

Editor's note: appealed - reversed, Civ. No. A82-396 (D. Alaska Aug. 8, 1985), 615 F.Supp. 990; Remanded to BLM by order dated Oct. 1, 1985 -- See 66 IBLA 37A & B below.

MARY OLYMPIC (ON RECONSIDERATION)

IBLA 76-627

Decided June 22, 1982

Petitions for reconsideration of Board decision styled Mary Olympic, 47 IBLA 58 (1980), affirming a decision of the Alaska State Office, Bureau of Land Management, denying a request to reopen Native allotment file, A-052511.

Petitions granted; prior decision reaffirmed.

1. Alaska: Native Allotments

Where an application for an allotment describes specific land for which an allotment is sought, but on which land the applicant cannot show the requisite use and occupancy, the death of the allotment applicant terminates all right of reselection by the applicant, and his heirs or his estate may not seek to amend the land description to embrace other land.

2. Alaska: Native Allotments -- Words and Phrases

"Pending." Where a Native allotment application was rejected in 1967, and no action seeking review or appeal of that decision was filed until 1975, the application was not "pending" on December 18, 1971, and, therefore, BLM lacks the statutory authority to "reopen" the case.

APPEARANCES: Elizabeth Barry, Esq., Office of the Regional Solicitor, for the Bureau of Land Management; Carolyn Lathrop, Esq., for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

By decision dated April 14, 1980, styled Mary Olympic, 47 IBLA 58 (1980), this Board affirmed the denial of a request by the appellant to reopen the Native allotment file of Alexis Gregory, appellant's father. The Board based its decision on two independent grounds. First, the Board held that there was no application "pending" before the Department on December 18,

1971, the date of the repeal of the Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970), and thus, the Department was without authority to grant the allotment application. Second, we held that even were this claim not barred by repeal of the Native Allotment Act, supra, the decision of the Bureau of Land Management (BLM) was correct since no rights inure to the heirs of a deceased applicant where BLM was unable to verify use and occupancy for the lands described in the application, and the applicant did not correct the application to embrace lands actually used.

On June 20, 1980, the Office of the Regional Solicitor moved that this Board reconsider its decision as it related to the first ground for affirmance. The petition referred to the Pence litigation (Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), and Pence v. Andrus, 586 F.2d 733 (1978)), expressing the view that the Board's decision was inconsistent with these opinions. The petition stated:

The Board's opinion in Mary Olympic does not mention the Pence cases and potentially violates the due process mandate. It is the BLM's position that while the result in Mary Olympic is correct, the holding is too broad. If the application was rejected and the file closed incorrectly the Department has an obligation to reopen the file and properly adjudicate the claim. Mary Olympic does not appear to allow for such action and should be modified to permit compliance with the Pence holdings. The court in Pence I and Pence II found that native allotment applicants have a sufficient property interest to warrant due process protection. Error on the part of the Department in closing a file before the 1971 repeal cannot obviate the applicant's right to this protection. [Emphasis in original; footnote omitted].

On June 23, 1980, counsel for appellant also filed a petition for reconsideration. This petition disagreed with both holdings of our original decision, arguing in essence that applications are always "pending" until they are granted and contending as well that Alexis Gregory had acquired an inheritable property right at his death, which right had devolved upon his daughter, Mary Olympic.

In order to examine these various contentions and to consider, as well, the provisions of the Alaska National Interest Lands Conservation Act (ANILCA), Act of December 2, 1980, 94 Stat. 2371, as they relate to this appeal, we have determined to grant the petitions and reconsider our decision. While the basic facts are not in dispute, it is important for the sake of our discussion that they be clearly understood. Accordingly, we repeat the facts as we described them in our original decision:

On July 5, 1960, the Bureau of Indian Affairs (BIA), filed a Native allotment application and evidence of use and occupancy under the Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), and implementing regulations at 43 CFR Part 67 (1959), on behalf of Alexis Gregory. The application claimed use and occupancy from 1922 and identified improvements consisting of a log cabin and two log caches. On March 25, 1961, BLM conducted a field examination of the allotment. The

examiner reported that no improvements were found on the allotment as described in the application and the nearest improvements, approximately 1 mile northeast, did "not appear to be of the size and number claimed by applicant." Witnesses, however, had substantiated Gregory's use of land in an area approximately as plotted on the map accompanying the allotment application. The examiner then recommended: "The applicant has undoubtedly complied with the regulations as to use of the land in the area but he should be requested to submit a better description that will include his improvements and not exceed 5 acres so that the improvements can be located and positively identified."

BLM again examined the land described in the allotment application on September 27, 1963, with the same results; no improvements or other evidence of use and occupancy were found. The examiners in this instance recommended:

It appears that the applicant should be requested to submit a description for the land on which his improvements are actually located. However, if the present description actually describes the land desired by the applicant, the evidence of occupancy should be rejected as the applicant has not actually occupied and appropriated the land to his own use.

Following this report, BLM notified Gregory by a certified letter dated February 13, 1964, that he should submit a correct description of the lands embracing his improvements within 30 days or his application would be rejected. Gregory signed the returned receipt for the letter, but no reply letter was ever received by BLM.

The next action on the case occurred when BLM, by memoranda dated April 5, 1967, and June 12, 1967, requested that BIA contact Gregory, find out if the description of his lands was in error, and assist him in filing a new application. On June 13, 1967, BIA informed BLM that they had not succeeded in contacting him. BLM contacted BIA again in October 1967 but BIA had still not located Gregory. They agreed that the allotment application should be rejected and BLM issued a decision to that effect on October 13, 1967. The copy of the decision sent to Gregory was returned to BLM marked "deceased."

By letter dated November 24, 1975, Alaska Legal Services Corporation, acting on behalf of appellant Mary Olympic, informed BLM that Gregory had died in early 1967 ^{1/} and requested that his allotment file be reopened so that appellant could show "that the area where the improvements are is actually the area [her father] was claiming in his allotment."

^{1/} We have subsequently been informed that the date of death was Sept. 7, 1967.

In a letter dated January 23, 1976, BLM refused to reopen the case stating that:

A decision rejecting the application was not issued until October 13, 1967, and according to your letter, Mr. Gregory died in the early part of 1967. Therefore, the applicant had at least 3 years to submit a new description. Furthermore, since Mr. Gregory did not submit a revised description before his death, Ms. Olympic would be unable to show the area of improvements. Thomas S. Thorson, Jr., 17 IBLA 326 (1974) states:

No rights inure to the estate of a deceased Native allotment applicant where the application, filed by the deceased during his lifetime, does not show prima facie entitlement and where a basic amendment to the application would be required to conform it with the law, rules, or regulations.

Thereafter, appellant requested reconsideration of the BLM position. Appellant argued that if her father had been allowed to accompany the field examiner, the problem would have been reconciled since "[i]t is obvious that a mere error in locating the land on paper is what transpired." She stated that her father was at a very old age and "[m]ost likely" was "too ill to attend to the BLM letter." They urged that guidelines issued in 1974 requiring that the applicant or a representative accompany the field examiners allow reopening this case and attempted to distinguish Thomas S. Thorson, Jr., supra.

On April 27, 1976, BLM issued the decision formally denying the request to reopen the Native allotment file from which the instant appeal is taken. The decision again cited the rule previously quoted from Thomas S. Thorson, Jr., supra. In addition, BLM applied the longstanding principle that an Alaska Native must have completed "all that was necessary and all that he could do to become entitled to the land before his demise" in order to have acquired an inheritable right to the land. BLM states that Gregory did not do "all that was necessary" because his use of the land applied for -- that land described in his application -- was not verified by the field examination nor was there any indication from Gregory himself that an error in the description had been made. BLM also indicated that the guidelines referred to by appellant were not an appropriate basis for reopening the case of deceased applicants, even if they had existed at the time BLM decided the case. [Footnote omitted.]

47 IBLA at 59-61.

As noted above, the appeal was originally rejected by the Board on two independent grounds. Only the appellant attacks the second basis of our

decision, viz., that no inheritable right to the allotment existed which Mary Olympic could exercise. We will examine this question first. In examining this issue, we will assume, arguendo, that the application was "pending" on December 18, 1971.

[1] In effect, appellant seeks to amend the application so as to properly describe the land which her father sought to have allotted to him. This Board has, in the past, noted that where the allotment applicant has misdescribed the land sought, such an application may be amended to reflect the original intent of the applicant. See Raymond Paneak, 19 IBLA 68 (1975). Moreover, we noted in Ernest L. Olson, Jr. (Deceased), 41 IBLA 179 (1979), that BIA could file a Native allotment applicant's evidence of use and occupancy for the benefit of heirs, after the applicant's death, so long as the applicant had fulfilled all other requirements for an allotment prior to his or her death. However, where a Native allotment applicant dies after making an application but such application is for land unoccupied either at the time of application or subsequently, his or her heirs may not amend a pending application to show that the applicant had erroneously described the land for which he intended to apply.

The right to an allotment is a personal right. Where the allotment right to a specific parcel of land has vested, it is inheritable, even though the original applicant may have died prior to issuance of the certificate of allotment. The right to an allotment vests, however, only upon the completion of 5 years' use or occupancy of land and the filing of an application therefor. United States v. Flynn, 53 IBLA 208, 224-38, 88 I.D. 373, 382-90 (1981). Thus, use or occupancy without an application, or application absent preexisting or subsequent use or occupancy, is insufficient to vest a right to an allotment.

The filing of an application by Gregory served to segregate the land described in his application. 43 CFR 67.6 (1963). The use or occupancy of other lands by Gregory may well have been sufficient to bar the initiation of rights by third parties (though not the United States) in those lands, so long as the use and occupancy continued. But until the elements of use or occupancy were conjoined with an application for the same lands, a vested preference right existed neither in the lands described nor the lands occupied. 2/

A review of the facts discloses that BLM was well aware of the possibility that Gregory had misdescribed the land that he sought. Indeed, BLM specifically sought to have Gregory amend the land description in his application. BLM also contacted BIA to obtain its help in clearing up this matter. All of these efforts were to no avail. Accordingly, by decision of October 13, 1967, with the concurrence of BIA, BLM formally rejected the allotment application. Inasmuch as Gregory had already died, there was, of

2/ As we noted in United States v. Flynn, supra, application was an essential element to the grant of an allotment since a Native could use or occupy lands greatly in excess of 160 acres, the maximum amount of land which could be allotted. Application served to identify the specific acreage sought and also established a right enforceable against the Government itself, in all save the most limited circumstances.

course, no appeal from this decision. Nevertheless, the effect of this decision was to finally reject Gregory's allotment application and to terminate the segregative effect of the application on the land therein described. See 43 CFR 2212.9-1(f) and (g) (1965). From this point in time, there was no longer an application to which an amendment might properly apply.

We wish to emphasize that rejection of an allotment application did not affect an applicant's right of possession, for these possessory rights were, until the passage of the Alaska Native Claims Settlement Act (ANCSA), independent of the right to allotment. See generally United States v. Flynn, supra. Nor would it foreclose, in most circumstances, the right to make another application. ^{3/} In the instant case, Gregory had died the month prior to the issuance of the rejection. Thus, his preference right to an allotment could only embrace the actual land described in his application.

Appellant does not contend that the lands described are those used or occupied by Gregory. Thus, unlike the situation in the Estate of Guy C. Groat, Jr., 46 IBLA 165 (1980), appellant is not contending that the action of BLM in rejecting the application was improper. ^{4/} Appellant, in effect, seeks to correct an error made in the original application, which error was, in fact, the basis of BLM's rejection. But, at the time that the application was rejected, Gregory had not established a vested right either in the land described or in the land occupied. When BLM rejected the application because it did not describe lands used or occupied, and no appeal or petition for reconsideration was filed by either Gregory, his estate, or his heirs, Gregory's rights under the application terminated. So, too, upon Gregory's death, the rights of use and occupancy of the land Gregory was then living on, terminated. There remained no rights to which appellant could lay claim, except by her own individual use or occupancy and subsequent application. The inchoate rights of Gregory, having never been perfected, did not survive his death. Thus, appellant's request "to reopen" the Gregory case file was properly denied.

^{3/} Where an application was rejected because of some legal impediment in the person making the application, e.g., the applicant had already received an allotment of 160 acres, rejection would, perforce of logic, prevent further applications from being favorably acted upon, as well. But, where the application was rejected for failure to show qualifying use and occupancy, rejection clearly did not foreclose reapplication.

^{4/} Since even appellant does not contend that the area embraced by the application was the area sought by Gregory, there is no question of fact involved such as would require notice and an opportunity for hearing prior to final rejection, under the dictates of Pence v. Kleppe, supra. Appellant's attorney while admitting that Gregory did not use the land described in the application contends that since the original field report stated that he used land "in the area," a question of fact exists. On the contrary, the Pence hearings are designed to ascertain whether the lands described in the application are used or occupied, not whether land adjacent, nearby, or in the area was used or occupied. Indeed, proof of the latter would have no relevance to the former. Thus, rejection of applicant's application for the land described therein would not, in the absence of an allegation of use and occupancy of that parcel, require notice and an opportunity for hearing.

Our analysis comports with section 905(c) of ANILCA, 94 Stat. 2436, which expressly provides that "an allotment 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 the application and if the description as amended describes the land originally intended to be claimed." By its terms, the right to amend an application is limited to the "allotment applicant." It is thus inapplicable where the applicant has died prior to the attempted amendment. Since the amendment would be necessary to vest an applicant's right, the failure to amend necessarily defeats the inchoate right of the applicant.

[2] The Board also held in Mary Olympic, supra, that, regardless of whether or not Gregory's application had been correctly rejected, there was no application "pending before the Department of the Interior on December 18, 1971," as required by section 18(a) of ANCSA, 43 U.S.C. § 1617(a) (1976). Both the Solicitor's Office and appellant object to this part of our earlier decision; the Solicitor argues that our statement is too broad, while the attorney for appellant contends it is simply wrong. We have examined both contentions, but we find them without merit as we shall show below.

Appellant argues that the savings clause covers any application filed, but yet not perfected, citing language used by Judge Fitzgerald in Barr v. United States, Civ. No. A 76-160 (D. Alaska, Jan. 18, 1980). Thus, while she recognizes that applications which have been granted are no longer "pending," she contends that any application which had not been granted had, therefore, not been "perfected" and was thus "pending." We emphatically disagree.

The term "pending" is neither arcane in usage nor controversial in scope. Indeed, while it has been interpreted by numerous courts, we have been unable to find, nor has appellant pointed out, a single instance where a court has determined that "pending" embraces the concept of something already decided or finally rejected.

Numerous cases have held, contrary to appellant's argument, that "pending" means "remaining undecided" or "not terminated." See, e.g., Stockard v. Hamilton, 180 P. 294, 295 (N.M. 1919); Smalley v. State, 127 S.W. 225 (Tex. 1910). While more recent decisions, particularly those arising out of the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U.S.C. § 1988 (1976), have noted that a case may be considered "pending" while it is on appeal (Sethy v. Alameda City Water District, 602 F.2d 894, 897 (9th Cir. 1979)) or where an "active" issue was unresolved on the critical date (Peacock v. Drew Municipal Separate School District, 433 F. Supp. 1072, 1075 (D. Miss. 1977)), not a single case has ever suggested that where a final decision has been rendered, and no timely appeal or petition for reconsideration had been filed, that the matter was still somehow "pending."

There is nothing in section 18(a) of ANCSA that would compel a differing result herein. Admittedly, it appears in a savings clause, but as the Supreme Court of Kansas noted, the use of the term "pending" in a savings clause in legislation "is used in the general sense of 'commenced and not terminated.'" Thompson v. Board of Commissioners of Reno City, 275 P. 205, 208 (1929). Nor does anything in Judge Fitzgerald's decision even remotely support the construction appellant seeks to place upon it. Appellant points to the court's statement that "[w]hat legislative history there is indicated

* * * congressional concern with applications which had already been filed with the Department of the Interior but which had not yet been perfected." (Emphasis in Brief.) Appellant, however, inexplicably fails to continue with the court's discussion. Thus, Judge Fitzgerald wrote:

In the course of hearings before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, Congressman Begich used the term "pending" to refer to such filed but unperfected applications:

MR. BEGICH: . . . Let me ask some short questions. Your bill would repeal the Native Homestead Act of 1906 which enabled the Alaskan Natives to file for surface rights of 160 acres based on use and my information is that approximately 3,000 applications under this Act are now pending. Will these pending applications be perfected? You have perfected 341 through March 20, 1971, which means you have a long way to go. By that rate, is it not true that it would take 45 months to handle those remaining?

MR. MELICH: We tend to process as fast as our personnel will allow.

MR. BEGICH: So you will continue to acknowledge those pending applications?

MR. MELICH: Those properly filed applications filed in time will be processed to completion.

The savings clause was apparently directed at such backlogged applications.
[Emphasis supplied.]

It is clear from Congressman Begich's reference that he was using the term "perfected" in the sense of continuing activities by BLM to complete adjudication of the allotments, not in the sense that applicants could "perfect" their right to an allotment after repeal. ^{5/} Moreover, Judge Fitzgerald's observation that "the savings clause was apparently directed at such backlogged applications" can scarcely be said to apply to applications which the Department had already rejected since those were not "backlogged" so much as "disposed of."

^{5/} We do recognize that in one sense an applicant can "perfect" his right to an allotment after repeal. If an applicant has timely filed an application, but not yet completed the requisite use or occupancy as of Dec. 18, 1971, he may fulfill the use requirement after the date of the repeal. See Warner Bergman (On Reconsideration), 31 IBLA 21 (1977). This is consistent with the fact that the regulations have always permitted the completion of the 5 years' use and occupancy within a 6-year period following the filing of the application. See 43 CFR 2561.2(a). This is merely another example of how an inchoate right of an applicant may become vested. Clearly, however, appellant could not avail herself of this provision to "perfect" the claim involved herein.

The Office of the Solicitor poses its contentions in a different fashion. Essentially, it argues that the rulings in Pence v. Kleppe, *supra*, and Pence v. Andrus, *supra*, should be retroactive in scope so that where the Department has, in the past, not afforded an applicant notice and hearing on a disputed issue of fact, or has rejected an application on any other "incorrect" ground, the Department has "an obligation to reopen the file and properly readjudicate the claim." While we agree that the decisions in Pence v. Andrus, *supra*, and Pence v. Kleppe, *supra*, are to be applied retroactively, we are of the opinion that, where the Department had finally rejected an application for allotment, and neither an appeal to the Federal courts nor a petition for reconsideration was pending on December 18, 1971, the Department not only does not have an obligation to reopen the file, it lacks the authority to do so.

Decisions of courts as to what the law is are presumptively retrospective in scope. This presumption is based, as many courts have noted, on "the Blackstonian view, that judges do not make law; they find law. Judicial declaration of law is merely a statement of what the law has always been." Cash v. Califano, 621 F.2d 626, 628 (4th Cir. 1980). See also Zweibon v. Mitchell, 606 F.2d 1172, 1175-77 (1979). While a number of recent judicial pronouncements, particularly in the field of criminal law, have limited the effect of decisions to prospective effect only, or alternatively provided for only partial retroactive effect, such actions have been based on considerations of fairness and public policy. See, e.g., In Remarriage of Brown, 544 P.2d 561, 568-69 (Cal. 1976); Li v. Yellow Cab Co., 532 P.2d, 1226, 1244 (Cal. 1975).

Thus, in Li v. Yellow Cab Co., *supra*, the Supreme Court of California adopted the comparative negligence test, but limited its retroactivity to cases which had not commenced at the time that its decision became final or to retrials occurring after the court's decision where the judgment had been reversed for other reasons. The basis of its decision was that since numerous parties had already tried cases on the contributory negligence theory, it would be unfair to penalize those litigants for a change in the court's viewpoint of the law that could not fairly have been anticipated.

The Supreme Court of Alaska took a slightly different approach when it abandoned the contributory negligence test in Kaatz v. State, 540 P.2d 1037 (1975). The court's ruling was made applicable to any case on appeal where application of the comparative negligence test was requested and in any trial, even if already commenced, so long as the case had not yet been submitted to the trier of fact for decision, where a request that the comparative test be applied had been made. Id. at 1050.

Other decisions, however, have determined, in the absence of questions of fairness or public policy, that a newly enunciated rule should be applied with full retroactivity. See Cash v. Califano, *supra*; Barber v. State Personnel Board, 556 P.2d 306 (Cal. 1976). In the context of the issue before us, we have no doubt that the Pence court expected that its decision would be applied with full retroactivity. Indeed, this has been the consistent practice of the Board. We applied the Pence decision to all cases then pending before us. See, e.g., John Moore, 40 IBLA 321, 86 I.D. 279 (1979). We entertained petitions for reconsideration of decisions issued prior to Pence and, where the Pence requirements of notice and an opportunity for hearing applied, we have not hesitated to vacate our prior decision and remand

the case for further proceedings in conformance with Pence. See Louise Luke (On Reconsideration), 60 IBLA 339 (1981); Mary Ayojiak, 59 IBLA 384 (1981). And it is clear that BLM has applied the Pence principles to all cases which had been filed before it, but not yet adjudicated.

The Solicitor's Office, however, is apparently of the view that the Pence ruling is retroactively applicable to cases already finally decided by the Department. This is not correct. As Circuit Judge J. Skelly Wright noted in Zweibon v. Mitchell, supra:

Historically, prospectivity has been less common in civil than in criminal cases. This is at least partly due to the potential flood of habeas corpus [emphasis in original] petitions that looms if a court recognizes retroactively a procedural or substantive right of criminal defendants. No such threat arises in civil litigation where a retroactive decision can affect only suits pending in the courts or not yet brought, but cannot be raised by previously unsuccessful litigants. The prospectivity determination in both civil and criminal cases, however, remains a pragmatic one that turns on the expected impact of a retroactive overruling on the society and legal system. Retroactivity is the rule, but not at the expense of other important values. [Emphasis supplied; footnotes omitted.]

Id. at 1176-77. Similarly, the California Supreme Court in Barber v. State Personnel Board, supra, rejected an argument that applying its ruling invalidating disciplinary procedures for permanent civil service employees retrospectively would cost the State hundreds of thousands of dollars in back pay to employees who were properly discharged. Among other factors, the Court noted that only a small number of litigants would benefit since "virtually all of the litigation involving this issue has become final. Under [the applicable procedures] all those proceedings in which the employee did not answer the accusations or withdrew the answer are final." Id. at 309.

In granting the various petitions for reconsideration of its earlier decisions this Board acted with the knowledge that since there is no time limit either for initiating judicial review or petitioning for reconsideration, these cases were not final. We would, however, contrast this situation with that of Alexis Gregory. The rejection of his application became final when he or his estate failed to appeal from the decision of rejection. No appeal was taken either to the BLM Office of Appeals and Hearings, or to the Secretary as provided in the regulations extant at that time. See 43 CFR Parts 1840 and 1850 (1965). We admit that, considering the unusual nature of this case, BLM might have looked favorably on a petition for reconsideration had one been filed. One was not. One could best characterize the status of the application, therefore, as finally rejected but with a possibility of reactivation. This possibility, however, was ended when Congress repealed the Native Allotment Act on December 18, 1971, save for those applications then "pending." Inasmuch as this application was not "pending," the repeal of the Native Allotment Act effectively finalized the rejection and removed any authority that BLM might have possessed to reconsider its rejection. Even had Alexis Gregory's application described the land which he occupied, and even if BLM's decision was demonstrably in error, Congress removed from the Department the ability to correct its past mistakes insofar as they related to allotment applications which had already been adjudicated.

While such a result might seem harsh, in fact, it was not. In the first place, assuming Gregory had not died, he would still have had an opportunity to apply for the land he occupied under the provisions of section 14(h)(5) of ANCSA, 43 U.S.C. § 1613(h)(5) (1976). Secondly, it was no secret at the time of the adoption of ANCSA that the Department had processed few of the allotment applications, as the colloquy between Congressman Begich and Solicitor Melich quoted above indicates. Thus, the number of applicants who could be affected by the statutory cut-off would be minimal.

In any event, the position of the Solicitor is logically inconsistent. The argument seems to be that the effect of the Ninth Circuit's decision in Pence v. Kleppe, was to retroactively cause some formerly denied applications to be "pending" on December 18, 1971. 6/ What, however, was the status of these applications prior to Pence? What, indeed, was the status of the land embraced by an application which had been rejected in 1967?

As we noted in United States v. Flynn, supra, the inchoate right to an allotment vested only where both use or occupancy and application coincided. We observed therein that where a Native allotment applicant had completed 5 years' use or occupancy and had applied for the land so used or occupied, subsequent removal of the applicant from the land, for whatever reason, would only affect the applicant's right to the land if it were shown that he or she subjectively intended to abandon the claim. Id. at 235.

Implicit in our analysis, however, was the assumption that the application remained outstanding. As we stated in United States v. Flynn, supra, either Native occupancy or the filing of an allotment application would independently serve to segregate the land with respect to third party encroachments. Thus, where a Native ceased to occupy land for which he had applied, the application would serve to give notice to the world of the fact that the land was under the appropriation of another, just as Native occupancy itself would so notify third parties. Where, however, there was neither present use or occupancy nor a pending application, there would be no way in which third parties could be apprised of the existence of a claim.

In the instant case, Gregory died in 1967, a month before the application had been rejected. Assuming no subsequent use of Gregory's parcel by appellant, 7/ it is likely that all evidence of prior use might, at some future

6/ Thus, it is argued that if an application was rejected because a disputed question of fact was determined adversely to the applicant, without notice and an opportunity for hearing, then that application must be deemed pending on Dec. 18, 1971.

7/ Indeed, the logic of the arguments advanced by both the Solicitor's Office and appellant would require rejection of an application made by appellant for an allotment of the same land involved herein. If appellant, after her father's death, had resided on the land and sought to have it allotted to her, the "pendency" of her father's application would defeat her right to an allotment, since lands are not available for allotment if they are embraced within a prior allotment application. It may be that, given the facts of the instant appeal, an allotment of the land to her father's estate might, in effect, be no different than an allotment to appellant in her own right. But it is not difficult to conceive of a situation where the original applicant

time, have so decayed that an observer on the ground might not be able to ascertain whether it was under active use. Inquiry to the State Office would have elicited the response that there was no application for the land "pending," and thus would have indicated that the land was open to settlement or entry. As we noted, with reference to a similar situation,

to require [a third-party applicant] to somehow become aware of the existence of a prior claim which is neither evidenced on the land nor noticed in the BLM records at the peril that at some future point in time, his own claim would be subject to invalidation, would enforce a standard of omniscience totally inconsistent with the entire history of land law adjudication in Alaska.

United States v. Flynn, *supra* at 237-38. Considering the great possibility for disruption implicit in such an approach, we cannot agree that either Congress in adopting ANCSA or the Ninth Circuit Court of Appeals in deciding the Pence appeals intended to leave "pending" these adjudications which had long ago been terminated. 8/ We reaffirm our prior determinations.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petitions for reconsideration are granted, and the Board's prior decision styled Mary Olympic, 47 IBLA 58 (1980), is reaffirmed for the reasons set forth herein.

James L. Burski
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Edward W. Stuebing
Administrative Judge

fn. 7 (continued)

left many heirs, and an allotment to the estate would be detrimental to the individual who actually resided on or used the land.

8/ It would seem to us that the Solicitor's argument would necessarily require the reopening of all applications granted in the past where, as was a common practice of the time, the applicant received less than the full acreage that he sought, particularly since such decisions normally rejected the additional acreage because of a failure to show potentially exclusive use and occupancy thereof. Thus, under the Solicitor's view, not only were applications which had been rejected with finality nevertheless still "pending," so too were many applications which had been granted.

October 1, 1985

IBLA 76-627 : A-052511
65 IBLA 26 :

MARY OLYMPIC (ON RECONSIDERATION) : Native Allotment
:
: Remand Ordered

ORDER

By decision dated August 8, 1985, the United States District Court for the District of Alaska reversed this Board's decision in Mary Olympic (On Reconsideration) 65 IBLA 26 (1982). See Olympic v. United States, No. A 82-396 Civil, (D.Alaska Aug. 8, 1985). Therein at page 14, Judge Fitzgerald directed the Department to allow Mary Olympic, the daughter of a Native applicant who had died in 1967, to amend the land description in her father's application to describe the land which he originally intended to claim. The Department was further directed to approve or adjudicate this application, as amended, pursuant to sections 905(a) and 905(c) of the Alaska National Interest Lands Conservation Act (ANILCA) 43 U.S.C. §1634 (1982).

Counsel for the Bureau of Land Management (BLM) requests that this Board remand the above-captioned case to BLM with directions that Olympic be permitted to submit an amended land description and if such amendment is found comport with the intent of her father under the standards set forth at section 905(c) of ANILCA, supra, that the necessary steps be taken to grant such allotment as amended.

No objection appearing of record, counsel's request for a remand to BLM, is hereby granted for the purposes set forth by Judge Fitzgerald in his aforementioned decision.

James L. Burski
Administrative Judge

We concur:

Wm. Philip Horton Bruce R. Harris
Chief Administrative Judge Administrative Judge

65 IBLA 37A

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65 IBLA 37B