

ESTATE OF GUY C. GROAT, JR.
VIOLET ROEHL

IBLA 79-21, 79-22

Decided March 21, 1980

Appeals from decision of Alaska State Office, Bureau of Land Management, declaring ineffective a relinquishment of Native allotment application A-058897; holding application A-058897 for rejection without prejudice to Bureau of Indian Affairs filing evidence of use and occupancy; and rejecting Native allotment application AA-2524.

Affirmed in part and remanded in part.

1. Alaska: Native Allotments

An inheritable property right in an allotment is created only if an applicant fully complies with all of the application requirements before his or her death. This right arises even though the applicant's evidence of use and occupancy has not been filed so long as the applicant has fulfilled all other requirements, because BIA may file such evidence on behalf of the applicant's heirs.

2. Alaska: Native Allotments -- Applications and Entries:
Relinquishment

In order for an heir to relinquish an allotment application, he or she must be the sole heir or have the authority to act on behalf of all heirs. Where, as in this case, the widow of a Native allotment applicant, who is not the sole heir, acting on her own behalf relinquishes his application and refiles for the same allotment; the relinquishment is ineffective.

3. Alaska: Native Allotments -- Applications and Entries:
Relinquishment

Upon the death of a Native allotment applicant, BIA may file evidence of use and occupancy for the benefit of the applicant's heirs so long as the applicant has fulfilled all other requirements for allotment. However, BIA has no authority to relinquish the applicant's allotment during the period for filing evidence of use and occupancy.

4. Alaska: Native Allotments

The filing of an acceptable application for a Native allotment segregates the lands from appropriation and subsequent conflicting applications must be rejected. An erroneous notation on the tract books of relinquishment of an allotment, although it appears to reopen the land for allotment, does not cut off the rights of the first applicant as against subsequent applicants. The notation rule expressed in 43 CFR 1825.1 serves to fix the point in time when previously segregated land is returned to the public domain and is designed to give all persons wishing to apply for the land an equal chance to do so. It does not necessarily establish when a prior applicant's rights in the land have terminated.

5. Alaska: Native Allotments

Where a person files a Native allotment application for lands segregated from appropriation, the application is null and void ab initio and does not give rise to any equitable interest.

6. Authority to Bind Government

The United States may not be bound by its officers when they enter into an agreement to do or cause to be done what the law does not sanction or permit.

7. Administrative Procedure: Hearings -- Alaska: Native Allotments -- Rules of Practice: Hearings

Where issues of material fact are in dispute, due process requires that an applicant for a Native allotment be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and granted an opportunity for an oral hearing before a trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment.

8. Administrative Procedure: Generally -- Administrative Procedure: Hearings -- Alaska: Native Allotments -- Contests and Protests: Generally -- Hearings -- Rules of Practice: Government Contests

Where Bureau of Land Management determines that an application for a Native allotment should be rejected for failure to establish use and occupancy of the land, Bureau of Land Management should initiate a contest proceeding pursuant to 43 CFR 4.451 to 4.452-9.

APPEARANCES: David B. Snyder, Esq., Alaska Legal Services Corporation, for Violet Roehl; Roy Peratrovich, Bureau of Indian Affairs, Department of the Interior, on behalf of the Estate of Guy C. Groat, Jr.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

On March 28, 1963, the Bureau of Indian Affairs (BIA), submitted a Native allotment application A-058897 on behalf of Guy C. Groat, Jr., under the provisions of the Native Allotment Act of 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed subject to pending applications, section 18(a), Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976)), and implementing regulations. The application covered 160 acres of unsurveyed land approximately located at sec. 15, T. 17 S., R. 47 W., Seward meridian. Although Guy Groat claimed occupancy from May 1, 1957, he did not file the required evidence of 5 years use and occupancy with his application because Bureau of Land Management (BLM) had notified him erroneously that use and occupancy ran from the filing of an application. BLM informed him instead that he must file the evidence by March 27, 1969, 6 years from

the date of his application. Groat died in an airplane accident on December 27, 1964, without having submitted the required evidence of use and occupancy.

Upon notification of Guy Groat's death, BLM sent the Superintendent of the Anchorage District, BIA, the following memorandum as to what procedure to follow under the circumstances:

We have received your letter of September 27, 1966, advising us of the death of Mr. Groat.

The regulations governing the filing of evidence of occupancy for Alaska allotments, 43 CFR 2212.9-4(a) require that such evidence of occupancy be filed by the applicant or the authorized officer of the Bureau of Indian Affairs. If the applicant had complied with the five year use provision of the law prior to his death, the evidence of occupancy may be filed for him by an authorized officer of the Bureau of Indian Affairs.

If he had not fully complied with the law prior to his death, his wife could relinquish his filing and file a new application in her own name. There are no provisions in the regulation or the law which would allow her to complete his claim.

On February 14, 1967, Guy Groat's widow, now Mrs. Violet Roehl, signed a relinquishment of Groat's allotment application and BIA submitted it to BLM on December 7, 1967. BLM noted this action on the tract books on the same day and closed the case. Also on the same day BIA submitted Native allotment application AA-2524 on behalf of Roehl. This application covered the same lands as those in Guy Groat's application. Roehl claimed occupancy from December 27, 1964.

Subsequently, BIA timely filed evidence of use and occupancy for Roehl and BLM conducted a field examination of the claimed area on June 29, 1975. On November 10, 1975, BLM notified Roehl that her use and occupancy had been verified as to approximately 40 of the claimed 160 acres, and provided her an opportunity to submit additional information to support the full claim. Thereafter, counsel for Roehl submitted various affidavits asserting her use of the entire claim.

In March 1978 the Alaska State Director, BLM, determined that the relinquishment of Guy Groat's claim had been improper because it was signed by an heir, and that BLM should not have closed the file in 1967. He then requested an opinion from the Regional Solicitor as to how to proceed. The Assistant Regional Solicitor returned the opinion that an allotment could not be issued to Violet Roehl on the basis of the following rationale:

According to 43 CFR 2561.1(e) "The filing of an acceptable application for a Native allotment will segregate the lands. Thereafter, subsequent conflicting applications for such lands shall be rejected * * *." The applicant "or the authorized officer" of the BIA, may make "satisfactory proof of substantial continuous use and occupancy of the land * * * within six years after the filing of the application * * *." 43 CFR 2561.2(a).

Thus, by the notice of "allotment accepted" the applicant was told he (or an authorized officer of BIA) had until March 27, 1969 to file proof of use and occupancy. During this time the land was segregated. 43 CFR 2561.1(e). Since no proof was filed, his application terminated on March 27, 1969. 43 CFR 2561.1(f). Until this date no one else could file an acceptable application and the widow's application should have been rejected. 43 CFR 2561.1(e).

An application for land which has been segregated gives the applicant no rights to that land even if it becomes available later. "* * * [T]he Department has long followed the policy, as to applications for * * * interests in land, of rejecting all applications for lands which are not available for requested disposition at the time they are filed or considered." (Citing cases) Hatheway, et al., 68 ID 49, 51 (1961).

* * * * *

The relinquishment that the widow filed was without effect. The relinquishment form the widow signed cited R.S. 2291 as its authority. R.S. 2291, 43 U.S.C. 164 provides for a widow or heirs to complete a homestead entry.

This is readily distinguishable from the situation where an entryman dies prior to filing final proof under the ordinary Homestead Act. (43 U.S.C. 161, et seq., as extended to Alaska under 48 U.S.C. 371, et seq.) That act specifically provides that "if at the expiration of [three years from date of entry], or at any time within two years thereafter, the person making such entry, or if he be dead his widow, or in the case of her death his heirs or devisee * * * proves by himself and by two credible witnesses [that requirements of residency and cultivation have been made] * * * then in such case he, she, or they * * * shall be entitled to a patent." (Emphasis supplied.) There are any number of decisions holding that first the widow and then the heirs may complete the original entryman's pre-patent requirements and furnish final proof under the ordinary

homestead laws. It should be noted, however, that even under the ordinary Homestead Act the widow and/or heirs do not succeed to the rights of the entryman by inheritance but rather the act simply sets up a method for completing the homestead claim in their own right and obtaining patent therefor. No such provision is contained in the 1906 Allotment Act.

There was lacking in the widow an interest which she could have relinquished for herself and Mr. Groat, Jr.'s other heirs.

Since there are not outstanding questions of fact, it is recommended that you reject the application of the widow. [Emphasis in original.]

On August 31, 1978, BLM issued a decision indicating that 1) the 1967 relinquishment by Violet Roehl of her husband's allotment claim was unacceptable, 2) the Groat allotment application (A-058897) would be held for rejection without prejudice to BIA coming forward with the required evidence of use and occupancy, and 3) Violet Roehl's Native allotment application (AA-2524) was rejected.

Both the Superintendent of the Anchorage Agency, BIA, on behalf of the Estate of Guy C. Groat, Jr., and counsel for Violet Roehl filed notices of appeal from this decision. ^{1/} By order of this Board on October 19, 1978, the two cases were consolidated for consideration on appeal. On November 13, 1978, BIA submitted evidence of use and occupancy for the Groat Native allotment and moved to withdraw its appeal.

[1, 2, 3] We must determine first whether there was an effective relinquishment of Guy Groat's allotment. Violet Roehl asserts that either she or BIA effectively relinquished the allotment and that, in any case, BLM's notation of the cancellation of the allotment on the tract books reopened the land to allotment.

^{1/} While the Superintendent of the Anchorage Agency, BIA, has purported to file this appeal on behalf of the heirs of Guy Groat, as the text subsequently notes, Violet Roehl was the administratrix of Guy Groat's estate and the estate, itself, was settled on August 8, 1966. While this Board has previously noted that officials of BIA may have standing to appeal on behalf of unknown heirs of a deceased allotment applicant from an adverse decision of BLM (see Donald Peters (On Reconsideration), 28 IBLA 153, 165-66, n.5, 83 I.D. 564, 570, n.5 (1976)), once the heirs have been identified, BIA no longer has standing to represent them. See Ernest L. Olsen, Jr. (Deceased), 41 IBLA 179, 183 (1979). Inasmuch, however, as these two applications are inextricably combined, it is necessary to examine both together.

Neither the Native Allotment Act, supra, nor the applicable regulations, 43 CFR Subpart 2561, provide specifically for relinquishment of Alaska Native allotment claims. The regulations only provide that an application for an allotment will terminate if the required proof is not submitted within 6 years of the filing of the application. See 43 CFR 2561.1(f); 43 CFR 2561.2. We believe, however, that a right to relinquish must be recognized. To conclude that Native allotment applications can not be relinquished under any circumstances, would needlessly tie up public lands when an applicant, for whatever reason, seeks to affirmatively terminate his application before the end of the 6-year period. See Keane v. Brygger, 160 U.S. 276, 287 (1895).

Generally, a person can not transfer rights in property which he or she does not possess. 73 C.J.S. Property § 15(b)(1) (1951). In order for Roehl's intended relinquishment to have been effective, she must have succeeded to all rights in the application or had complete authority over those rights when she submitted the relinquishment. 2/

On a number of occasions, we have held that the Native applicant, personally, must meet all of the requirements of the Native Allotment Act and that, therefore, an inheritable property right in an allotment is created only if an applicant fully complies with all of the requirements before his or her death. Andrew Petla, 43 IBLA 186, 195 (1979); Arthur R. Martin, 41 IBLA 224 (1979); Louis P. Simpson, 20 IBLA 387 (1975); Larry W. Dirks, Sr., 14 IBLA 401 (1974). Recently, in Ernest L. Olsen, Jr. (Deceased), 41 IBLA 179 (1979), however, we recognized that BIA may file a Native applicant's evidence of use and occupancy for the benefit of the heirs, if otherwise timely, after the applicant's death so long as the applicant has fulfilled all other requirements for an allotment prior to his or her death. In such a situation, we conclude that an inheritable interest in a deceased applicant's allotment still arises upon his or her death subject to the condition that BIA file, in timely fashion, the required evidence to support the deceased's application.

Turning to the case now before us, upon notification of Guy Groat's death, BLM should have first determined the status of the Groat application as of his death. If BLM had found that Groat had not met the requirements of the Native Allotment Act, then no rights to the allotment would have vested in Groat's heirs and, contrary to BLM's advice to BIA, Violet Roehl would have had no interest to relinquish. BLM, itself, could have terminated the application and removed the notation of the allotment from the tract books. It appears, however, that BLM would have found that Groat had met all requirements

2/ Roehl intended to relinquish the application in toto, implying that she either had full "ownership" thereof or properly represented all "owners" thereof. Neither situation obtains here. At best she had a partial interest as one of the heirs. We need not decide whether her relinquishment could have been effective to relinquish her partial interest.

except the filing of evidence of use and occupancy. Therefore, BLM's first recommendation to BIA was the proper way to proceed. BIA should have timely filed the evidence of use and occupancy so that the allotment could have been adjudicated on behalf of the heirs of Guy Groat.

Roehl signed the relinquishment form as "wife of deceased." In her statement of reasons, she asserts that she was acting as "administrator to the estate, widow to the decedent, and natural guardian of decedent's children." Roehl served as administrator of Guy Groat's estate from March 22, 1965, until the estate was settled on August 8, 1966. Thus, she was not administrator in 1967 and did not sign as administrator when she signed the purported relinquishment. In 1967, as an heir, though not the sole heir of her husband, Roehl could have claimed at most an undivided interest in the allotment of her husband. There is no evidence in the record that she had the authority to act on behalf of all of the heirs and there is no indication on the relinquishment form that she was acting on behalf of anyone other than herself. We find that Violet Roehl's attempt at relinquishment was ineffective.

As to the argument that BIA could and did relinquish the Groat allotment claim, we have a number of comments. First, we find that BIA might in effect, relinquish an allotment of a deceased applicant by failing to file evidence of use and occupancy within the applicable time frame, when the applicant dies without having so filed. The application would then terminate, BLM would remove the allotment notation from the tract books, and the land would be open to allotment once again. We do not agree, however, with Roehl's assertion that BIA generally has authority to relinquish prior to the end of the time period for filing. To do so would be in contravention of the rights vested in the decedent's estate or heirs. Roehl's reference to 25 CFR 15.29 (1967) as giving BIA general probate authority over Groat's property is not applicable in this case because this regulation relates to the care of personal property belonging to a deceased Indian pending administration of the estate.

[4] Since we find that there was no effective relinquishment we also must conclude that the notation of cancellation on the tract books by BLM was in error. Although the erroneous notation, on its face, appeared to open the land in question to allotment, it was not effective to cut off the rights of the heirs of Guy Groat and any later conflicting applications must be rejected. Cf. Keane v. Brygger, supra. The applicable regulation 43 CFR 2561.1(e) states simply that "[t]he filing of an acceptable application for a Native allotment will segregate the lands. Thereafter, subsequent conflicting applications for such lands shall be rejected * * *." The rule does not rest on whether or not the appropriate notation is made in the tract books. For example, if BLM failed to note application A's allotment on the books upon filing and applicant B later filed for the same allotment, A's application would take priority over B's. If all other requirements were met, A would receive the allotment.

Roehl argues that the cancellation notation effectively opens the lands to allotment under 43 CFR 1825.1(b). ^{3/} We do not agree. The notation rule, as expressed in 43 CFR 1825.1, reflects the well-established Departmental policy that land segregated from the public domain is not subject to any form of appropriation until its restoration to the public domain is noted on the tract books. State of Alaska, 6 IBLA 58, 66-67, 79 I.D. 391, 395-96 (1972); California and Oregon Land Co. v. Hulen and Hunnicutt, 46 L.D. 55, 57 (1917); Hiram M. Hamilton, 38 L.D. 597 (1910). See Joyce A. Cabot, 63 I.D. 122, 123 (1956). The primary objective of this policy is to assure that all persons wishing to apply for available public land will have an equal chance to do so. Duncan Miller 66 I.D. 388, 392 (1959); Elmer F. Garrett, 66 I.D. 92, 95 (1959). The rule establishes that previously segregated lands become available to the public at that point in time when the termination of an earlier claim is noted on the tract books. What is important in this case is that the rule does not necessarily serve to establish the point in time when the rights of the prior claimant are cut off. In summary, although a cancellation notation in the tract books subsequent to relinquishment gives the appearance that the land is open for appropriation, if the relinquishment was not effective, the land has not been restored to the public domain. As between the prior applicant and one who files on the basis of the erroneous notation in the tract books, the earlier claimant has the superior rights.

Since there was no relinquishment of the Groat allotment, we conclude that BLM properly rejected Violet Roehl's application pursuant to 43 CFR 2561.1(e). Roehl filed an allotment application for the same allotment during the 6-year period for filing evidence of use and occupancy under the Groat application. That land was segregated from appropriation until March 27, 1969. Applications filed for lands not available for disposition at the time of filing must be rejected. State of Alaska, supra; J. G. Hatheway, 68 I.D. 48, 51 (1961); R. B. Whitaker, 63 I.D. 124 (1956). We hold that Violet Roehl's application is null and void ab initio.

^{3/} The cited regulation reads as follows:

"§ 1825.1 When relinquished land becomes subject to further appropriation.

* * * * *

"(b) Upon the filing of a relinquishment of an entry or claim (other than a homestead claim), or a lease, the land will not become subject to further application or other appropriation until the entry, claim or lease has been canceled pursuant to the relinquishment and the fact of the cancellation has been noted on the tract books in the proper office."

The same regulation was in effect in 1967 except that the last phrase read, "noted on the tract book in the land offices."

[5] In her statement of reasons, Roehl makes two additional arguments to support her claim to the allotment. First, she asserts the principle that equitable title attaches upon full compliance with the requirements for allotment and that such equitable title cannot be arbitrarily denied without affording appellant due process. She claims that a November 10, 1975, letter from BLM notifying her that she had met the use and occupancy requirements as to a portion of the allotment is evidence that equitable title had vested in her. We disagree. Her argument requires that there have been a valid entry from which the vested interest arises. In this case, there was no such entry. As we have stated, Roehl's application must be rejected as null and void ab initio as a matter of law. She did not acquire any rights upon filing her application because the land was not open to entry. 43 CFR 2561.1(e). The cases which Roehl cites in her statement of reasons are not persuasive because they involved situations where rights arising from an approved allotment were being protected as against a later entry, reservation, or withdrawal of the land. See Raymond Bear Hill, 52 L.D. 688 (1929); Charley Clattoo, 48 L.D. 435 (1922). That is not the situation in the present case.

[6] Finally, Roehl asserts that the Department should be estoppel from holding that the relinquishment is ineffective. The simple response to that assertion is to repeat the well-established principle that the United States can not be bound or estopped by the acts of its officers when they cause to be done what the law does not sanction or permit. 43 CFR 1810.3(b). Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384 (1947); Utah Power and Light Co. v. United States, 243 U.S. 389, 409 (1916); Atlantic Richfield Co. v. Hickel, 432 F.2d 587, 591 (10th Cir. 1970). As we have discussed, BLM had no authority to accept relinquishment from Roehl under the circumstances of this case.

To go a step further, however, we note that in defining equitable estoppel, the Ninth Circuit Court of Appeals in United States v. Georgia Pacific, 421 F.2d 92 (9th Cir. 1970), stated: "Equitable estoppel is a doctrine adjusting the relative rights of parties based upon consideration of justice and good conscience." 421 F.2d at 95. In this case, we are not balancing the public's interest in preserving Federal lands against the rights of a private party. Rather, we are determining the relative rights of opposing private parties. We can not in justice and good conscience deny the superior rights of the heirs of Guy Groat by holding that this Department should be estopped from finding the relinquishment ineffective. Furthermore, one recognized test as to whether estoppel is available as a defense against the Government requires that the wrongful conduct cause a serious injustice. The anomaly of this case is that Violet Roehl, as an heir of Guy Groat, potentially stands to gain the allotment or a portion of it regardless of our ruling. On that basis, we can not find that serious injustice will occur if estoppel were not granted.

[7, 8] Since BIA filed evidence of use and occupancy of the Groat allotment following BIA's August 31, 1978, decision, Native allotment application A-058897 must be returned to BLM for a determination as to the sufficiency of the use and occupancy.

In Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), the United States Court of Appeals for the Ninth Circuit ruled that where issues of material fact as to use and occupancy are in dispute, due process requires that

applicants whose claims are to be rejected must be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and, if they request, granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment.

529 F.2d at 143.

Following that decision, this Board ruled that the Departmental contest procedures, 43 CFR 4.451-1 to 4.452-9, would satisfy the requirements of due process. Thus, when BLM adjudicates a Native allotment application presenting a factual issue as to the applicant's compliance with the use and occupancy requirements, BLM must initiate a contest giving the applicant notice of the alleged deficiency in the application and an opportunity to appear at a hearing to present favorable evidence prior to rejection of the application. Donald Peters, 26 IBLA 235, 241-42, 83 I.D. 308, reaffirmed on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976). The Court of Appeals has since held that the Departmental contest procedures would satisfy, at least facially, the due process requirements set forth in Pence v. Kleppe, *supra*. Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

If BLM determines that the Groat application should be rejected for failure to establish use and occupancy of the land, BLM should initiate a contest proceeding as outlined in our decision in Donald Peters, *supra*. If a contest is required, BLM must give notice and opportunity to participate to all of the Groat heirs including Violet Roehl.

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, the appeal of Violet Roehl as to Native allotment application AA-2524 is denied, the appeal of BIA as to Native allotment application A-058897 is dismissed and application

A-058897 is remanded for further proceedings consistent with the opinion.

James L. Burski
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Edward W. Stuebing
Administrative Judge

