

HEIR OF FRANK HOBSON (ON RECONSIDERATION)

IBLA 90-64

Decided October 25, 1991

Petition for reconsideration of Heir of Frank Hobson, 117 IBLA 368 (1991), affirming a decision of the Alaska State Office, Bureau of Land Management, which denied a request to reinstate Native allotment application A-038241.

Petition granted; prior opinion vacated; decision set aside; and case referred for a hearing.

1. Administrative Authority: Generally--Administrative Procedure: Adjudication--Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Applications and Entries: Relinquishment--Patents of Public Lands: Suits to Cancel

The Department may consider a request to reinstate a relinquished Native allotment application for land which has been either patented or made part of an interim conveyance to a Native corporation. If the record shows that the possibility exists that the applicant involuntarily and unknowingly relinquished the application in whole or in part, or was fraudulently induced to do so, he is entitled an evidentiary hearing. If the relinquishment was not knowing and voluntary or was fraudulently procured, the Department may reinstate the application to adjudicate its validity prior to recommending the instigation of judicial proceedings to cancel conflicting interests in the land.

2. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Applications and Entries: Relinquishment--Rules of Practice: Appeals: Hearings

The relinquishment of a Native allotment application must be made voluntarily and with knowledge of the applicant's allotment rights and the consequences of the relinquishment. In determining whether there is a factual issue whether the relinquishment of a Native allotment application was knowing and voluntary so as to require a hearing, the Board will regard as true the factual allegations made in affidavits filed in support of a request for reinstatement.

APPEARANCES: Mary Anne Kenworthy, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for petitioner Walya Hobson.

OPINION BY ADMINISTRATIVE JUDGE KELLY

In Heir of Frank Hobson, 117 IBLA 368 (1991), this Board affirmed a decision of the Alaska State Office, Bureau of Land Management (BLM), denying a request to reinstate Frank Hobson's Native allotment application A-038241. We found the record to show that on July 6, 1962, he relinquished approximately 5 acres to allow Robert Marshall to file a homesite application for the land and that on September 12, 1963, Hobson relinquished the remainder of the lands in his application in order to file a homestead entry application for 120.79 acres of the land, subsequently receiving patent to 65.39 acres. Id. at 369, 372. We concluded that "the relinquishment was clearly knowingly and voluntarily made in order to receive conveyance of the land by other means." Id. at 372. Because we found there to be no genuine issue of material fact and also no allegation of the misrepresentation of material fact as inducement to relinquishment, we held that an evidentiary hearing was not required to determine whether the relinquishment had been knowing and voluntary. Id.

On April 11, 1991, counsel for Walya Hobson, the wife and heir of Frank Hobson, filed a petition for reconsideration. Under 43 CFR 4.403 reconsideration of a decision is available "in extraordinary circumstances for sufficient reason." The petition asserts that the effect of the Board's decision was to deny petitioner due process of law as recognized by Pence v. Kleppe, 529 F.2d 135, 141-42 (9th Cir. 1976). 1/ She contends that the Board erred in concluding that an affidavit given by her husband before he died presented no allegation of the misrepresentation of a material fact as inducement to relinquishment (Petition at 3-4). She argues that the assertions in his statement show that the relinquishment was not voluntary and that the "BLM official lied to Mr. Hobson and pressured him to apply for land under the Homestead Act instead of the Allotment Act" (Petition at 5). Petitioner also charges the Board with ignoring affidavits by Hobson's family members (Petition at 5) and criticizes the Board for stating that, because proof of use and occupancy of the allotment had not been filed, "relinquishment of the application was not the only impediment to approval." Heir of Frank Hobson, supra at 371.

---

1/ The petition argues that the Board's conclusion that the relinquishment was knowing and voluntary "denied Mr. Hobson the right to hearing required by Pence" (Petition at 3). Frank Hobson died on Sept. 12, 1984. "However, where an allotment selection has been made and the applicant has fully complied with the law and regulations and has accomplished all that is required to be done during his lifetime, the right to an allotment is earned and becomes a property right which is inheritable." Thomas S. Thorson, Jr., 17 IBLA 326, 327 (1974); accord Arthur R. Martin, 41 IBLA 224, 226 (1979); Louis P. Simpson, 20 IBLA 387, 391 (1975); see United States v. Flynn, 53 IBLA 208, 234, 88 I.D. 373, 387 (1981). Any issue of entitlement to due process concerns the petitioner as heir to Frank Hobson.

Recent cases concerning the validity of relinquishments of Native allotment applications have arisen due to two statutes. In 1971, section 18 of the Alaska Native Claims Settlement Act, P.L. 92-203, 85 Stat. 688, 710 (1971), codified at 43 U.S.C. § 1617 (1988), repealed the Native Allotment Act (34 Stat. 197 (1906)), but allowed pending applications to proceed to patent. In 1980, in subsection 905(a) of the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 98-487, 94 Stat. 2371, 2435 (1980), codified at 43 U.S.C. § 1634(a) (1988), Congress legislatively approved, subject to valid existing rights, Native allotment applications "which were pending before the Department of the Interior on or before December 18, 1971," within limitations and exceptions provided by the subsection. Among the exceptions, paragraph (6) provided that legislative approval did not "apply to any application pending before the Department of the Interior on or before December 18, 1971, which was knowingly and voluntarily relinquished by the applicant thereafter." 43 U.S.C. § 1634(a)(6) (1988).

In reviewing appeals from BLM decisions addressing petitions to reinstate Native allotment applications, the Board concluded that, between the repeal of the Native Allotment Act in 1971 and the enactment of subsection 905(a) in 1980, BLM was without authority to reinstate a Native allotment application and that, after 1980, the Department lacked authority to consider reinstating a relinquished application for land which subsequently had been either patented or made part of an interim conveyance to a Native corporation. Kenai Natives Association, Inc., 87 IBLA 58, 61-62 (1985); Peter Andrews, Sr., 77 IBLA 316, 319 (1983), (On Reconsideration), 83 IBLA 344, 347 (1984). However, we recognized that, after the enactment of subsection 905(a), an application could be reinstated for land which remained unpatented and that an evidentiary hearing is required when the record presents an issue of material fact as to whether a relinquishment was knowing and voluntary. Peter Andrews, Sr., supra at 319.

[1] In Matilda Titus, 92 IBLA 340, 345 (1986), the Board overruled its holding that a patent or interim conveyance of land precluded the Department from considering a request to reinstate a relinquished application. We recognized, in accord with Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), that the Department could determine whether the relinquishment had been knowing and voluntary and not fraudulently procured and, if the land had been improperly relinquished, reinstate the application to adjudicate its validity prior to recommending the instigation of judicial proceedings to cancel conflicting interests in the land. Id. at 345-47; see also Kenai Natives Association, Inc., supra at 64-66 (A.J. Harris concurring in the result). Subsequently, the Board held that the reasoning of Pence v. Kleppe, 529 F.2d 135 (1976), applied to such cases so that when "the possibility exists that an allotment applicant involuntarily and unknowingly relinquished her allotment application in whole or in part, or was fraudulently induced to do so, she is entitled to the procedural protections of Pence." Feodoria (Kallander) Pennington, 97 IBLA 350, 355 (1987).

[2] The issue before us is whether the possibility exists that Frank Hobson involuntarily and unknowingly relinquished his Native allotment application or was fraudulently induced to do so. "[A] relinquishment of a Native allotment application must be made voluntarily and with knowledge

of the applicant's allotment rights and the consequences of the relinquishment." Katherine C. (Zimin) Atkins v. BLM, 116 IBLA 305, 312 (1990); Matilda Titus, *supra* at 343. In determining whether there is a factual issue whether the relinquishment was knowing and voluntary so as to require a hearing, we must regard as true the factual allegations made in the affidavits filed in support of a request for reinstatement. Heir of Frank Hobson, *supra* at 371; Heirs of Linda Anelon, 101 IBLA 333, 337-38 (1988).

With the request for reinstatement filed by the Bureau of Indian Affairs (BIA) on February 3, 1989, was a copy of an affidavit given to Stanton A. Williams of BIA, March 12, 1984. It stated:

On 9-12-63 I went in the BLM office in Anchorage, on Cordova St. to file for my Native allotment. I had cleared the 160 acres and lived on it for the required 5 years. When I told the man behind the counter that I wanted to file for my 160 acres Native allotment, he told me that I couldn't have the allotment because they were cutting the Native allotments down in size (They being the people in Washington, D.C.). I told him that I had giving [sic] 5 acres to Robert Marshall so it wasn't 160 acres but only 155 acres. He still wouldn't let me apply. I told him that I would take it as a homestead instead, and he said that would be alright [sic]. Therefore, I relinquished 90 acres, thinking that this was the only way I could get some land. I finally got a homestead in 1967 for 65 acres.

I feel I was mislead [sic] and should be allowed to get what I originally applied for. And would like the BIA to help me do this.

Petitioner contends that this statement shows the misrepresentation of material facts as inducement to relinquishment and asserts that the BLM employee lied. The deficiency in her argument is that she fails to point to any misrepresentation of the truth or explain the lie. We accept, as we must, that a BLM employee told Frank Hobson that administrative officials in Washington, D.C. were cutting Native allotments down in size. The statement may have been true. The employee also may have been referring to the fact that approval of an application was limited to the land found by a field investigation to be actually used and occupied. *See, e.g., Lucy Lincoln*, 102 IBLA 182 (1988). Petitioner has presented neither argument nor information to indicate that the statement was false or misrepresented the truth. Absent any indication of the misrepresentation of a material fact, there is no basis for concluding there is a possibility the relinquishment was obtained by fraud or deceit.

Review of Hobson's statement, however, has focused our attention on his assertions that he thought the relinquishment "was the only way I could get some land" and that he felt he had been misled. In light of other decisions issued by the Board, we find these statements raise a possibility that Frank Hobson may have involuntarily and unknowingly relinquished his allotment application. As noted by petitioner, in Titus O. Nashookpuk, Sr., 99 IBLA 213, 215-16 (1987), a statement that "[i]f I really had had a

choice, I would never have given up my Native allotment" was found to be sufficient to indicate "a desire to argue that the relinquishment was in fact not voluntary" and require a hearing. See also Lucy Lincoln, supra. We also have ordered a hearing when the record showed that a relinquishment may not have been knowing and voluntary because the applicant may not have understood its consequences. See Feodoria (Kallander) Pennington, supra at 353; Katherine C. (Zimin) Atkins, 95 IBLA 391 (1987).

The affidavits by Hobson's son, daughter, and widow indicate that he expressed to them his feeling that relinquishing his application had not been his choice. See Heir of Frank Hobson, supra at 369. Petitioner's arguments, however, overstate the effect of accepting the affidavits as true. While we accept that Frank Hobson made the statements reported in the affidavits, we need not regard as true either the substance of those statements or conclusory statements made by the affiants. Cf. F.R.C.P. 56(e) (affidavits "shall be made on personal knowledge").

Accordingly, we find it appropriate to grant the petition for reconsideration, vacate our prior decision, set aside the September 22, 1989, decision of the Alaska State Office from which the appeal was taken, and refer the case for an evidentiary hearing pursuant to 43 CFR 4.415. 2/ At the hearing the petitioner will bear the burden of proving that Frank Hobson's relinquishment of his Native allotment application was invalid because it was not knowingly and voluntarily made or was fraudulently procured through the misrepresentation of a material fact. Heirs of William A. Lisbourne, 97 IBLA 342, 344 (1987).

Our review of the record has disclosed two matters which the Administrative Law Judge to whom the case is assigned may wish to have petitioner clarify prior to the hearing so that parties having interests in the land will be notified. First, although the arguments raised in the petition for reconsideration concern only the relinquishment filed on September 12, 1963, the statement of reasons filed in the initial appeal indicates that petitioner wishes to also challenge the validity of the relinquishment filed on July 6, 1962 (Statement of Reasons at 6, 9). Second, although the case file contains a copy of a supplemental master title plat which has marked on it the lands apparently affected by Hobson's

---

2/ Although we do not reach petitioner's criticisms of the Board's statement that the lack of proof of use and occupancy presented an impediment to approval of the application, we note that the arguments misconstrue the import of the Board's statement. We did not hold that lack of proof of use and occupancy is a barrier to reinstating an application. Rather, if petitioner prevails at the hearing, she will be required to provide evidence of use and occupancy and BLM must adjudicate whether Frank Hobson satisfied the requirements of the Native Allotment Act. If BLM determines he did not, petitioner will be entitled to notice and an opportunity for a hearing on that issue. See Katherine C. (Zimin) Atkins v. BLM, supra at 315.

application, the area marked does not fully correlate with the lands described in the application. 3/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is granted, Heir of Frank Hobson, supra, is vacated,

---

3/ The application stated that it was for 160 acres described as "that portion of Lot 2 and SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 9 lying on the westerly side of the right-of-way of the Richardson Highway and all of Lot 7 and the S $\frac{1}{2}$  SE $\frac{1}{4}$  of Section 8, all in Township 3 North, Range 1 West, Copper River Meridian." The copies of the supplemental title plat in the case file do not show the location of lot 2 of sec. 9. Although lot 2 may correspond to the areas identified as lots 8, 9, and 16, the fact is not apparent from the record. In addition, the calculation of the acreage of the area affected by the application to be 176.14 acres appears to include land within the right-of-way for the Richardson Highway rather than land "lying on the westerly side of the right-of-way."

The case file also contains a number of protests, the current applicability of which is not clear. The State of Alaska filed a protest on May 12, 1981, asserting that "the applicant is not entitled to the land \* \* \* because it is owned by the State of Alaska." This protest was summarily dismissed by BLM on Jan. 18, 1982, because it did not set forth a ground for protest allowed under subsection 905(a)(5) of ANILCA. The State appears to have filed a second protest on June 1, 1981, a single page of which is included in the case file. It states that A038241 "identifies land that is necessary for access to lands owned by the United States, the State of Alaska, or a political subdivision of the State of Alaska, to resources located thereon, or to a public body of water regularly employed for transportation purposes" and has "x" marks placed next to statements that the land is used for an "existing trail," "forms the only reasonable access to publicly-owned resources," and "is an existing constructed public access route, transportation facility or corridor." By letter dated Oct. 16, 1981, the State withdrew a number of protests of Native allotment applications which it listed in exhibits as belonging to one of three categories. Although not identified as such on the exhibit page included in the case file, it appears that the protest against A038241 was withdrawn because it was among "Native Allotment applications which are now noted by the BLM as properly closed." Based on the withdrawal, on Nov. 27, 1981, BLM summarily dismissed in part the State's protest; however, the exhibits listing affected applications are not included in the case file. The Alyeska Pipeline Service Company filed a protest on May 22, 1981. It is not clear that the protest was directed to Frank Hobson's Native allotment application; however, the case file also contains no indication that the protest has been addressed by BLM.

the September 22, 1989, decision of the Alaska State Office is set aside, and the case is referred to the Hearings Division, Office of Hearings and Appeals, for assignment to an Administrative Law Judge.

---

John H. Kelly  
Administrative Judge

I concur:

---

Franklin D. Arness  
Administrative Judge