

**Editor's note: Reconsideration denied by Order dated July 23, 1991**

HEIRS OF SAUL SOCKPEALUK  
HEIRS OF CARL TAKAK  
HEIRS OF SILAS SOCKPEALUK

IBLA 88-132, 88-135,  
88-137

Decided August 7, 1990

Consolidated appeals from decisions of the Alaska State Office, Bureau of Land Management, denying requests of the heirs of Native allotment applicants that BLM reopen and reinstate Native allotment applications F-022704, F-023379, and F-023053.

Vacated and remanded.

1. Alaska: Native Allotments--Rules of Practice: Appeals: Generally

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), provides that all Native allotment applications which were pending before the Department on or before Dec. 18, 1971, are approved on the 180th day following the effective date of the Act, unless otherwise provided by other paragraphs or subsections of that section. Pursuant to Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), if BLM rejected a Native allotment application without first affording the applicant an opportunity for a hearing before a trier of fact, the decision to reject is not final, and the application was pending before the Department on Dec. 18, 1971. BLM erred in rejecting a request by the heirs of the applicant that the Native allotment application be reinstated and either approved or adjudicated pursuant to sec. 905(a) of ANILCA.

APPEARANCES: Tred R. Eyerly, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for the heirs of Saul Sockpealuk, the heirs of Carl Takak, and the heirs of Silas Sockpealuk; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

The heirs of Saul Sockpealuk, the heirs of Carl Takak, and the heirs of Silas Sockpealuk have appealed from three separate decisions dated November 10, 1987, in which the Alaska State Office, Bureau of Land Management (BLM), denied their respective petitions for reinstatement of the

Native allotment applications of Saul Sockpealuk (F-022704), Carl Takak (F-023379), and Silas Sockpealuk (F-023053). <sup>1/</sup> Because these three appeals involve similar factual backgrounds and identical legal questions, we have consolidated them for disposition in this opinion.

Heirs of Saul Sockpealuk, IBLA 88-132

On January 9, 1959, Saul Sockpealuk filed an application for a Native allotment pursuant to the Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed on Dec. 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1982), subject to applications pending before the Department on or before that date). The application described approximately 160 acres of land located near the village of Shaktoolik, and stated that Sockpealuk commenced use of his land in 1925.

By notice dated August 19, 1960, BLM informed Saul Sockpealuk that the Bureau of Indian Affairs (BIA) had found him to be entitled to an allotment, that BLM had found his application to be in order, and that the selected lands were available for allotment. However, BLM informed him that in order to receive title to the lands, he must submit proof of substantially continuous use and occupancy of the lands for a period of 5 years, and that if he did not file such proof by January 9, 1965 (6 years from the date he filed his application), his application would terminate without prejudice to his filing a subsequent new application.

By notice dated July 31, 1964, BLM informed Saul Sockpealuk that "[t]he time fixed by law within which to submit proof of use and occupancy of the lands embraced in \* \* \* allotment application [F-022704] will expire on January 9, 1965."

When Saul Sockpealuk died on August 12, 1961, no additional evidence of use and occupancy had been filed. On July 16, 1965, BLM issued a decision declaring his Native allotment application terminated and the case file closed on the basis that he had failed to submit proof of substantially continuous use and occupancy of the land within the 6-year period prescribed at 43 CFR 2212.9-1(f), now codified at 43 CFR 2561.2.

On December 17, 1986, the heirs of Saul Sockpealuk requested that the allotment application F-022704 be reopened and reinstated, and by decision dated November 10, 1987, BLM denied the request.

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<sup>1/</sup> The case caption with corresponding docket and application numbers of the appeals are:  
IBLA 88-132 - HEIRS OF SAUL SOCKPEALUK - Native Allotment F-022704  
IBLA 88-135 - HEIRS OF CARL TAKAK - Native Allotment F-023379  
IBLA 88-137 - HEIRS OF SILAS SOCKPEALUK - Native Allotment F-023053

Heirs of Carl Takak, IBLA 88-135

On May 14, 1959, Carl Takak filed an application for a Native allotment pursuant to the Alaska Native Allotment Act, supra. The application described approximately 50 acres of land located near the village of Shaktoolik, and stated that Takak commenced use of his land in 1947.

By notice dated February 8, 1960, BLM informed Takak that BIA had found him to be entitled to an allotment, that his application was in order, and that the selected land was available for allotment. However, BLM informed Takak that in order to receive title to the lands, he must submit proof of substantially continuous use and occupancy of the lands for a period of 5 years, and that if he did not file such proof by May 14, 1965 (6 years from the date he filed his application), his application would terminate without prejudice to his filing a subsequent new application.

By notice dated November 23, 1964, BLM informed Takak that "[t]he time fixed by law within which to submit proof of use and occupancy of the lands embraced in \* \* \* allotment application [F-023379] will expire on May 14, 1965."

On May 18, 1965, BLM issued a decision declaring Takak's application closed for failure to file proof of use and occupancy within the 6-year period as prescribed at 43 CFR 2212.9(f), currently 43 CFR 2561.2. On December 17, 1986, Takak's heirs requested that the allotment application be reinstated, and by decision dated November 10, 1987, BLM denied their request.

Heirs of Silas Sockpealuk, IBLA 88-137

On March 13, 1959, Silas Sockpealuk filed an application for a Native allotment pursuant to the Alaska Native Allotment Act, supra. His application described approximately 55 acres of land located near the village of Shaktoolik, and stated that he commenced use of his land in 1943.

By notice dated February 1, 1960, BLM informed Silas Sockpealuk that BIA had found him to be entitled to an allotment, that his application was in order, and that the selected land was available for allotment. However, BLM informed him that in order to receive title to the lands, he must submit proof of substantially continuous use and occupancy of the lands for a period of 5 years, and that if he did not file such proof by March 13, 1965 (6 years from the date he filed his application), his application would terminate without prejudice to his filing a subsequent new application. Silas Sockpealuk died in 1961.

In a second notice dated September 21, 1964, BLM informed him that "[t]he time fixed by law within which to submit proof of use and occupancy of the lands embraced in \* \* \* allotment application [F-023053] will expire on March 13, 1965."

On April 27, 1965, BLM issued a decision declaring Silas Sockpealuk's application terminated and the case file closed on the basis that he had

failed to submit proof of substantially continuous use and occupancy of the land within the 6-year period prescribed at 43 CFR 2212.9-1(f), currently 43 CFR 2561.2.

On December 17, 1986, the heirs of Silas Sockpealuk requested reinstatement of allotment application F-023053, and by decision dated November 10, 1987, BLM denied their request.

### Discussion

In their requests for reinstatement, appellants all argued that BLM's closure was erroneous on three primary grounds, set forth below:

First, Congress perceived the Allotment Act of May 1906 (34 Stat. 197 as amended) "as a means of granting to the Alaska Natives land to which, on compliance with certain conditions, they would become entitled." Pence v. Kleppe, 529 F.2d 135, 140 (9th Cir. 1976). Passed for the benefit of Alaska Natives, the Act is to be liberally construed in their favor. Mary Olympic, 615 F. Supp. 990 (1985); Pence v. Kleppe, 529 F.2d at 140; Secretarial Order No. 3040 (May 25, 1979).

The Allotment Act requires applicants to provide satisfactory proof of substantially continuous use and occupancy of the land for a period of five years. The Act, however, does not establish a six-year "statutory life" period. This "statutory life" requirement is imposed by regulation and has resulted in the summary closure of over six hundred Native allotment claims. This "statutory life" regulation is inconsistent with "the statutory mandate" and frustrates "the policy that Congress sought to implement." Mary Olympic, 615 F. Supp. [990, 993 (D. Alaska 1985)].

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Second, this request is supported by the language in Section 905 of the Alaska National Interest Lands Conservation Act (ANILCA), PL 96-487, December 2, 1980. Section 905(a)(1) provides for the approval of Native allotment applications, with certain exceptions, "which were pending before the Department of the Interior on or before December 18, 1971." As Saul Sockpealuk's Native allotment application was pending before BLM before December 18, 1971, his claim should be approved or adjudicated pursuant to Section 905. See Frederick Howard, 67 IBLA 157, 159-60 (1982); see also Mary Olympic, 615 F. Supp. 990 (1985).

Finally, Pence v. Kleppe mandates that factual questions regarding the sufficiency of an applicant's use and occupancy must be resolved by an independent decision maker before the case can be closed. Saul Sockpealuk's application was closed for failure to submit sufficient proof of use and occupancy.

However, "written testimony is inadequate to satisfy due process when it involves a right as important as the right to be allotted land under the Act." Pence v. Kleppe, 529 F.2d at 143. Accordingly, the closure of his application without affording him the right to a hearing on the sufficiency of his use and occupancy was improper under Pence.

In its November 10, 1987, decisions, BLM concluded that the applicants did not "describe the type of use as required in the regulations." 2/ Accordingly, BLM denied all three petitions for reinstatement. 3/ In each of these three appeals, BLM specifically rejected the argument that closure of the case file was improper under section 905(a)(1) of ANILCA and Pence v. Kleppe, reasoning as follows:

The Pence v. Kleppe decision held that a hearing may be required to resolve disputed questions of fact. However, the issue as to whether or not the required document was timely submitted to BLM

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2/ BLM quoted 43 CFR 67.5(f) (1961), which provided as follows:

"The filing of an application for allotment will grant no rights to the applicant over and above those which are specified in §§ 67.6 and 67.11. If the applicant does not submit the proof required by § 67.7 within 6 years of the filing of his application in the land office, his application for allotment will terminate without affecting the rights of the applicant gained by virtue of his occupancy of the land, or his rights to make another application. If the application was filed prior to the effective date of this paragraph, the application will be terminated under this paragraph only by decision of the authorized officer after appropriate notice to the applicant, granting him a reasonable period within which to file proof of continuous use and occupancy of the land as required by the regulation in this part."

Further, BLM quoted 43 CFR 67.7 (1961), which described the kind of proof required to be filed within 6 years:

"The proof \* \* \* should show the periods each year applicant has resided on the land; amount of the lands cultivated each year to garden or other crops; the amount of crops harvested each year; the number and kinds of domestic animals kept on the land by the applicant and the years they were kept there; the character and value of the improvements made by the applicant and when they were made; and the use, if any, to which the land has been put for fishing or trapping."

3/ As an alternative basis for denying the request for reinstatement, BLM stated: "[T]he BLM rejection decision was issued in the 1960's. A judicial action contending that those decisions were wrong would be time barred by 28 U.S.C. 2401(a). Christensen v. United States, 755 F.2d 705 (9th Cir. 1985). The petition for reinstatement is also denied on these grounds."

In light of our recognition, infra, that BLM rejected these applications without affording the applicants a hearing under Pence v. Kleppe, that BLM's decisions to reject such applications were not final, and that they were pending before the Department on Dec. 18, 1971, we find this alternative basis for denying reinstatement of the applications to be without merit.

has not been disputed. Therefore, a hearing is not required pursuant to Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). Similarly, Section 905(a)(1) of the Alaska National Interest Lands Conservation Act does not apply to this application because the application was not completed and the application was not erroneously closed without an opportunity for hearing on a disputed question of fact.

(Nov. 10, 1987, Decisions at 2).

In their statements of reasons (SOR) for appeal to the Board, appellants challenge BLM's having "closed the application[s] for failure to provide further evidence of use and occupancy, apparently concluding that [each applicant's] proof of use and occupancy was insufficient" (SOR at 5). <sup>4/</sup> They state that "[w]hile [applicants were] given an opportunity to provide further written evidence, [they were] not given an opportunity for an oral hearing or to present witnesses. Nor [were they] provided with notice informing [them] why [their] evidence was deemed insufficient" (SOR at 5-6). They maintain that "[t]hese procedural deficiencies violated [the applicants'] due process rights as set forth in Pence" (SOR at 6). They contend that under Pence v. Kleppe "[t]he process that was due included notice of the specific reasons for the proposed rejection, opportunity to submit written evidence, and an opportunity for an oral hearing where evidence and testimony of favorable witnesses may be submitted" (SOR at 6). <sup>5/</sup> They argue that BLM erred in concluding that "the only issue of inquiry was whether a particular document was timely filed," and that "[t]he fact that additional written documentation describing use and occupancy was not timely submitted is irrelevant to the issue of whether the BLM granted the process that was due [applicants]" (SOR at 7).

In addition, appellants maintain that reinstatement of the Native allotment applications is mandated under section 905(a) of ANILCA, which provides as follows:

Subject to valid existing rights, all Alaska Native allotment applications made pursuant to the Act of May 17, 1906 (34 Stat.

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<sup>4/</sup> Appellants in these three cases made identical arguments; however, those arguments appear on differing pages of their respective SOR's. In this opinion, we quote from the SOR filed in Saul Sockpealuk, IBLA 88-132. However, such quoted material also appears in the other two SOR's.

<sup>5/</sup> Appellants point out that in order to comply with the mandate of the Ninth Circuit Court of Appeals in Pence v. Kleppe, the Department adopted the contest procedures found at 43 CFR 4.450 through 4.452, and that the Ninth Circuit subsequently found these procedures to facially comply with due process. Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978). Appellants complain that there was no issuance of a contest complaint (43 CFR 4.450-4, 4.451-2), no opportunity to answer (43 CFR 4.450-6), and no assignment of the case to an Administrative Law Judge to conduct a hearing (43 CFR 4.452).

197, as amended) which were pending before the Department of the Interior on or before December 18, 1971 \* \* \* are hereby approved on the one hundred and eightieth day following the effective date of this Act, except where provided otherwise by paragraph (3), (4), (5), or (6) of this subsection \* \* \*. [Emphasis added.]

Appellants offer the following interpretation of this statutory provision:

All Native allotment applications which were pending before the Department on or before December 18, 1971, are to be approved or adjudicated. [This] application \* \* \* falls within the scope of section 905; it was pending before the Department of the Interior on or before December 18, 1971. It must, therefore, be processed accordingly. [Emphasis in original.]

(SOR at 8). Appellants argue that BLM erred in concluding that section 905(a) of ANILCA does not apply to the subject applications because they were "not completed and \* \* \* [were] not erroneously closed without an opportunity for hearing on a disputed question of fact" (SOR at 8).

Appellants take issue with BLM's position that "only erroneously rejected applications were to be reinstated by section 905 regardless of when they were rejected" (SOR at 9). They refer to the legislative history of section 905, which explained:

An amendment to Section 905 clarifies that the purview of the section includes all Alaska Native allotment applications which were pending before the Department of the Interior on "or before" December 18, 1971. The amendment clarifies that applications which were erroneously rejected by the Secretary prior to December 18, 1971, without an opportunity for hearing shall be approved or adjudicated by the Secretary pursuant to the terms of the section. [Emphasis added.]

(S. Rep. No. 413, 96th Cong., 1st Sess. 238 (1970), reprinted in 1980 U.S. Code Cong. & Ad. News 5182).

Appellants argue that an application filed and pending before December 18, 1971, even though BLM has rejected the application and closed the file before that date, must be reinstated and either approved or adjudicated pursuant to section 905. They read section 905(a) to mean that BLM acted "erroneously" in rejecting an application without affording the applicant a hearing in compliance with Pence v. Kleppe. They conclude that in section 905(a), "Congress was acknowledging the mandate in Pence v. Kleppe, where the Court found that applications rejected by the Secretary 'without an opportunity for a hearing,' violated the applicant's due process rights and were therefore erroneously rejected by the Secretary" (SOR at 10).

In its answer, BLM offers two reasons as to why appellants are not entitled to a hearing under section 905 of ANILCA and Pence v. Kleppe. First, argues BLM, "ANILCA only requires the consideration of applications that were erroneously closed before December 18, 1971 \* \* \*" (Answer at 8).

Second, BLM asserts that "[t]he lack of any factual issue with respect to applicant's failure to comply with the requirement of filing of proof of use and occupancy within six years after the date of application takes such a case outside the coverage of the Ninth Circuit's holding in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976)" (Answer at 9). Thus, BLM concludes that since the applicants failed to file such proof within the prescribed 6-year period, their cases were not "erroneously" closed, and ANILCA does not require their reconsideration.

[1] For the reasons given below, we are in substantial agreement with the arguments presented by appellants. The facts in Olympic v. United States, 615 F.Supp. 990 (D. Alaska 1985), are analogous to those in the instant appeals. Olympic involved the question whether BLM properly denied Mary Olympic's request for reinstatement of the Native allotment application of Alexis Gregory, her father, and for permission to amend the land description contained in the application. Gregory filed a Native allotment application in 1960 for land which he and his family had used since at least as early as 1922. BLM examiners conducted a field examination in 1961 and a second one in 1963, both times being unable to locate improvements on the claimed land. In 1967, BLM sent Gregory a letter requesting a corrected land description. He signed a receipt indicating that he received the letter, but he died on September 7, 1967, without having filed the corrected land description. In May 1975, Mary Olympic requested that BLM reopen Gregory's case so that she could correct the land description. BLM denied her request. This Board affirmed BLM's denial in Mary Olympic, 47 IBLA 58 (1980), and reaffirmed that denial in Mary Olympic (On Reconsideration), 65 IBLA 26, 27 (1982).

The District Court ruled that section 905(a) of ANILCA, enacted 8 months after the Board's original decision in Mary Olympic, supra, applied to legislatively approve Gregory's allotment application. Before the District Court, BLM conceded that section 905(a) of ANILCA provided for legislative approval of Gregory's allotment as described in his original application, and that Gregory's heirs were entitled to the land therein described. However, BLM contended that Olympic had no right under section 905(c) of ANILCA 6/ to amend the land description to entitle her to land other than that described by Gregory in his application. Olympic, on the other hand, argued that section 905(c) permits the heirs of a deceased applicant to amend an allotment application which incorrectly describes the land sought by the applicant.

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6/ Section 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1982), provides in relevant part: "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 application and if the description as amended describes the land originally intended to be claimed."

The District Court, looking to the legislative history of section 905 of ANILCA (see S. Rep. No. 413, 96th Cong., 2d Sess. 237-38, reprinted in 1980 U.S. Code Cong. & Ad. News 5070, 5181-82), agreed with Olympic, finding that Congress' intent in enacting section 905 was to "facilitate approval of the backlog of Native allotment applications by dispensing with the usual time-consuming adjudication procedures." 615 F. Supp. at 994. The District Court found, contrary to the Government's argument, that "[t]he legislative history indicates no congressional intent to limit the right to amend only to applicants themselves," and ruled that to "fulfill the congressional purposes inherent in the Alaska Native Allotment Act and ANILCA, heirs of deceased applicants should be permitted to amend applications to correct erroneous land descriptions." Id. at 995. Accordingly, the court reversed the Board's decision denying reinstatement of Gregory's application, ordered the Department to allow Olympic to amend the land description in Gregory's application, and then to approve or adjudicate Gregory's application, as amended, pursuant to section 905(a) and (c) of ANILCA.

The reasoning of the District Court in Olympic v. United States, supra, applies in the instant three appeals. The District Court expressly rejected the argument that because Olympic failed to request BLM to reopen Gregory's application prior to December 18, 1971, she had "allowed any right to reopen the application to lapse." 615 F. Supp. at 992, quoting Mary Olympic, supra at 62. Just as BLM improperly denied Olympic's request for reinstatement of her father's Native allotment application, BLM improperly denied the requests for reinstatement of the applications involved herein. The ruling in Olympic v. United States requires that we direct BLM to either approve these applications or adjudicate them pursuant to section 905(c) of ANILCA and Pence v. Kleppe.

Our opinion is consistent with State of Alaska, 109 IBLA 339 (1989), which involved a Native allotment application filed in 1962 by Hazel L. Barlip for the SE<sup>1</sup>/<sub>4</sub>, sec. 22, T. 5 S., R. 13 W., Seward Meridian, Alaska. In 1975, BLM approved the application as to 40 acres, but rejected the application as to 120 acres based upon the absence of evidence of substantial use and occupancy. In 1981, BLM reinstated the application as to the 120 acres. Also in 1981, BLM dismissed a protest against the application filed by the State of Alaska, which had filed a general purposes grant selection application for all vacant, unappropriated, and unreserved lands in T. 5 S., R. 13 W., Seward Meridian, Alaska, pursuant to section 6(b) of the Act of July 7, 1958, as amended (the Alaska Statehood Act), 72 Stat. 340 (1958).

In State of Alaska, supra at 343, the Board upheld BLM's reinstatement of Barlip's application as to the 120 acres, reasoning in terms consistent with the interpretation of Pence v. Kleppe advanced by appellants in the instant case:

Barlip had not been afforded an opportunity [sic] to present evidence of use and occupancy before a trier of fact following either the 1975 or the 1977 decision rejecting her claim to the

additional 120 acres. Barlip was therefore entitled to reinstatement of her application as to the 120 acres previously rejected. Therefore, the decision rejecting Barlip's application was not final on December 18, 1971. If the decision was not final, we must consider her application to have been pending on that date. In accordance with the holdings in the Pence and Olympic cases, we find that Barlip's Native allotment application was pending on December 18, 1971.

109 IBLA at 343.

The Board proceeded to examine whether, under section 905(a)(1) of ANILCA, her allotment was congressionally approved. The Board noted that Congress provided certain exceptions to the legislative approval provisions of section 905(a) of ANILCA. One of those exceptions is found at section 905(a)(4) of ANILCA, 43 U.S.C. § 1634(a)(4) (1982), which provides that "[w]here an allotment application describes land \* \* \* which on or before December 18, 1971, was validly selected by \* \* \* the State of Alaska pursuant to the Alaska Statehood Act, \* \* \* [it] shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended." The Board ruled that because the State did not select the land subject to the Barlip application prior to December 19, 1971, "her Native allotment application is subject to the legislative conveyance provision of section 905 of ANILCA." 109 IBLA at 345.

In accordance with Olympic v. United States, Pence v. Kleppe, and State of Alaska, supra, we rule that BLM erred in denying appellants' requests for reinstatement of the three Native allotment applications subject to this decision. Since they were rejected without a hearing, as required by Pence v. Kleppe, they were pending before the Department on December 18, 1971. We direct that BLM reinstate these applications and either approve or adjudicate them in accordance with section 905(a) of ANILCA.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions of the Alaska State Office are vacated; allotment applications F-022704, F-023379, and F-023053 are reinstated; and these cases are remanded for further action consistent with this opinion.

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Gail M. Frazier  
Administrative Judge

I concur:

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John H. Kelly  
Administrative Judge