonstrates that the original application contained a significant error, and the principle set out in the Carlo and Peter cases cited above does not mandate reinstatement. 6/

6/ Logic dictates separation of the issue of reinstatement from the issue of whether there should be a hearing. For example, if an applicant presents

Having made this finding, it remains for us to consider whether application of administrative finality would now result in a denial of due process. As presented by Silas, the sole reason for reinstatement is to afford a hearing. However, if no issue of fact is present, no hearing is required as an appeal to this Board satisfy due process. United States v. Jones, *supra* at 246; Turner Brothers v. OSMRE, *supra* at 121. When seeking reinstatement, Silas has failed to tender sufficient evidence to justify a hearing to establish as a matter of fact that there was an error in the original application. If there was no error, no Pence v. Kleppe hearing is required, as the application was properly rejected as a matter of law, taking all statements on its face as true. If no hearing is required, Gabbs Exploration Co. v. Udall, *supra*, is applicable. Silas was afforded an opportunity to appeal to this Board in 1972. We are not now persuaded that there are any compelling legal or equitable reasons for us to allow a second opportunity to appeal the merits of the 1972 decision by reinstating Silas' application 15 years after expiration of the time for appeal from the 1972 decision.

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 as modified.

R. W. Mullen
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

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fn. 6 (continued)

clear and convincing evidence of an error in the original application, it may be appropriate to remand for BLM consideration rather than sending the case for a hearing. If, after consideration, BLM finds that the allotment should issue, and no objection is raised, there is no need for a hearing prior to issuance of patent. Similarly, if error is shown, the application is amended to correct the error, and as a matter of law, the application must be rejected, no hearing is called for. The mere fact that a hearing is required in some circumstances does not give rise to the conclusion that all rejected applications must be reinstated if no opportunity for a hearing was afforded.