

Appeal from decision of the Alaska State Office, Bureau of Land Management, holding Native allotment application AA-3045 and evidence of occupancy unacceptable for recordation.

Set aside and remanded.

1. Attorneys -- Alaska: Native Allotments -- Practice Before the Department: Persons Qualified to Practice -- Rules of Practice: Appeals: Dismissal
The Department has determined that an official of the Bureau of Indian Affairs is not entitled to represent a Native allotment applicant in an appeal to the Board of Land Appeals. However, where the case involves the propriety of proofs submitted by the Bureau of Indian Affairs in behalf of a deceased Native allotment applicant, that issue may be resolved.
2. Alaska: Native Allotments -- Applications and Entries: Generally -- Applications and Entries: Rights of Widows, Heirs, or Devisees -- Evidence: Indian Lands: Allotments: Generally -- Rules of Practice: Evidence

Where a Native allotment application is filed before the death of an applicant, proof of the applicant's use and occupancy, if otherwise timely, may be filed by the appropriate official of the Bureau of Indian Affairs pursuant to 43 CFR 2561.2(a) after the applicant's death. A decision rejecting the application because the proof was filed after the applicant's death must be set

aside where the proof is not inconsistent with the application. Further proceedings must be served upon the heirs, known or unknown, by appropriate service, and also upon conflicting claimants, such as the State of Alaska.

APPEARANCES: Roy Peratrovich, Superintendent, Anchorage Agency, Bureau of Indian Affairs, for the deceased applicant; James N. Reeves, Assistant Attorney General, State of Alaska, for the State, before Bureau of Land Management only.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Roy Peratrovich, Superintendent, Anchorage Agency, Bureau of Indian Affairs (BIA), on behalf of the heirs of Ernest L. Olson, Jr., appeals from the August 8, 1975, decision of the Alaska State Office, Bureau of Land Management (BLM), holding Native allotment application AA-3045 and evidence of occupancy unacceptable for recordation. 1/

Pursuant to the Act of May 17, 1906, 34 Stat. 197, as amended 70 Stat. 954 (repealed by section 18(a) of the Alaska Native Claims Settlement Act, 85 Stat. 710, 43 U.S.C. § 1617 (1976), saving pending applications), Olson filed a Native allotment application with BIA on July 17, 1968; 2 days later BIA filed the application with BLM. Olson alleged occupancy of the land "off and on" since childhood. In 1968 he was 21 years of age. On March 26, 1971, Olson died as a result of a snowmobile accident. Peratrovich submitted evidence of occupancy for Olson on July 25, 1973, on a new form for an allotment application. This document alleges use and occupancy by Olson since 1963. It is stated that the decedent resided on the land in the fall of each year from 1963 to 1970, that he had a campsite on the land, and used it for hunting and berrypicking. There were three witness statements attached attesting that Olson used and occupied the land "for fishing and hunting for more than 5 years prior to 1968 continuing up to the time of his death."

By letter of May 15, 1975, an employee of BLM informed BIA that Olson had satisfied the requirements of the Native Allotment Act and the land would be surveyed. BLM received a letter from the State of Alaska June 19, 1975, asserting that State selection application AA-8416, filed June 4, 1973, segregated these lands and no other applications should have been accepted. The State requested that BLM give it notice of any decision made or further proceedings proposed,

1/ Consideration of this appeal has been delayed pending the outcome of related litigation in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), and Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

and sought to reserve the right to request a hearing. The State made other assertions which were not answered by BLM, and are not involved in this appeal other than the issue of notice to it of further proceedings. Thereafter, BLM issued its decision rejecting the allotment application. It, in effect, indicated the letter of May 15, 1975, was not binding and was erroneous.

The decision appealed referred to 43 CFR 2561.1(f), which requires the applicant to submit proof of use and occupancy within 6 years of the filing of the application. BLM ruled that as an Alaska Native's right of selection is inalienable, nontransferable, and uninheritable, it terminates with death. It held that because the application was incomplete at his death, Olson had not met the requirements of the Act and earned no rights which could inure to his estate.

Peratrovich filed a statement of reasons for appeal, alleging standing pursuant to 43 CFR 4.270 which places on the Superintendent, BIA, responsibility for custody and care of trust personal property of a deceased Indian when necessary for the benefit of the estate pending a determination of the heirs. He asserts that the BLM decision is in error in rejecting the evidence because it was not filed by Olson. Peratrovich states that the approved forms for Native allotment applications and evidence of occupancy were the same and that the filing by BIA was intended only to serve as the latter. He argues that under the regulations, BIA is permitted to file the evidence of occupancy for the applicant, that Olson completed more than 5 years of substantially continuous use and occupancy at the time of his death, and the heirs are entitled to the allotment.

[1] Part 1 of Title 43, Code of Federal Regulations, governs representation of parties in proceedings before Appeals Boards of the Office of Hearings and Appeals. 43 CFR 4.3. It has previously been ruled that Peratrovich is not authorized to practice before this Department, and his appearance before the Board of Land Appeals on behalf of individuals filing Native allotment applications violates these regulations. See Virginia Gail Atchison, 13 IBLA 18 (1973); Julius F. Pleasant, 5 IBLA 171 (1972); Memorandum of the Deputy Solicitor and the Director, Office of Hearings and Appeals, to the Commissioner, Bureau of Indian Affairs and the Director, Bureau of Land Management, September 26, 1975. In the prior cases involving representation of Native allotment applicants by Peratrovich before this Board, the appeals were dismissed, but the Natives were allowed an opportunity to present their own case in subsequent proceedings. The case before us, however, presents additional problems. Here the applicant is deceased, the heirs are unknown, and the BLM decision raises the question whether proofs of a Native allotment applicant's use and occupancy may be filed by an official of the BIA. The appeal challenges the propriety of BLM's ruling on the filing of the proof by BIA in behalf of the deceased's heirs. It is appropriate in these

circumstances to address this issue, and to instruct BLM on the further handling of this case. ^{2/}

[2] The regulations pertaining to Native allotments contemplate that an application will be filed and signed by a Native. See 43 CFR 2561.1. This was done here. It is also clear, however, that proof of the Native's use and occupancy may be made by the applicant or an authorized officer of BIA. Regulation 43 CFR 2561.2 provides:

(a) An allotment will not be made until the lands are surveyed by the Bureau of Land Management, and 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. Such proof shall be made on a form approved by the Director, Bureau of Land Management, and filed in the proper land office. If made by the applicant, it must be signed by him, but if he is unable to write his name, his mark or thumb print shall be impressed on the statement and witnessed by two persons. This proof may be submitted with the application for allotment if the applicant has then used and occupied the land for five years, or may be made at any time within six years after the filing of the application when the requirements have been met. [Emphasis added.]

The application signed by the Native here indicated that proof of use and occupancy would accompany the application. There is no indication in the record why it was not submitted with the application. While the above-quoted regulation contemplates the proof to be filed with the application if the requisite 5-year use and occupancy has then been made, it does not require it. Indeed, it permits such proof to be filed within 6 years after the application has been filed. Neither this regulation nor any other of which we are aware addresses specifically the question of proof filed after an applicant's death. However, since the regulation permits BIA to file the proof, in any event, it is obvious that it can be filed after a decedent's death, if otherwise timely.

In ruling that the Native applicant did not do all that was required by the law to do before his death, the BLM decision cited Thomas S. Thorson, Jr., 17 IBLA 326 (1974). That decision and other Board decisions, e.g., Heirs of Madronna Wassillie, 23 IBLA 131 (1975),

^{2/} In Donald Peters (On Reconsideration), 28 IBLA 153, 165, 83 I.D. 564, 570, n.5 (1976), reference is made to this case which was pending at the time. We noted that the appeal was being handled by the BIA official here "pursuant to his obligation to conserve the estates of deceased Natives."

and Louis P. Simpson, 20 IBLA 387 (1975), stand generally for the proposition that the Native, himself, must meet all the requirements of the Native Allotment Act and that no property right is created which can pass to the heirs if the decedent had not fully met all the requirements before his or her death. These cases are all distinguishable and relate to different problems than that presented here. In Wassillie and Simpson it was found that there was not sufficient occupancy and use by the Native before lands were segregated from Native allotment entry. Prior use of an applicant's family could not be substituted to meet this deficiency. In Thorson, BIA attempted to amend an application by substituting a fact different from that stated by the applicant. We need not reexamine that proposition at this time; it suffices to point out that the situation here is different. There has been nothing filed which on its face contradicts the application filed by Olson, other than the fact that the application indicated the proofs were being submitted then.

Here the use and occupancy alleged on the application was from childhood. ^{3/} The application was filed almost 5 years prior to the State selection. The proof submitted by BIA was filed within 6 years from the filing of the application as required by the regulation. This should be treated as a proof of use and occupancy and not as a new application, as that was obviously the intent, and it made no change in the original application.

The BLM decision, therefore, must be set aside and the case reexamined. We make no ruling on the adequacy of the use and occupancy alleged in the proof submitted here. Because of the rulings by the United States Court of Appeals for the Ninth Circuit in the Pence cases cited in footnote 1, an allotment application should not be rejected because of an applicant's inadequate use and occupancy without a hearing. In all future proceedings, if the heirs have been finally determined, they must be named and served as parties. Otherwise, all unknown heirs or claimants to the estate must be served with appropriate notice by publication as provided in the regulations. All parties responding must do so either in person or by a representative qualified to practice before this Department. If upon reexamination of this case BLM determines that the allotment is not valid, it should initiate a Government contest affording appropriate notice to the heirs, as indicated above, and also to all conflicting claimants, including the State of Alaska, who may intervene in the contest proceedings. In any event, the State should be afforded an opportunity to contest the allotment application if it is to be allowed. See, e.g., State of Alaska, 40 IBLA 79 (1979).

^{3/} The BLM decision states that BIA amended the use and occupancy date claimed from 1968 to 1963. This is incorrect. The decedent alleged use and occupancy from childhood. In the evidence of occupancy submitted by BIA the year 1963 was given for commencement of the statutory period. This is not inconsistent with the original application.

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 set aside and the case remanded for further proceedings consistent with this decision.

Joan B. Thompson
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Newton Frishberg
Chief Administrative Judge

