

DWIGHT TEVUK, DECEASED (ON RECONSIDERATION)

IBLA 76-22

Decided March 9, 1977

Petition for reconsideration of Dwight Tevuk, Deceased, 22 IBLA 296 (1975), which remanded the case to the Fairbanks District Office, Bureau of Land Management, for processing under section 14(h)(5) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(5) (Supp. III, 1973).

Petition for reconsideration granted; Dwight Tevuk, Deceased, 22 IBLA 296 (1975), reversed and case remanded.

1. Alaska: Native Allotments--Alaska Native Claims Settlement Act: Indian Residence Allotment

The filing of an option form by an Alaska Native to receive his "primary place of residence" pursuant to section 14(h)(5) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(5) (Supp. III, 1973), does not terminate a prior allotment application filed under the Native Allotment Act, 43 U.S.C. § 270-1 (1970). Allowance of an application under either act renders the applicant ineligible for allowance of the other application.

2. Alaska Native Claims Settlement Act: Indian Residence Allotment

Pursuant to 43 CFR 2653.8-3, appeals from decisions made by the Bureau of Land Management on applications filed pursuant to section 14(h)(5) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(5) (Supp. III, 1973), "shall be made to the Alaska Native Claims Appeals Board."

APPEARANCES: Curtis V. McVee, State Director, Bureau of Land Management, Anchorage, Alaska.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

The State Director, Bureau of Land Management (BLM), Anchorage Alaska, has petitioned the Board for reconsideration and clarification of its decision, Dwight Tevuk, Deceased, 22 IBLA 296 (1975). The Board's decision held that the exercise of an option by an Alaska Native to receive his "primary place of residence" pursuant to section 14(h)(5) of the Alaska Native Claims Settlement Act, ANCSA, 43 U.S.C. § 1613(h)(5) (Supp. III, 1973), served to terminate a prior application filed under the Native Allotment Act, 43 U.S.C. § 270-1 (1970). The decision remanded the case to BLM for appropriate processing under section 14(h)(5) of ANCSA.

[1] Petitioner states that the Board's decision raises some questions concerning the election of a Native allotment applicant to apply under section 14(h)(5) of ANCSA.

Section 14(h)(5) reads:

The Secretary may convey to a Native, upon application within two years from December 18, 1971, the surface estate in not to exceed 160 acres of land occupied by the Native as a primary place of residence on August 31, 1971. Determination of occupancy shall be made by the Secretary, whose decision shall be final. The subsurface estate in such lands shall be conveyed to the appropriate Regional Corporations;

The tract must constitute "a primary place of residence" for the applicant as of August 31, 1971.

Petitioner directs our attention to a memorandum dated September 20, 1973, from the Secretary of the Interior, to the Assistant Secretary, Land and Water Resources, and to the Assistant to the Secretary for Indian Affairs, which stated, in part:

* * * it is apparent to me that many persons are under the impression, caused primarily by certain elective forms which Allotment Applicants were asked to execute, that the pendency of an Allotment Application precluded the filing of an application under § 14(h)(5) for a primary place of residence. Such is not the case.
* * *

* * * * *

An Allotment Applicant may therefore, if eligible, file an application under § 14(h)(5) of the Alaska Native Claims Settlement Act and both applications may be pending simultaneously before the Department. Allowance of either application will render the applicant ineligible for allowance of the other application.

It is clear from such memorandum that both an application under section 14(h)(5) of ANCSA and a Native allotment application may be pending at the same time. Allowance of either application negates allowance of the other.

In the present case Dwight Tevuk filled out a form provided by BLM. The form states as follows:

EXERCISE OF OPTION (Choice)
(Alaska Native Claims Settlement Act)

I have filed a Native Allotment Application. I understand that the claims act allows me either to have my Native Allotment Application processed in the normal way by the Bureau of Land Management or that I can apply for my primary place of residence (home) under section 14(h)(5) of the claims act. I also understand that I cannot have both.

I want one of the following (check one of the boxes):

To have my Native Allotment Application

To apply for my primary place of residence (home) and I withdraw my Allotment application.

As recognized in the Secretary's memorandum, the option form was clearly wrong in stating the options in the disjunctive. The form provided by BLM was erroneously worded. Therefore, it would be unconscionable to hold a Native to have made a binding election on the basis of the erroneous election form.

The filing of the option form by a Native did not result in termination of a prior Native allotment application. A different result would be untenable, especially where an applicant might not qualify under section 14(h)(5), but would be qualified to receive an allotment.

In the present case Dwight Tevuk indicated on the option form filed on February 5, 1973, that he wanted to apply under section 14(h)(5). Subsequently, on July 12, 1973, he filed an identical form which was labeled "amended application." Thereon it was noted, "Applicant did not understand the difference between the options at the time he chose his primary place of residence." The application purported to cancel the option made in February and "To have my Native Allotment."

The option form filed in February did not terminate Dwight Tevuk's allotment application. Therefore, the attempted revival in July was unnecessary. In the same respect, because of the confusing nature of the option form, the fact that he changed his election in July should not affect any rights he or his estate might have under section 14(h)(5).

[2] Petitioner has stated that it is the position of BLM that the mere filing of the option form does not constitute an application under section 14(h)(5). We note that the regulation, 43 CFR 2653.8, governing the filing of an application under section 14(h)(5), does not delineate any specific form to be filed to make application; however, we do not pass on the question of whether the option form would suffice as an application under section 14(h)(5), as the resolution of such a question is not within our province. The appropriate forum is the Alaska Native Claims Appeals Board. Appeals from decisions made by BLM on applications filed pursuant to section 14(h)(5) "shall be made to the Alaska Native Claims Appeals Board * * *." 43 CFR 2653.8-3.

Dwight Tevuk's allotment application was rejected by BLM based on the authority of Thomas S. Thorson, Jr., 17 IBLA 326 (1974). Thorson held that 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 fully complied with the law and regulations and all that remained to be done at the date of his demise was the mere administrative act of issuing an allotment certificate.

Dwight Tevuk died August 29, 1973. Evidence of occupancy of the land was filed by his widow on March 26, 1974. BLM stated that based on the Thorson decision Tevuk's widow was precluded from submitting and signing the final proof.

On appeal, Alaska Legal Services Corporation presented evidence of occupancy, signed by the Superintendent of the Nome Agency of the Bureau of Indian Affairs and dated June 27, 1975. It was pointed out that the evidence of occupancy signed by the Superintendent was sufficient to satisfy the requirement of 43 CFR 2561.2(a), which provides in relevant part:

An allotment will not be made * * * until the applicant or the authorized officer of the Bureau of Indian Affairs has made satisfactory proof of substantially continuous use and occupancy of the land for a period of five years by the applicant. * * * This proof * * * may be made at any time within six years after the filing of the application when the requirements have been met.

In light of such new evidence presented on appeal, the case will be remanded to BLM for further processing pursuant to final rules being established for the processing of Native allotment applications. See Donald Peters I, 26 IBLA 234 (1976); Donald Peters II, 28 IBLA 153 (1976); Pence v. Kleppe, Civil No. A74-136 (D. Alaska, December 20, 1976).

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; Dwight Tevuk, Deceased, 22 IBLA 296 (1975), is reversed and the case remanded.

Frederick Fishman

Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Douglas E. Henriques
Administrative Judge

