

THEODORE SUCKLING
(HEIR OF CHIEF ALEXANDER)

IBLA 89-406

Decided October 23, 1991

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying a request of the heir of a Native allotment applicant that the Bureau of Land Management reopen and reinstate Native allotment application F-0426.

Reversed and remanded.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Duty of Department of the Interior to Native Allotment Applicants

A purported relinquishment of a Native allotment application by the widow of the deceased applicant who is not vested with authority to relinquish the interest of the applicant's heirs is legally ineffective.

2. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Duty of Department of the Interior to Native Allotment Applicants

The fiduciary relationship of the Department of the Interior with Alaska Natives requires reinstatement and adjudication of a Native allotment application as to those lands for which an unauthorized relinquishment was improperly accepted regardless of the subsequent conveyance of the lands pursuant to a State selection. If the Native allotment application is found to be valid, the Department is obligated to pursue recovery of the land through negotiation with the State or litigation.

APPEARANCES: Carolyn Crinkley, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for Theodore Suckling, heir of Chief Alexander; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management; Bonnie E. Harris, Esq., Assistant Attorney General, Department of Law, Anchorage, Alaska, for the State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Theodore Suckling, heir of Chief Alexander, has appealed from a decision dated March 21, 1989, in which the Alaska State Office, Bureau of

Land Management (BLM), denied his petition for reinstatement of the Native allotment application of Chief Alexander (F-0426). ^{1/}

The record shows that on September 8, 1915, Chief Alexander 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a Native allotment pursuant to the Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed on Dec. 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1988), subject to applications pending before the Department on that date). The application was filed for approximately 160 acres of unsurveyed land a quarter of a mile below the confluence of the Tolovana and Tanana Rivers. The applicant claimed to have occupied the tract of land for many years continuously.

A favorable field examination was completed in 1919. The report of the examination of the allotment disclosed that: "The applicant makes a residence here most of the year. He has a cabin at the mouth of the Tolovana and goes back and forth often. He is the chief of this remnant of a village and makes this locality his permanent home." The report also described substantial improvements on the land belonging to the applicant. The record indicates the allotment application was approved by the First Assistant Secretary on March 22, 1920.

Chief Alexander died in 1921, leaving a widow and two children. A "listing" survey of the land was made in 1931 ^{2/} by examiner H. K. Carlisle of the General Land Office (GLO). In a subsequent letter of January 18, 1932, addressed to the Commissioner, GLO, Carlisle noted that: "The applicant's wife and some of his children live upon this land at various times when they are not away fishing or trapping." Subsequently (apparently in 1936), the allotment tract was reduced in size to 18.32 acres when it was surveyed in U.S. Survey No. 1343. The following explanation for the reduction in acreage is found in the surveyor's notes:

Between the time of issuance of special instructions and date of survey Chief Alexander died and all rights passed to his widow Jane Alexander. * * * Prior to survey I consulted Jane Alexander and her daughter Daisy on the location of the allotment. They instructed me at this time to decrease the size of the tract to include only land valuable for agricultural, fuel and fishing purposes and to leave room for additional allotments. The tract then surveyed embraces 18.32 acres while the acreage included in special instruction amounted to approximately 160 acres. The claimant furnished an affidavit signed and witnessed by her daughter Daisy Alexander and three others to the effect that the acreage now embraced in Survey No. 1343 was all that she needed or desired.

The purported written relinquishment is not in the case file, and BLM indicated in the decision under appeal that it cannot be located.

^{1/} The State of Alaska filed a motion to intervene in this appeal which was granted by order of the Board on July 31, 1989. However, the State did not make any further filing in this matter.

^{2/} The acreage embraced in this "listing" survey was 151.76 acres.

On November 16, 1937, a certificate of allotment was issued in the name of Chief Alexander for the 18.32-acre tract described in U.S. Survey No. 1343. The remaining land within the original allotment was later selected by the State of Alaska in State selections F-026842 and F-026844, dated September 30, 1960, and patented to the State January 17, 1975 (U.S. Patent No. 50-75-0115).

On March 10, 1980, BLM, evidently acting on its own motion, reinstated Chief Alexander's allotment application for further consideration as to the remainder of approximately 141 acres. During the course of continued processing, BLM conducted a field examination of the allotment area on August 7, 1986, in which the examiner concluded from the evidence found that the applicant did qualify for the full allotment applied for. In response to a January 22, 1988, letter from BLM advising that the application might be valid based on qualifying use and occupancy preceding the date of the State selection, the State challenged reinstatement. The State wrote to BLM objecting to reinstatement on the ground that the heirs did not challenge the reduction in the size of the allotment at the time of the survey and that the failure to object when the certificate of allotment was issued for 18.32 acres in 1937 should be binding upon the heirs under the doctrine of administrative finality. Subsequently, by letter dated September 29, 1988, BLM determined that its reinstatement of the allotment application had been in error and closed the case of record. In support of its decision, BLM found that: Chief Alexander was not within the class of Native allotment applicants certified by the court in Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979); the doctrine of administrative finality precluded review now of the decision to reduce the size of the Native allotment in 1937; and the relinquishment was knowing and voluntary.

On March 7, 1989, the Alaska Legal Services Corporation filed a request with BLM for reinstatement of the allotment application on behalf of the heirs of Chief Alexander. BLM denied reinstatement in its March 21 decision for the same reasons given in its September 29, 1988, letter. BLM's decision noted that, after the 1937 certificate of allotment issued for 18.32 acres, no appeal was taken by the heirs from that action. Since the remaining lands were eventually patented to the State of Alaska many years after certification, BLM determined that the doctrine of administrative finality would bar any further consideration of this case stating:

An appellant's collateral attack on an appealable decision of over fifty years ago would not be permitted in the courts and should not be permitted here. Christensen v. United States, 755 F.2d 705 (9th Cir. 1985). The doctrine of administrative finality applies to this case. The applicant (heirs) might have corrected the error or defect, if any, by a timely appeal to the Secretary of the Interior.

(Decision at 2).

In his statement of reasons (SOR), appellant argues that BLM's refusal to reinstate this allotment application and closure of the record was erroneous because Chief Alexander met all the requirements of the Alaska Native Allotment Act for the full 160 acres and BLM records of the field examination completed in 1919 confirm these facts (SOR at 7).

Appellant argues that the alleged relinquishment was ineffective. Citing the law of inheritance in force at Chief Alexander's death, appellant points out that the Chief's children inherited equitable title to his allotment, and they alone had the power to relinquish any part of it. Appellant argues that BLM made a fundamental error assuming that the widow, Jane Alexander, inherited all of Chief Alexander's interest in the allotment, when she only inherited a dower interest, stating "the alleged relinquishment is void for that reason alone." Because the relinquishment was ineffective, appellant asserts, the case must be processed as though the relinquishment had never taken place. Even though the lands have been patented, BLM's "trust responsibility" requires an examination of the validity of the relinquishment and reinstatement of the application (SOR at 8-9). In addition appellant maintains, even if Jane Alexander had the power to relinquish a portion of the allotment, the surveyor's allegations in the field notes "falls well short of the requirements of a valid relinquishment" (SOR at 12).

Appellant argues that the heirs were never given due process. He asserts that BLM cannot arbitrarily deny an allotment interest without giving proper notice to interested parties, stating:

As the court stated in Pence v. Kleppe, 529 F.2d 135, 142 (9th Cir. 1976), quoting from Baldwin v. Hale, 1863, 68 U.S. 223, 233, 1 Wall. 223:

Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.

There was never any notice to anyone concerned of the alleged relinquishment itself. The certificate of allotment, Attachment 9, shows only that the allotment was for 18.32 acres rather than 160. BLM might argue that the heirs were thus put on notice of a serious problem with the allotment, but the certificate makes no reference to the relinquishment, and most importantly, was sent to Chief Alexander himself even though he had died sixteen years earlier. Naturally, the envelope came back undelivered. BLM did nothing further to notify anyone with an interest in the allotment.

BLM can show no plausible excuse for giving absolutely no notice of its actions in reducing the allotment to a mere fraction of its original size. [Emphasis in original.]

(SOR at 9).

Appellant points out that the doctrine of administrative finality does not bar reinstatement of this allotment because neither the applicant nor his heirs had an opportunity to protest actions taken against their interests. He asserts the doctrine should not apply because there never has been litigation of the issues involved. In addition, he argues it does not apply where there is a showing of compelling legal or equitable reasons such as a violation of basic rights of the parties by the failure to give the heirs notice and an opportunity for a hearing (SOR at 10-11).

Appellant argues that Chief Alexander's Native allotment application was erroneously closed and should be reinstated under section 905(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634 (1988). Reviewing the development of the law of allotments he concludes: "Section 905 clearly required all Native allotment applications which were pending before the Department on or before December 18, 1971, to be either approved or adjudicated. Accordingly, even those applications which were timely filed but closed prior to December 18, 1971, were to be reinstated" (SOR at 5, emphasis in original).

In its answer, BLM maintains that Chief Alexander's Native allotment application need not be reinstated because it was properly closed and requires no further action by BLM. BLM asserts that the application of Chief Alexander is not within the class certified in Aguilar v. United States, supra, stating:

The court has previously certified a class under Fed.R.Civ.P. 23(a) and (b)(2) as follows:

All Alaska Native allotment applicants each of whom commenced use of the land for which he or she applied prior to the filing with the Department of [the] Interior of an application for conveyance of the same land to the State of Alaska and whose allotment application was or will be rejected, in whole or part, because the land described therein was conveyed to the State of Alaska prior to adjudication of the allotment application.

Id. at 842 (Emphasis added). This allotment was issued years before any land was conveyed either to the Territory or the State of Alaska.

(Answer at 4-5).

It is asserted by BLM that "[a]n appellant's collateral attack on an appealable decision of over fifty years ago would not be permitted in the courts and should not be permitted here. Christensen v. United States, 755 F.2d 705 (9th Cir. 1985)" (Answer at 5). BLM cites extensive case law for the proposition that the doctrine of administrative finality applies to the facts of this case and is controlling in our disposition of the case.

Further, BLM contends that the partial relinquishment of the remainder of the Alexander allotment was valid and serves as a proper basis for not reopening this case. BLM is satisfied that the facts establish that this allotment was "knowingly and voluntarily" relinquished.

The appeal in this case raises two key issues. The first is whether the purported relinquishment of the Native allotment as to all except 18.32 acres was binding upon the heirs of the allotment applicant. The second issue is whether BLM properly denied the petition to reinstate the Native allotment application filed on behalf of the heirs of Chief Alexander.

[1] With respect to the efficacy of the relinquishment in this case to bind the heirs, we find the threshold question to be the legal authority of the widow, Jane Alexander, to execute a relinquishment of the claim. In a previous case where it appeared that the applicant had established his qualification for a Native allotment prior to his death, the Board was required to consider the efficacy of a purported relinquishment of the Native allotment by the surviving widow. Estate of Guy C. Groat, Jr., 46 IBLA 165 (1980). In the absence of evidence of the authority of the widow to execute the relinquishment on behalf of all of the heirs, we found the relinquishment to be ineffective. 46 IBLA at 172. We find this precedent to be controlling in the circumstances of the present case. There is an absence of evidence of the authority of the widow of the allotment applicant to relinquish the application on behalf of the heirs. On the contrary, it appears the widow lacked this authority. Thus, we find the relinquishment was legally ineffective to bind the heirs. Estate of Guy C. Groat, Jr., *supra*. 3/

This leaves the question of whether BLM properly refused to reinstate the Native allotment application more than 50 years after the purported relinquishment and reduction in size of the allotment and after conveyance of the relinquished lands to the State. As an initial matter we must reject appellant's contention that the balance of the lands in the application were legislatively approved by section 905 of ANILCA, 43 U.S.C. § 1634 (1988). Although it is true that section 905, by its terms, applied to Native allotment applications pending before the Department on or before December 18, 1971, 4/ the lands at issue in this case were conveyed to the State prior to enactment of ANILCA. The Board has noted that legislation passed by Congress concerning disposition of the public lands cannot generally transfer title to lands which have previously been conveyed into private ownership and which, hence, are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment. Consequently, the Board has found that section 905 of ANILCA did not act to legislatively approve Native allotments in such circumstances. Heirs of Doreen Itta, 97 IBLA 261, 265 (1987). However, this is not dispositive of the propriety of refusing to reinstate the application.

[2] In Aguilar v. United States, *supra*, the court recognized that the United States has a fiduciary relationship with Alaska Natives and that the protection of Indian property rights is an area where the trust responsibility is greatest. 474 F. Supp. at 846. Further, the court found that initiation of use and occupancy of the land pursuant to the Alaska Native Allotment Act, coupled with filing an application for the land established a preference right to the land. 474 F. Supp. at 845. Notwithstanding prior patenting of the land to the State of Alaska, rejection of an application in such circumstances without a hearing was held violative of due process

3/ In view of this holding, we find it unnecessary to consider the question of whether the relinquishment was knowing and voluntary.

4/ This provision has been held applicable to Native allotment applications which had been rejected by the Department prior to enactment of ANILCA. Olympic v. United States, 615 F. Supp. 990, 992-93 (D. Alaska 1985).

and the court found the Department obligated to recover the land in cases where it is ascertained that the land was conveyed to the State in error. 474 F. Supp. at 847. This obligation is consistent with the provision of section 905(a)(4) of ANILCA regarding Native allotment applications to the effect that "where an allotment application describes land which has been patented or deeded to the State of Alaska * * *, paragraph (1) [legislative approval] of this subsection shall not apply and the application shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended * * *." 43 U.S.C. § 1634(a)(4) (1988); State of Alaska v. Thorson (On Reconsideration), 83 IBLA 237, 254, 91 I.D. 331, 341 (1984).

In view of the fact that the purported relinquishment of this application was without legal authority, we find the Native allotment application for the balance of the lands must be considered as pending before

the Department and that denial of the application for reinstatement was improper. See Heirs of Saul Sockpealuk, 115 IBLA 317, 325 (1990). 5/

This Board has rejected application of the doctrine of administrative finality to bar reinstatement of Native allotments rejected for lack of evidence of qualifying use and occupancy without benefit of a hearing as required by Pence v. Kleppe, supra. Heirs of Saul Sockpealuk, supra at 321 n.3. In State of Alaska, 109 IBLA 339 (1989), the Board upheld reinstatement (and approval) of a Native allotment application as to lands for which the application had been previously rejected for lack of evidence of qualifying use and occupancy without an opportunity for a hearing even though the rejection decision had not been appealed.

In view

of the fact that the Native allotment applicant had not been provided an

5/ In Heirs of Saul Sockpealuk, 115 IBLA 317 (1990), we considered a similar issue where BLM had denied reinstatement to three different Native allotment applications which had been terminated and the case files closed on the basis that they had failed to submit proof of substantially continuous use and occupancy of the land within the 6-year period prescribed by regulation. In each of these three instances, the cases were closed without the Natives being afforded a right to a hearing on the sufficiency of use and occupancy as required by Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976).

In our resolution of these three appeals, we found the facts analogous to those in Olympic v. United States, supra, and relied at great length on the analysis of the court in that case to require that the Native applications be reopened stating:

"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."

115 IBLA 325. Although, as noted supra, the prior conveyance in this case precludes legislative approval of the Native allotment application, the balance of the application must be reinstated and adjudicated. See 43 U.S.C. § 1634(a)(4) (1988).

opportunity for a hearing as required by Pence, the Board held that the BLM decision rejecting the Native allotment application was not final and was properly considered to be pending on December 18, 1971. Invalid relinquishments have been treated similarly to applications improperly rejected without a hearing, requiring reinstatement of the relinquished application and adjudication thereof in the event the relinquishment is determined to be invalid. Matilda Titus, 92 IBLA 340 (1986). ^{6/}

Further, we note that to the extent it may be argued that appellant is collaterally estopped from seeking reinstatement of the application, collateral estoppel is inapplicable where, as in this case, there was no notice to the heirs of the rejection of the application. Under the Rules of Practice governing actions of the GLO in 1937, as near as we are able to determine them, service of notice on unknown heirs could be accomplished as follows:

[W]hen notice is to be served by [GLO] on the unknown heirs of a public-land claimant, the same should be addressed to the claimant at his address of record and also at the post-office nearest the land. Notice thus addressed will be held to constitute notice to the unknown heirs, provided the letter, if undelivered, is held at the office of delivery for at least thirty days. [Emphasis supplied.]

Circular No. 436 (Sept. 4, 1915), 44 L.D. 364-65 (1916). Significantly, this provision was codified unchanged in the first Code of Federal Regulations in June 1938, thus strongly indicating that it remained in effect continuously from 1915 to the date of codification. See 43 CFR 220.14 (1938).

It is evident that no constructive or actual notice of the rejection of the balance of Chief Alexander's allotment was effectuated. There is no

^{6/} In this regard, these cases represent an exception to the general rule under the doctrine of administrative finality, the administrative counterpart of *res judicata*, that a party is precluded from seeking reconsideration of a decision of an agency official when the party or his predecessor in interest had the opportunity to obtain review within the Department and took no action. See Lloyd D. Hayes, 108 IBLA 189, 192-93 (1989). The basis for this exception is found in the Secretary's special fiduciary responsibility to Native Americans, in this case, Native Alaskans, under which the Secretary and his delegates have a fiduciary duty to examine the circumstances of any purported relinquishment of a Native allotment. Matilda Titus, 92 IBLA 340, 351 (1986) (Grant, A.J., concurring); see Aguilar v. United States, 474 F. Supp. at 846-47.

The failure of the heirs to challenge the relinquishment for over 40 years, during which time the State applied for and was granted title to the lands originally covered by Chief Alexander's application, might well establish grounds for invocation of the doctrine of laches against their claim. The Board of Land Appeals, however, is not the proper forum to assert equitable remedies such as laches. Such rights and equities may be properly resolved, however, in any legal action initiated through the courts to cancel the patent issued to the State. See Matilda Titus, *supra* at 351-52.

indication that GLO issued any decision formally rejecting the allotment. To the extent notice of such action might nevertheless be deemed to have resulted from the heirs' notice (actual or constructive) of issuance of the certificate of allotment for less than the acreage applied for, the record establishes that notice was not given in accordance with the governing rule of practice quoted above. A letter indicating approval was sent on December 8, 1937, to Chief Alexander in Tolovana, Alaska, which appears to have been his last address of record and may be presumed to be the post office nearest the land at issue. The record indicates that this letter was returned to GLO by the post office and was received there on December 16, 1937. Nothing in the record indicates that the letter was held in the post office for 30 days as required to establish constructive notice to the heirs.

Finally, while it is technically true that appellant does not fall within the Aguilar class certified by the court in that the Native allotment application was not rejected because the land was conveyed pursuant to the State selection, we find this immaterial. The Native allotment application was never actually rejected, but rather an unauthorized relinquishment was accepted prior to filing of the State selection. It is clear that the application must now be reinstated and adjudicated. If the application is found to be valid, then recovery of the land must be pursued through negotiation with the State or litigation. See State of Alaska v. Thorson (On Reconsideration), supra at 254, 91 I.D. at 341.

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 reversed and the case is remanded.

C. Randall Grant, Jr.
Administrative Judge

I concur:

David L. Hughes
Administrative Judge