

STATE OF ALASKA
(HEIRS OF WILLIE TAKAK)

IBLA 95-295

Decided February 20, 1996

Appeal of a decision of the Alaska State Office, Bureau of Land Management, approving Native allotment application F-02361.

Motion to dismiss denied; decision affirmed.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Applications and Entries: Reinstatement

The question whether BLM has properly reinstated a Native allotment application is separate and apart from the issue of the Department's ability to transfer the lands described in the application. The Department has jurisdiction to address issues concerning reinstatement even though the lands described in the application have been congressionally conveyed.

If an application was initially terminated or rejected because its averments were facially insufficient as a matter of law, reinstatement is not appropriate absent clear evidence demonstrating a significant error in the application.

2. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Estoppel--Laches

The doctrines of estoppel and laches originate in equity rather than law and may be appropriately raised in a proceeding to determine whether a Native holds rights under an allotment application. However, they are not a proper basis for denying reinstatement of the application for review on the merits.

APPEARANCES: Paul R. Lyle, Esq., Office of the Attorney General, Fairbanks, Alaska, for the State of Alaska; Regina L. Sleater, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The State of Alaska has appealed a February 10, 1995, decision by the Alaska State Office, Bureau of Land Management (BLM), reinstating Native allotment application F-02361, filed by Willie Takak. BLM has filed a motion to dismiss the appeal or, in the alternative, extend the time for filing an answer to the statement of reasons.

BLM contends that the Department does not have jurisdiction over the land subject to the application because the surface was conveyed to the Shaktoolik Native Corporation and the subsurface to the Bering Straits Native Corporation (BLM Motion at 1). BLM argues that it "is merely conducting an investigation to determine whether or not it is appropriate to seek to recover title to the land in question" and, until it does, "an appeal is not ripe and must be dismissed." *Id.* at 2. BLM relies upon *State of Alaska*, 127 IBLA 276 (1993), and *Bay View, Inc.*, 126 IBLA 281 (1993).

Appellant opposes the motion to dismiss, contending that its appeal does not concern an adjudication of title to the land but collateral issues pertaining to reinstatement of the application (Opposition to Motion to Dismiss at 2-3). In particular, the State argues that it "challenges Takak's right to seek reinstatement under the doctrines of estoppel and laches and further challenges BLM's decision to reinstate the application without first considering whether these doctrines should be applied to deny reinstatement." *Id.* at 2.

The State cites *Kootznoowoo, Inc. v. Johnson*, 109 IBLA 128, 134 (1989), *aff'd sub nom. Kootznoowoo, Inc. v. Spang*, Civ. No. A91-254 (D. Alaska Dec. 23, 1992), *aff'd*, 33 F.3d 59 (9th Cir. 1994) (table), and *Matilda Titus*, 92 IBLA 340 (1986), in support of its claim that the Department has jurisdiction to decide such collateral issues. It distinguishes *Bay View, Inc.* and *State of Alaska* as appeals from BLM's acceptance of amended land descriptions which involved issues of Native use and occupancy. *Id.* at 1-2. The State contends that the decision to reinstate Takak's application is not an adjudication of title, but a final BLM decision, which is properly subject to appeal. *Id.* at 2-3.

The record on appeal shows that Willie Takak filed his Native allotment application on April 24, 1959. The record also indicates that by notice dated October 30, 1964, BLM informed him of the date evidence of substantially continuous use and occupancy of the land would be due. No evidence was submitted, and BLM terminated Takak's application by a decision dated May 18, 1965, and closed the file. However, the record does not show that Takak received either the notice or the decision.

On June 1, 1981, the State filed a protest of the conveyances to the Native corporations under sections 905(a)(5) and 1328 of the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 98-487, 94 Stat.

2371 (1980), codified at 16 U.S.C. § 3215 (1994) and 43 U.S.C. § 1634 (1988), asserting that the land was used for an existing trail. The land Takak had applied for was included in interim conveyances made to the Shaktoolik Native Corporation and to the Bering Straits Native Corporation on September 26, 1983.

Following the resolution of Mary Olympic v. United States, 615 F. Supp. 990 (D. Alaska 1985), Takak filed an affidavit attesting to his use and occupancy of the land and requested reinstatement of his application. Letters from BLM to the State of Alaska dated January 21 and August 19, 1994, state that the application would be reopened in accordance with Heirs of Saul Sockpealuk, 115 IBLA 317 (1990). BLM conducted a field examination on September 7, 1994. By the decision on appeal, BLM reinstated Takak's application because it had been terminated without an opportunity for a hearing, citing Heirs of Edward Peter, 122 IBLA 109, 115 (1992), in support of its decision. BLM also published notice that the application would be processed under the stipulated procedures negotiated by the parties to Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), and approved by the court on February 9, 1983. By letter dated March 3, 1995, BLM informed the Shaktoolik Native Corporation that, under the Aguilar procedures, it had determined the application was legislatively approved, and requested reconveyance of the surface estate as well as the subsurface estate which had been conveyed to it by the Bering Straits Native Corporation. By memorandum also dated March 3, 1995, BLM requested that its hearing officer schedule a hearing to determine rights of bona fide purchasers because the "parcel encompasses half of the town of Shaktoolik and there are approximately 25 to 30 houses sitting on this parcel." In addition to the homeowners or occupants, BLM identified those holding interests in the land as the City of Shaktoolik, the State of Alaska Department of Transportation, and the Bering Straits Regional Housing Authority.

[1] We agree with the State that State of Alaska and Bay View, Inc. do not preclude consideration of the appeal. BLM is correct that the Department cannot adjudicate interests in land to which it does not have title. Bay View, Inc., supra at 287. The matter on appeal is not the adjudication of Takak's right to the allotment (or the State's rights to lands within it). The State has appealed BLM's decision to reinstate Takak's application. This circumstance was not addressed by State of Alaska or Bay View, Inc. As the State notes, both of those decisions concern cases in which BLM accepted amended descriptions of land for allotment applications which were properly before it. Neither addressed reinstatement of a closed Native allotment application. "The question of the validity of the application is separate and apart from the issue of the ability to transfer the lands named in the application, and the Department has the jurisdiction to address this question, even though the lands described in the application may have been congressionally conveyed * * *." Kootznoowoo, Inc. v. Johnson, supra at 134.

In accord with Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), and Olympic v. United States, supra, the decision whether to reinstate a Native allotment application turns on fairly narrow questions. In Heirs of Saul Sockpealuk, supra, relied upon by BLM when it reopened Takak's application, the Board held that BLM had erred when it denied three petitions by the heirs of applicants seeking reinstatement of applications which had been terminated and closed for failure to submit proof of use and occupancy within 6 years. Id. at 321. Following the reasoning of Olympic and State of Alaska, 109 IBLA 339 (1989), the Board ordered the applications reinstated so that they might be approved or adjudicated under Pence. Id. at 324-26. In contrast, if an application has been terminated or rejected because its averments on the face of the application were insufficient as a matter of law, reinstatement is not appropriate, absent clear evidence demonstrating a significant error in the application. Lena Baker Maples, 129 IBLA 167, 170-71 (1994); Franklin Silas, 117 IBLA 358, 364 (1991), (On Judicial Remand), 129 IBLA 15 (1994), aff'd sub nom. Silas v. Babbitt (A93-35 CV (JKS) July 31, 1995 (mem.)); cf. Pence v. Andrus, 586 F.2d 733, 739-40 (9th Cir. 1978) (noting that hearings are not held when applications are rejected as a matter of law). 1/

[2] Takak's application stated: "This land has been used by me and my ancestors for 50 years." The asserted use and occupancy is sufficient to preclude finding the application invalid as a matter of law. See Heirs of Edward Peter, supra. Although the State contends that BLM should be required to first consider its arguments as to estoppel and laches, it overlooks the origin of these doctrines in equity rather than law. While they may be appropriately raised in a proceeding to determine whether Takak holds rights under his application, they are not a proper basis for denying reinstatement of the application for the purpose of review on the merits. See Armstrong v. Maple Leaf Apartments, Ltd., 436 F. Supp. 1125, 1147-50 (D. Okla. 1977), aff'd in part, 622 F.2d 466 (10th Cir. 1979), cert. denied, 449 U.S. 901 (1980); Evelyn Alexander, 45 IBLA 28, 36 (1980). We conclude that BLM correctly determined that Takak's application should be reinstated.

Our review of the record, however, reveals that BLM has erred in ascertaining the status of the application. The Native Allotment Act, 34 Stat. 197 (1906), codified as amended at 43 U.S.C. §§ 270-1 through

1/ BLM's citation of Heirs of Edward Peter, supra, in the decision on appeal appears to have been based upon its interpretation of Heirs of Saul Sockpealuk. Edward Peter rejected an argument that a Native allotment application should be reinstated, finding that it had been properly terminated as a matter of law because it did not assert on its face 5 years of use and occupancy and further evidence had not been provided. Heirs of Edward Peter, supra at 115. It relied upon Franklin Silas, supra, in ruling that "no hearing is required by Pence where termination of an allotment application occurred as a matter of law * * *." Heirs of Edward Peter, supra at 115.

270-3 (1970), was repealed by section 18 of the Alaska Native Claims Settlement Act, P.L. 92-203, 85 Stat. 688, 710 (1971), codified at 43 U.S.C. § 1617 (1988). Subsequently, ANILCA provided for legislative approval of pending applications except in circumstances identified in the statute. Among the exceptions, subsection (a)(5) provides that an application is not approved and shall be adjudicated under the Native Allotment Act if:

The State of Alaska files a protest with the Secretary stating that the land described in the allotment application is necessary for access to lands owned by the United States, the State of Alaska, or a political subdivision of the State of Alaska, to resources located thereon, or to a public body of water regularly employed for transportation purposes, and the protest states with specificity the facts upon which the conclusions concerning access are based and that no reasonable alternatives for access exist * * *.

43 U.S.C. § 1634(a)(5)(B) (1988). As noted above, the State filed its protest on June 1, 1981. ^{2/} Accordingly, Takak's application was not legislatively approved and must be adjudicated in accordance with established procedures. State of Alaska (Heirs of Lucy Charlie), 126 IBLA 204, 208 (1993); State of Alaska (Harvey Pootoogooluk), 121 IBLA 363, 367-68 (1991); State of Alaska (Molly Tocktoo), *supra* at 3, 6 (1991). The statement in BLM's March 3, 1995, letter to the Shaktoolik Native Corporation was erroneous.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's motion to dismiss the appeal is denied and the February 10, 1995, decision of the Alaska State Office reinstating Native allotment application F-02361 is affirmed.

R. W. Mullen
Administrative Judge

I concur:

Franklin D. Amess
Administrative Judge

^{2/} The filing was timely, as May 31, 1981, was a Sunday. See Kootznoowoo, Inc. v. Johnson, *supra* at 131 n.3, citing State of Alaska, 95 IBLA 196, 198 n.2 (1987); see State of Alaska (Molly Tocktoo), 118 IBLA 1, 2 (1991) (protest filed June 1, 1981).

