

HEIRS OF ALICE BYAYUK

IBLA 93-116

Decided July 16, 1996

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying request to amend Native allotment application AA-7234.

Affirmed.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

BLM properly denies a request by the applicant's heirs to amend a Native allotment application to include land additional to that originally described, where BLM previously afforded the applicant an opportunity to amend the application pursuant to sec. 905(c) of ANILCA, but no request was submitted during the prescribed time period, and where a final plan of survey was adopted and executed before the request to amend was made.

APPEARANCES: Joseph R. Faith, Esq., Dillingham, Alaska, for appellants; Carlene Faithful, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The Heirs of Alice Byayuk (Heirs) 1/ have appealed from the October 28, 1992, decision of the Alaska State Office, Bureau of Land Management (BLM), denying their request to amend Native allotment application AA-7234.

When Alice Byayuk 2/ filed Native allotment application AA-7234, she sought a parcel of land situated in unsurveyed secs. 19, 20, and 30,

1/ We note that the appeal was purportedly brought on behalf of the "Estate of Alice Byayuk" (Notice of Appeal, dated Dec. 8, 1992). However, because the record indicates that her will was probated in 1985, we regard her heirs as the proper appellants (Public Inquiries, Jan. 6, 1992; Reply, July 7, 1994). They are David T. Byayuk, Jacob W. Byayuk, Pauline Byayuk, George Bayayok, and Susan Byayuk Pasquariello (Letter to BLM from Bristol Bay Native Association (BBNA), Nov. 30, 1992; Public Inquiries, Jan. 6, 1992).

2/ In the allotment application, the applicant's last name was spelled Byayuk. She also signed the application, using that spelling. In

T. 14 S., R. 68 W., Seward Meridian, Alaska, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970). ^{3/} Byayuk stated in her application that she resided in Togiak, Alaska, and claimed use and occupancy of the parcel since May 1, 1956, for berrypicking, fishing (May to September), and trapping (November to April). She also stated that the land was the situs of two improvements (a campsite and a tent frame, valued together at \$175), which were constructed in 1956.

The land sought was described in the application as the "E¹/₂SE¹/₄SW¹/₄ [and] fractional S¹/₂ SE¹/₄, sec. 19" and the "E¹/₂ NE¹/₄ NW¹/₄ [and] fractional NW¹/₄ NE¹/₄, sec. 30" in the township. The application also indicated that the corners of her claim were marked and posted on the ground. In addition, the location of the allotment claim was depicted on a portion of a Geological Survey (GS) topographic map, entitled "Hagemeister Island (D-3) Quadrangle," attached to the application. The map showed a generally triangular area of land, bounded to the east by the shores of Togiak Bay, to the north by the southern bank of the Quigmy River where it enters the bay, and to the west in part by the claim of Kenneth J. Coupchiak (AA-7235). The remainder of that boundary did not extend any further west than Coupchiak's claim, but continued almost due south to the bay.

BLM placed the claim in the S¹/₂ SE¹/₄ sec. 19, the W¹/₂ SW¹/₄ NW¹/₄ SW¹/₄ sec. 20, and the NW¹/₄ NE¹/₄ sec. 30, on its Master Title Plat for the township dated March 16, 1972. Until the claim was surveyed in 1983, it was thought by BLM to encompass about 160 acres of land: 95 acres in sec. 19, 5 acres in sec. 20, and 60 acres in sec. 30.

On July 31, 1973, a BLM realty specialist inspected the claim in the field. He was not accompanied by Byayuk and could not find any corner markers or postings for the Byayuk claim (Feb. 26, 1974, Land Report at 2). However, he did find wooden posts marking the northeast and southeast corners of Coupchiak's neighboring claim (BLM Answer, Exh. D at 2). Further, he found an abandoned homesite, but no campsite or tent frame or any signs of berrypicking, fishing, or trapping (Land Report at 1). He estimated that the homesite had been "abandoned 20 to 30 years ago from the condition of the wood and types of materials found." *Id.* He nailed a BLM aluminum tag, inscribed with the applicant's name and the serial number of her claim, to a wooden post at the northwest corner of the claim, which was

fn. 2 (continued)

March 1992, BLM came to the conclusion that the correct spelling was "Bayayok" (Public Inquiries, dated Mar. 3, 1992). We find no explanation for that change in the record and shall use "Byayuk."

^{3/} The Act of May 17, 1906, was repealed effective Dec. 18, 1971 (subject to Native allotment applications pending before the Department on that date), pursuant to section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1994). Although filed with BLM on Mar. 20, 1972, Byayuk's application, which was signed by her on Apr. 29, 1971, is deemed to have been received by the Department before Dec. 18, 1971.

on the southern bank of the Quigmy River and corresponded with Coupchiak's northeast corner. The inspector attached to his land report a copy of the portion of the GS topographic map included with Byayuk's application, with the boundaries of the land claimed clearly delineated.

In the absence of any evidence that Byayuk had complied with the use and occupancy requirements of the Act of May 17, 1906, and its implementing regulations, the inspector recommended that her application be rejected. This was concurred in by the Acting District Manager, Anchorage District, BLM. On May 30, 1974, BLM notified Byayuk that it would defer taking any adverse action against her application in order to afford her an opportunity to present evidence of qualifying use and occupancy. ^{4/}

Byayuk filed such evidence on July 23 and October 18, 1974. She stated that she claimed land situated "at the mouth of the Quigmy river as it enters Togiak Bay on the east side." She stated that she had used and occupied the land every year from 1950 until 1971, during the spring (hunting and trapping), summer (fishing and food gathering), and fall (berrypicking). She also noted that the land was the situs of a campsite, tent, fire pit, cleared area, boat landing, traps, and trails.

By letter dated July 23, 1982, BLM notified Byayuk that it appeared that her allotment application had been legislatively approved effective June 1, 1981, pursuant to section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(1) (1994). ^{5/} However, BLM stated that this approval was subject to "confirmation of [the] location" of her allotment claim. BLM attached to the letter a copy of the February 1974 BLM Land Report, including the GS topographic map depicting the "approximate location" of Byayuk's claim. BLM further stated that, pursuant to section 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1994), Byayuk would have 60 days from receipt of the letter to submit an amended land description if the land depicted was not what she had originally intended to claim. BLM cautioned that, in the absence of any submission, it would proceed to survey the land as shown on the attached map. BLM warned that

^{4/} The record indicates that the May 1974 BLM letter was sent to Byayuk at the address listed on her allotment application (Togiak, Alaska 99678), and was signed for by Pauline Byayuk, her daughter. Applicant had indicated on Feb. 13, 1973, that her full address was P.O. Box 38, Togiak, Alaska 99678. That address was used on later letters.

Alaska Legal Services Corporation (ALSC) entered appearances on behalf of Byayuk on July 22, 1974, July 20, 1978, and Dec. 3, 1979, requesting BLM to provide it, along with Byayuk, with all future notices or other written communications concerning her allotment application.

^{5/} Section 905(a)(1) of ANILCA legislatively approved, subject to certain exceptions, all Native allotment applications pending before the Department on or before Dec. 18, 1971, which described land that was unreserved on Dec. 13, 1968. See 43 U.S.C. § 1634(a)(1) (1994). Such approval was to take effect on the 180th day following Dec. 2, 1980.

"[t]he location of your allotment cannot be changed after we have issued the request for survey," (emphasis in original) and that she would be notified when the official survey plat was filed.

The record establishes that the July 1982 BLM letter was received at Byayuk's last address of record (P.O. Box 38, Togiak, Alaska 99678) by Pauline Byayuk, and by her attorney of record (ALSC) at its address on July 26, 1982. No response was received from Byayuk or her attorney within the specified 60 days. According to the record, Byayuk died on April 27, 1983. ^{6/}

In the absence of any objection to the land description in the original allotment application, BLM surveyed the allotment claim, relying on the description in Byayuk's application and the accompanying map and starting from BLM's wooden post with the inscribed aluminum tag. The survey (U.S. Survey No. 7238, Alaska) was performed in September 1982 and was accepted by the Deputy State Director for Cadastral Survey, Alaska, BLM, on October 6, 1983, and the survey plat and field notes were officially filed on December 8, 1983. As reflected on the plat, BLM's survey placed the claim, which was found to encompass 91.43 acres, along the Quigmy River where it enters Togiak Bay. The claim was found to extend about 4,500 feet along the shores of the bay. Its western boundary coincided in part with the eastern boundary of Coupchiak's allotment claim (AA-7235), which was also surveyed at the same time. ^{7/}

By letter dated February 14, 1984, BLM (which was then unaware that Byayuk had died) notified her that it had surveyed her allotment claim, and afforded her 30 days from receipt of the letter to object to the survey. Attached to the letter was a copy of the official survey plat. BLM stated that, in the absence of any objection, it would consider the survey correct and proceed to issue a certificate of allotment based on the survey. The record shows that the February 1984 BLM letter was received at Byayuk's last address of record by Pauline Byayuk and by her attorney of record on February 16, 1984. No response was received.

BLM accordingly issued a certificate of allotment (No. 50-84-0527) to Byayuk on May 23, 1984, for 91.43 acres, described as Lot 1 of U.S. Survey No. 7238, Alaska. The case was closed on June 6, 1984.

The certificate remained outstanding for over 7 years until BLM, on November 19, 1991, received a request by Byayuk's heirs (through BBNA) seeking another opportunity to object to the BLM survey (Public

^{6/} BLM was not notified that Byayuk had died until it received an Oct. 21, 1988, letter from BBNA.

^{7/} Byayuk's and Coupchiak's claims were surveyed, respectively, as Lots 1 and 2 of U.S. Survey No. 7238, Alaska. Coupchiak was issued a certificate of allotment (No. 50-84-0448) on Apr. 25, 1984.

Inquiries, dated Nov. 19, 1991). In response, BLM reinstated the case and issued a letter on January 7, 1992, affording the Heirs 30 days from receipt of the letter (later extended) to object to the survey if it did not encompass the land "shown" in BLM's July 1982 letter. BLM, however, stated that Byayuk's application could not be amended, since she had already been afforded that opportunity with receipt of the July 1982 BLM letter. ^{8/}

On February 24, 1992, the Heirs (through BBNA) requested BLM to amend Byayuk's allotment application to include land in addition to that described in her original application and depicted on the topographic map attached to that application. The additional parcel was described by metes and bounds and depicted on a copy of the survey plat, adjacent to lot 1 of U.S. Survey No. 7238, Alaska, continuing to the southwest for 792 feet along the shores of Togiak Bay. ^{9/} The Heirs maintained that Byayuk originally claimed that land, as shown by a copy of a hand-drawn map (entitled "Location of Alice Byayuk's Allotment") stamped as received by the Realty Office, Anchorage Agency, Bureau of Indian Affairs (BIA), on May 3, 1971, but not filed with BLM. They also explained that Byayuk did not make any effort to amend her application upon receipt of BLM's July 1982 letter because she was physically unable to respond to the letter.

In its October 1992 decision, BLM denied the Heirs' amendment request. BLM noted that an allotment applicant was permitted, by section 905(c) of ANILCA, to amend the land description in his application so that it described the land he intended to claim at the time he filed it, but that BLM could limit the time for seeking amendment to 60 days following receipt of notice. BLM noted that it had done so by serving its July 1982 letter on Byayuk, but that nothing was submitted. BLM also noted that nothing had been submitted objecting to the correctness of the 1983 BLM survey, despite issuance of its February 1984 letter. BLM further noted that section 905(c) of ANILCA precluded amendment "following adoption of a final plan of survey."

BLM denied the Heirs' request to amend because Byayuk was notified by BLM's July 1982 letter of her right to amend her application and by its February 1984 letter that the survey had been accomplished, and because the

^{8/} BLM also stated that the certificate of allotment must be surrendered so that a corrected one could be issued to Byayuk's heirs. Following its October 1992 decision, BLM issued a corrected certificate of allotment (No. 50-93-0030) on Nov. 13, 1992, to the "Heirs, Devisees and/or Assigns of Alice Bayayok." In view of the instant appeal, the certificate was not noted to BLM's records.

^{9/} This parcel, together with the land previously approved, appears to encompass more than the maximum 160 acres permitted under the Native Allotment Act. The Heirs advised BLM in February 1992 that they would seek to include the parcel to the extent that the maximum was not exceeded.

description in the original application corresponded with the land examined by BLM in 1974 (as well as surveyed in 1982). The Heirs appealed.

[1] Prior to December 18, 1971, an Alaskan Native was entitled, pursuant to the Act of May 17, 1906, as amended, to apply for an allotment of up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska, and to satisfy the requirement of 5 years' qualifying use and occupancy either before or after application. 43 U.S.C. §§ 270-1, 270-3 (1970); 43 CFR 2212.9-4(a) (1970) (formerly codified at 43 CFR 67.7 (1959)); United States v. Flynn, 53 IBLA 208, 225-26, 234, 88 I.D. 373, 382-83, 387 (1981). If, after filing an application, an applicant subsequently desired to obtain an allotment of additional land up to the statutory 160-acre maximum, he could amend his application to encompass it and then fulfill the requirement of 5 years' use and occupancy as to the additional land. See Hermann T. Kroener, 124 IBLA 57, 65 (1992); Stephen Northway, 96 IBLA 301, 307 (1987).

An amendment of this nature was permitted because the placement of a claim on a protraction diagram might not conform to the land that the applicant actually intended to claim on the ground, since the land sought was often unsurveyed at the time of application, and reliance had to be placed on the projection of survey lines in such diagrams. Further, applications were often prepared on behalf of the applicant, so that the description might not conform to what he in fact intended to claim. As a result, after the repeal of the Act of May 17, 1906, and prior to ANILCA's enactment on December 2, 1980, applicants were permitted to amend their applications to ensure that they encompassed the land the applicants originally intended to claim.

Section 905(c) of ANILCA provided similar amendment authority, stating that an applicant "may amend the land description contained in his or her application if said description designates land other than that which the applicant intended to claim at the time of application and if the description as amended describes the land originally intended to be claimed." 43 U.S.C. § 1634(c) (1994). The legislative history of ANILCA establishes that errors that are "subject to correction under [the] authority of Section 905(c)" include "[t]echnical errors in land description, made either by the applicant or by the Department in computing a * * * survey description from diagrams" (S. Rep. No. 413, 96th Cong., 2d Sess. 286, reprinted in 1980 U.S. Code Cong. & Admin. News 5070, 5230).

It is now well established that section 905(c) of ANILCA was intended to permit only the amendment of an allotment application so that it would accurately reflect the land that the applicant originally intended to claim, but that was misdescribed through some error in the application. Amendment to permit the substitution of new or additional land which the applicant had not originally intended to claim was not authorized. See Hermann T. Kroener, 124 IBLA at 64-65; State of Alaska (Helen M. Austerman), 119 IBLA 260, 266 (1991), and cases cited.

Moreover, although the statute did not place any limitation on the time for seeking amendment of an application, it authorized the Department to do so:

[T]he Secretary [of the Interior] may require that all allotment applications designating land in a specified area be amended, if at all, prior to a date certain, which date shall be calculated to allow for orderly adoption of a plan of survey for the specified area, and the Secretary shall mail notification of the final date for amendment to each affected allotment applicant, and shall provide such other notice as the Secretary deems appropriate, at least sixty days prior to said date. [Emphasis added.]

43 U.S.C. § 1634(c) (1994); see also S. Rep. No. 413, 96th Cong., 2d Sess. 286, reprinted in 1980 U.S. Code Cong. & Admin. News 5070, 5230; Angeline Galbraith, 97 IBLA 132, 144-45, 146, 94 I.D. 151, 157-58, 158 (1987). The effect is to grant the Secretary authority "to set a deadline for amending all allotment applications in a designated area by notice mailed to them at least 60 days prior to the deadline." Id. at 144, 94 I.D. at 157.

An applicant's failure to respond to such notice terminates the right to amend. Silas Solomon, 133 IBLA 41, 47-48 (1995).

The statute also provides that, in any event, "no allotment application may be amended for location following adoption of a final plan of survey which includes the location of the allotment as described in the application or its location as desired by amendment." 43 U.S.C. § 1634(c) (1994); see also S. Rep. No. 413, 96th Cong., 2d Sess. 286, reprinted in 1980 U.S. Code Cong. & Admin. News 5070, 5230; Angeline Galbraith, 97 IBLA at 146, 94 I.D. at 159. Thus, where a plan of survey is adopted subsequent to the enactment of ANILCA, the adoption of such plan of survey cuts off any opportunity to amend the application. Id. at 146, 94 I.D. at 159.

It is clear from the above that, whatever the circumstances surrounding Byayuk's application, the governing statute and regulations dictate that the Heirs' request to amend the application must be rejected as untimely.

It is unclear when BLM adopted its "final plan of survey" for the location of the allotment as described in Byayuk's 1972 application, within the meaning of section 905(c) of ANILCA, supra. However, special instructions for the survey of the lands sought by Byayuk and Coupchiak were approved on August 6, 1982, and the survey took place from September 16 through 19 of that year. It was accepted on October 6, 1983, and the survey plat and field notes officially filed on December 8, 1983. The final plan of survey was plainly adopted no later than that date.

We conclude that BLM was precluded by section 905(c) of ANILCA from permitting an amendment of Byayuk's application after December 8, 1983, the

date the survey plat and field notes were officially filed. That point was clearly "following adoption of [the] final plan of survey" for the allotment. 43 U.S.C. § 1634(c) (1994). ^{10/}

In any event, the application was filed more than 60 days after Byayuk was served with BLM's letter dated July 23, 1982, providing notice of the lands she had selected and allowing 60 days to object. BLM thus provided the means for Byayuk to ascertain whether an amendment was necessary if her application did not reflect the land she originally intended to claim by enclosing a copy of the February 1974 Land Report, including the topographic map depicting the location and configuration of the allotment claim, with its July 1982 letter. By enclosing that map, BLM placed Byayuk on notice that it thought her claim was triangular (not rectangular) in shape and encompassed different land than depicted on the map originally submitted to BIA on May 3, 1971. Moreover, the map clearly showed that BLM did not regard Byayuk's claim as extending any farther west than the eastern boundary of the Coupchiak claim.

BLM also expressly warned that the consequences of failure to respond within 60 days would be that it would order a survey and that no amendment to the location of the allotment would be considered. No response was made. In such circumstances, BLM properly concluded that she considered the land depicted on the GS topographic map submitted to BLM on March 20, 1972, and set forth on the map included with its February 1974 Land Report the land she had originally intended to claim. See State of Alaska (Heirs of Lucy Charlie), 126 IBLA 204, 212 (1993).

Appellants explain Byayuk's lack of response on the basis that she was then suffering from an illness, from which she eventually died. The record includes affidavits indicating that Byayuk was ill and hospitalized at the time she received the July 1982 BLM letter, and that she was unable to speak, having been paralyzed by a stroke. There is also evidence that, at times, she had trouble remembering people and events.

Although the record does not show that Byayuk signed for BLM's determination as to the location of Parcel B, it was delivered to her

^{10/} We recognize that BLM's Feb. 14, 1984, letter notifying Byayuk that it had surveyed her allotment claim solicited her objections to the correctness of the survey. The letter did not provide an opportunity to amend the application, although it is unclear what BLM might have done if objections had in fact been raised.

We have recognized a limited exception to the time limit to provide that such an amendment may occur even after adoption of a final plan of survey (of the claimed land) where the applicant has not been notified of the pending adoption and afforded an opportunity to object to the plan. See Daniel Roehl, 103 IBLA 96, 100-101 (1988). Those circumstances are not present here.

last address of record, a circumstance allowing the presumption that she did receive notice of that fact before her death. See 43 CFR 1810.2(b); State of Alaska (Lucy Charlie), 126 IBLA at 212. As notice was received at Byayuk's home (apparently by a close relative), this created the opportunity for her heir to consider the question of the extent of Byayuk's entitlement. It is also significant that the possibility of prejudice to her claim was abated by contemporaneous service of notice on her legal counsel, who might be expected to be privy to her state of mind concerning the extent of her application.

Appellants assert that the Board should exercise its equitable adjudication authority, pursuant to 43 U.S.C. §§ 1161-64 (1994) and its implementing regulations (43 CFR 1871.1-1), to excuse Byayuk's failure to seek amendment after issuance of the July 1982 letter by BLM and their failure to seek amendment immediately after issuance of the February 1984 notice by BLM, and thus to permit the amendment. Under the doctrine of equitable adjudication, the Department is permitted, in adjudicating an entry, to excuse a failure to fully comply with the relevant law where the entryman has substantially done so, and the failure to fully comply is due to "ignorance, mistake, or some obstacle over which the party had no control, or any other sufficient reason not indicating bad faith." 43 CFR 1871.1-1. It has been held applicable to the adjudication of Native allotment applications, including permitting an applicant to properly amend his land description, where a deficient amendment was submitted to the Department before December 18, 1971. See, e.g., Herbert Herrmann, 45 IBLA 43, 49 (1980).

The present case, however, concerns the application of the provisions of section 905 of ANILCA, rather than an adjudication under the Act of May 17, 1906. Therefore, it is not subject to adjudication under 43 U.S.C. § 1161 (1994). The specific language in section 905(c) of ANILCA prohibiting amendment of Byayuk's application may not be circumvented. In any event, the Heirs have not shown circumstances that would compel exercise of equitable authority.

Appellants contend that BLM was estopped from concluding that Byayuk wanted less than 160 acres of land. They argue that BLM had acknowledged that she desired 160 acres and that applicant relied on those representations to her detriment (SOR at 8). Appellants point to BLM's February 1974 Land Report and a July 1982 letter, which indicate, respectively, that Byayuk's allotment claim encompassed 160 acres, "more or less," and "approximately 160 acres."

Those statements in question are not incorrect, but plainly allowed for the possibility that the claim, in fact, encompassed less than 160 acres. Thus, we do not find any affirmative misrepresentation of a material fact that would give rise to an estoppel against BLM, even assuming the other requirements were present. Even if the statements could be regarded as informing applicant that BLM believed the application to cover a full 160 acres, estoppel would not apply. The party against whom

estoppel is sought must have cause to know that a representation is false. BLM had not surveyed the claim at the time of either statement and, thus, could not have known the acreage in question. Nor, in view of this fact, could Byayuk reasonably have expected BLM to know the size of the parcel she had applied for in the absence of a survey. See Carl Dresselhaus, 128 IBLA 26, 33 (1993).

Finally, appellants request a hearing before an administrative law judge pursuant to 43 CFR 4.415, which request is opposed by BLM. As a general matter, we will order a hearing where there is a material issue of fact that must be resolved. See Woods Petroleum Co., 86 IBLA 46, 55 (1985). Moreover, we are required to order a hearing in a case where the validity of a Native allotment turns on a disputed question of fact. See Pence v. Kleppe, 529 F.2d 135, 143 (9th Cir. 1976); Heirs of Edward Peter, 122 IBLA 109, 114 (1992). Appellants, however, have failed to establish that disposition of this case hinges on the resolution of a material issue of fact. Any question regarding whether Byayuk originally intended to claim the land now sought by appellants was finally concluded, as a matter of law, when she failed to respond timely to the July 1982 BLM letter, or she and her heirs failed to act before the survey was executed. Thus, the request for a hearing is denied. See Heirs of Edward Peter, 122 IBLA at 115-16, 116 n.6.

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.

David L. Hughes
Administrative Judge

I concur.

John H. Kelly
Administrative Judge

