

HEIRS OF GEORGE BROWN

IBLA 94-888

Decided March 31, 1998

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application A-0395.

Affirmed as modified.

1. Alaska: Land Grants and Selections—Alaska National Interest Lands Conservation Act: Native Allotments

The fact that a Native allotment application had been rejected prior to 1980 without an APA hearing does not necessarily establish that the application is properly reinstated under section 905(a) of ANILCA. Rather, reinstatement is appropriate where, under the adjudication procedures utilized, a failure to afford the claimant a hearing on a disputed issue of fact violated the minimum standards of due process as described in Pence v. Kleppe, 529 F.2d 135, 143 (9th Cir. 1976), or, alternatively, where failure to reinstate the application would work a manifest injustice.

State of Alaska (Heirs of Peter Wise), 130 IBLA 83 (1984), and Ellen Frank, 124 IBLA 349 (1992), overruled to extent inconsistent.

APPEARANCES: Daniel Brown, Juneau, Alaska, pro se and for the Heirs of George Brown; Carlene Faithful, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Daniel Brown, appearing for himself and on behalf of the other heirs of George Brown, has appealed from a determination of the Alaska State Office, Bureau of Land Management (BLM or Bureau), dated August 11, 1994, rejecting reinstated Native allotment application A-0395 because the land description provided in the application was insufficient to locate the parcel sought. For reasons supplied below, we deny the appeal.

The record reflects that George Brown filed an application on February 27, 1909, to obtain a parcel of land aggregating 59.33 acres, under the Alaska Native Allotment Act of 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), (repealed effective December 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1994), with a savings provision for applications pending on December 18, 1971). The application, serialized A-0395, identified the land sought as

situate on the north side of Hood Bay, about 10 miles south of Killisnoo, Alaska, Admiralty Island, described as follows:

Beginning at Cor. No. 1, identical with Cor. No. 1, Newton Nelson allotment, at high water mark of Hood Bay, whence rock 5 ft. base. 4 ft. high, bears S 38°00'E 3.8 chains distant; and cabin 20X20 bears S 64°00'E .75 chains distant; thence along meander S 49°00'E 3.52 chains; thence S 51°37'E 1.30 chains; thence N 2°53'E 9.09 chains; thence N 39°30'E 2.00 chains; thence N 23°10'E 16.23 chains; thence N 72°50'E 12.85 chains, to Cor. No. 2; thence North 15.0 chains to Cor. No. 3; thence West 24.04 chains to Cor. No. 4; thence South 41.20 chains to Cor. No. 1, the place of beginning, containing an area of 59.33 Acres. Corners marked by posts 4"X4"X4'. Courses turned from true meridian. Magnetic variation, 30°00' East.

No sketch map or plat depicting the parcel was provided. It should also be noted that neither the allotment applicant nor the two witnesses provided any date for the commencement of occupancy on the Allotment Affidavit. 1/

The application was subsequently transmitted to the Alaska Field Division of the General Land Office (GLO) where it was received on December 1,

1/ The application forms utilized were those provided in the Circular dated Feb. 11, 1907. See 35 L.D. 437 (1907). The Allotment Affidavit form contained blanks in which the applicant was to indicate whether he or she was "full blood" or "mixed blood," "the head of family" or "a single person over 21 years of age," and also a statement attesting that "I have occupied the land so applied for since _____." The instructions on the form noted that the applicant should "Insert date, if occupied, or strike out the clause, if not occupied." The two witnesses were also required to attest that the applicant "has occupied the land described in the foregoing application since _____," and were similarly instructed to insert the date, if occupied, or, if not occupied, to strike the clause. Brown's application, which was clearly completed with the assistance of someone else since he signed by a mark, did not provide a date of occupancy or evidence a striking of the clause as the instructions directed in either the applicant's or the witnesses' statements.

1919. 2/ A field investigation was conducted on July 1, 1924, by J.A. Ramsey, a GLO special agent. An unsigned copy of Ramsey's report to the Commissioner, GLO, can be found in the case file. The report provided, inter alia:

It was ascertained from Mr. G. E. Good, teacher of the government school at Killisnoo, that this applicant died on September 24, 1921.

Various persons were interviewed, both at Killisnoo and at the Indian village at the Hidden Inlet Cannery on Hood Bay, and I was unable to find anyone who knew of this applicant or his wife or his heirs ever having occupied or made improvements on land on Hood Bay except a cabin which was built for him in the Indian village on the patented land included in the trade and manufacturing site of the Hidden Inlet Cannery Company, U.S. Survey No. 1480.

Among those interviewed was Mrs. George Betts, a daughter of the deceased applicant, and she stated that her father had never occupied or improved any allotment but that he had resided at the cannery during the summer season and at Killisnoo throughout the winter.

In view of the foregoing it is recommended that this application be rejected and the case closed.

(Report dated July 14, 1924, at 1-2.) While the copy of this report in the case file is unsigned, it bears the holographic approval of both the Assistant Superintendent, Surveys and Public Lands, and the District Supervisor of the U.S. Bureau of Education. 3/

2/ The procedures applicable for processing Native allotments in 1909 when the Brown application was filed were those found at 37 L.D. 615 (1909). These rules noted, inter alia, that "[t]he allotments, when found correct in form, and without valid adverse claims, will be placed on a schedule which will be submitted to the Department for approval." Id. at 616. However, in these initial years of allotment adjudication, the procedures for processing Native allotment applications were frequently amended. See, e.g., Circular of Jan. 31, 1914, 43 L.D. 88 (1914); Circular No. 491, 45 L.D. 227, 245-47 (1916); Circular No. 572, 46 L.D. 226 (1917). The regulations under which Brown's application was ultimately processed were those established by Circular No. 749, 48 L.D. 70 (1921), repromulgated in 50 L.D. 27, 48-54 (1923).

3/ Under the procedures applicable in 1924, where the land sought had been previously surveyed, favorable reports by the Chief of the Field Division and the District Superintendent of the U.S. Bureau of Education were required prior to the issuance of a notice to the applicant that the application "has been placed of record in this office and forwarded to the

however, indicate that it was believed that the parcel was probably located within T. 52 S., Rs. 68 or 69 E., Copper River Meridian.

By letter dated November 14, 1990, BLM requested the assistance of the Central Council of the Tlingit and Haida Indian Tribes of Alaska (Central Council) in plotting this parcel, among others. While BLM originally sought to have this replotting accomplished within 90 days, a number of extensions were granted at the Central Council's request. A final request for information was sent by BLM on February 18, 1994. When no plottable description was forthcoming, BLM rejected the reinstated application on August 11, 1994. Thereupon, Daniel Brown, a grandson of George Brown, sought review by this Board.

On appeal, Daniel Brown requests that we remand this case to BLM in order to allow him the opportunity to determine the exact location of the allotment parcel through a field examination. While admitting that he had received a number of notices from BLM seeking his assistance in its efforts to plot George Brown's parcel to which he had not replied, Daniel Brown explains:

I did not come forward with information concerning the allotment application of George Brown because of the Jimmie George claim. I had been under the impression that those lands in Hood Bay were owned by the heirs of Jimmie George. During a meeting in Angoon we were discussing these lands. At that time Lydia George, an heir of Jimmie George, told the people that the heirs of Jimmie George owned all of those lands at Hood Bay. She said that they had title to the land.

At the same time there was discussion from the Angoon Community Association [ACA] members saying that ACA owned those land and that they were tribal lands. ACA also says that they have title to the lands. They said that they were working with the Bureau of Land Management to get it on record that they are the rightful owners.

I hope that you will understand that I have not wanted to rock the boat so to speak. I have listened to the people who I thought were knowledgeable about land claims, such as Lydia George and ACA. I could not understand that I needed to also come forward and assert the claim of George Brown. He may have applied for some of the land that ACA applied for, he and Jimmie George may have applied for some of the same land, but I am sure they did not intend to be in conflict. The way I see the records, that is what it shows on paper though.

(Request for Remand at 1-2.) Daniel Brown asserts that he could identify the location of George Brown's allotment application on the ground and requests that he be allowed to accompany a field examination "to get the location right and make sure that I don't conflict with the other claims."

Id. Together with his request for a remand, he has submitted a map on which he had placed two "X's" as possible sites for locating the lands for which George Brown applied. We note that one of these "X's" is located in sec. 12, T. 52 S., R. 68 E., while the other marked site is located over a mile away in sec. 5, T. 52 S., R. 69 E.

The Bureau opposes the request for remand, arguing that Daniel Brown had already been afforded substantial time in which to furnish the Department with a plottable land description and had failed to do so. It contends that, given the resources available to Brown through the Central Council and the Bureau of Indian Affairs, the allotment would have been plotted by now if such action was feasible and it requests that the appeal be dismissed based on Daniel Brown's failure to support the appeal with a statement of reasons.

[1] Our review of the subject appeal convinces us that it involves two separate considerations. The first relates to the question of the location of the parcel described in George Brown's allotment application. This is the issue which has, thus far, consumed the attention of the parties to this appeal. But of equal relevance, in our view, is the assumption, unexamined below, that this application was properly reinstated. As we subsequently explain, we do not believe that it was, and for that reason we must deny the instant appeal.

In our recent decision in William Demoski, 143 IBLA 90 (1998), there was a lengthy discussion relating to the factors properly involved in reinstating Native allotment applications previously rejected. Id. at 95-122 (concurring opinion). It was suggested therein that insufficient consideration had been given in a number of Board decisions to the operable parameters for reinstatement when the applications being reinstated had been rejected decades previously, such as in the instant appeal. Indeed, the present appeal epitomizes some of the potential problems alluded to in Demoski.

Initially, we note that a number of previous Board decisions have proceeded under the implicit assumption that, unless an Administrative Procedure Act (APA) hearing had been afforded a Native allotment applicant on disputed issues of fact before the rejection of his or her application, all previous decisions were necessarily flawed and violative of due process. This is demonstrably false.

There is absolutely nothing in the Pence decisions which required an APA hearing as a precondition for providing Native allotment applicants the due process to which they were entitled. Thus, in Pence v. Kleppe, supra, while the court clearly held that the procedures then utilized did not afford allotment applicants due process, it did not mandate adoption of the APA standards with respect to allotment hearings. On the contrary, the court declared:

Thus, at a minimum, applicants whose claims are to be rejected must be notified of the specific reasons for the

proposed rejection, allowed to submit written evidence to the contrary, and, if they request, granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment. Beyond this bare minimum, it is difficult to determine exactly what procedures would best meet the requirements of due process. The specific problems and the demands placed upon the Bureau of Land Management are best judged initially by the Secretary. It is up to the Secretary in the first instance, to develop regulations which provide for the required procedures, subject to review by the district court and, if necessary, by this court.

Id. at 143 (emphasis supplied).

Thereafter, it was this Board, not the courts, which, in consultation with the Secretary, determined that, notwithstanding the circuit court's apparent determination that "all of the procedural requirements of [the APA] need not be met," the best way to afford Native allotment applicants with the required due process was to apply procedures "consonant with the APA." Donald Peters, 26 IBLA 235, 239, 83 I.D. 308, 310 (1976). Thus, the Board concluded, that "[t]o carry out the mandate of the court in Pence and insure due process in the adjudication of Native allotment applications, the contest regulations included in 43 CFR 4.451 et seq. shall henceforth be applied to such cases." Id. at 241 (emphasis supplied). ^{5/}

The Board's Peters decision, however, itself proved controversial. A petition for reconsideration was filed on behalf of allotment applicants challenging the technical and formal nature of the contest procedures, particularly the 30-day answer requirement found in the Department's contest regulations.

The Board rejected these challenges in a decision styled Donald Peters (On Reconsideration), 28 IBLA 153, 83 I.D. 564 (1976). The matter did not end there, however. A second appeal from the Board's decision was taken, ultimately resulting in another decision by the Ninth Circuit Court of Appeals, Pence v. Andrus, 586 F.2d 733 (1978). In this decision, while the court dismissed a challenge to the constitutionality of the contest regulations as premature, ^{6/} it did find that the procedures "facially" complied with the Pence v. Kleppe decision. Id. at 744.

^{5/} The Peters decision also noted that "[p]ursuant to the procedures and departmental decisions, where BLM determines a claim or application must be rejected as a matter of law, assuming the truth of all relevant matters stated in the claim or application, it may reject the claim or application without a hearing." Id.

^{6/} We note that in Silas v. Babbitt, 96 F.3d 355, 357 (9th Cir. 1996), the court expressly held that the Department's regulations satisfied administrative due process.

Under the Donald Peters decision, subsequent determinations to reject Native allotment applications on disputed issues of fact would require invocation of Departmental contest procedures. It should be noted, however, that this did not mean that the Board considered the Pence decision to be prospective only. On the contrary, as the Board explained in Mary Olympic (On Reconsideration), 65 IBLA 26 (1982):

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.

Id. at 34-35. What the Board declined to initially do, however, was apply the Pence ruling to cases which had been finally decided by the Department prior to December 18, 1971. Id.

In 1980, Congress adopted section 905 of the Alaska National Interest Lands Conservation Act (ANILCA), 94 Stat. 2435, as amended, 43 U.S.C. § 1634 (1994). This section provided, inter alia, for the legislative approval or adjudication, in certain circumstances, of Native allotment applications which "were pending before the Department of the Interior on or before December 18, 1971." 43 U.S.C. § 1734(a)(1) (1994). In effect, this provision removed the jurisdictional bar which the Board held in Mary Olympic, 47 IBLA 58 (1980), and Mary Olympic (On Reconsideration), supra, 7/ prohibited reinstatement of any allotment application which had been finally rejected prior to December 18, 1971. See William Demoski, supra, at 95-99 (concurring opinion).

As the Board subsequently noted, the legislative history of this provision established that the phrase "or before" had been added to clarify that "applications which were erroneously rejected by the Secretary prior to December 18, 1971, without an opportunity for a hearing shall be approved or adjudicated by the Secretary pursuant to the terms of the section." Frederick Howard, 67 IBLA 157, 160 (1982), citing S. Rep. No. 413, 96th Cong., 1st Sess. 238 (1979), reprinted in [1980] U.S.C.C.A.N. 5182. But, as was suggested in William Demoski, supra, the fact that any specific

7/ In fact, the Department of Justice's confession of error in Olympic v. United States, 615 F. Supp. 990 (D. Alaska 1985), was occasioned by the adoption of this provision.

Native allotment application had previously been rejected without there having been a hearing does not, ipso facto, establish that it had been "erroneously rejected." Thus, as the court itself recognized in Pence v. Andrus, supra, where rejection was premised on a matter of law, no hearing was required. 586 F.2d at 743.

Similarly, it cannot be maintained, consistent with the analysis in Pence v. Kleppe, supra, that every pre-APA rejection of an allotment application must necessarily give rise to a conclusion that due process was not afforded the applicant. Rather, what Pence required and what section 905(a) of ANILCA authorized was the Departmental reexamination of those past cases in which an allotment application had been rejected with finality to determine whether or not due process was afforded the applicant and the reinstatement of those applications where either the minimum requirements of due process, as delineated by the court in Pence v. Kleppe, supra, were not met or where a manifest injustice would occur were the application not to be reinstated. See generally, Lord v. Babbitt, 943 F. Supp. 1203, 1208 (D. Alaska 1996). 8/

Judged by the foregoing standard, it seems clear that the application herein should not have been reinstated. As we noted above, there is nothing in the application which asserted occupancy by George Brown of the land sought prior to or even after the filing of the application. In this regard, it is important to keep in mind the fact that it was not until 1935 that the Department required the completion of 5 years use and occupancy as a precondition for obtaining any allotment of land. See 55 I.D. 282, 285 (1935). 9/ Prior to that time, occupancy of the land sought was only required if an individual wished to assert a "preference right" to an allotment. Thus, the 1906 Act, 34 Stat. 197, originally provided:

That the Secretary of the Interior is hereby authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres or nonmineral land in the district of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a family, or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be

8/ In light of the foregoing, we hereby overrule the decisions in State of Alaska (Heirs of Peter Wise), 130 IBLA 83 (1994), and Ellen Frank, 124 IBLA 349 (1992), to the extent of any conflict with the decision herein.

9/ And, it was not until 1956 that the statute was changed to reflect the requirement that issuance of any allotment was dependent upon a showing of "substantially continuous use and occupancy of the land for a period of five years." See § 3 of the Act of Aug. 2, 1956, 70 Stat. 954, 43 U.S.C. § 270-3 (1970).

inalienable and nontaxable until otherwise provided by Congress. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred and sixty acres.

(Emphasis supplied.)

Accordingly, when George Brown filed his application in 1909, the Department was authorized to allot him any 160-acre tract of nonmineral land which he requested; Brown had a "preference right" to obtain an allotment, however, only to those parcels which were "occupied by him." ^{10/} Yet, nothing in his application showed the existence of a preference right to an allotment with respect to the parcel described. As noted above, despite the fact that spaces were provided on the Allotment Affidavit in which the applicant and the witnesses could attest to the applicant's pre-existing occupancy of the land being sought, both spaces were left blank. See note 1, supra. The failure of either the applicant or the witnesses to indicate a present occupancy of the land described must properly give rise to a conclusion that no such occupancy was being asserted.

Nor is this conclusion contradicted by anything else of record. Thus, the field examiner's written report related that, while Brown had died on September 24, 1921, he was unable to find anyone who was aware of Brown occupying or making improvements to the land in Hood Bay other than "a cabin which was built for him in the Indian village on the patented land included in the trade and manufacturing site of the Hidden Inlet Cannery Company, U. S. Survey No. 1480." The report further noted that, in a discussion with George Brown's daughter, Ramsey was informed by her that George Brown "had never occupied or improved any allotment." While the pencil notations on the back of the Non-Mineral Affidavit indicate that Brown might have had a smoke house on the land at one time, these notes also indicate that this smoke house had been purchased by someone else by the time of the field examination.

We note that no objection to the rejection of George Brown's allotment application was made in 1924, though notice was provided pursuant to then-prevailing procedures. Nor, apparently, were any questions raised in the ensuing 50 years as to the propriety of the GLO's rejection of Brown's application. Thus, at the time that this file was initially examined by BLM in 1978 there was no basis on which it could be concluded that the rejection of this application in 1924 either violated the requirements of due process or worked a manifest injustice. There was, in short, no basis in the record for reinstating this application either before or after the adoption of section 905(a) of ANILCA. See Lord v. Babbitt, supra.

^{10/} As noted above, the preference right afforded by the 1906 Act was limited to lands "occupied" by the Native. The concept of "use and occupancy" arose in 1935 as a condition for obtaining any allotment, whether based on a preference right or not.

Nor has anything been provided since that time which might properly give rise to a conclusion that reinstatement of this application was justified. No one has even disputed any of the factual predicates upon which the original decision was made. Moreover, the difficulty in plotting the description provided on the application merely underlines the problems attendant to BLM's action in reinstating George Brown's application. While Daniel Brown assures the Board that he could locate the land George Brown sought and avoid conflicts with existing allotments and Native claims, there is no indication in the historical record, whatsoever, that a proper location of the land claim would not be in conflict with other entries.

One of the obvious problems in attempting to locate the land described in the application is that the description is not only provided by metes and bounds but, more critically, that the starting point of the entire description was a wooden post set along the northern shore of Hood Bay. Not only has this post doubtless long since disappeared, but the shoreline configuration which the application describes along the first courses to corner No. 2 (which is the part of the description that would be most susceptible to independent verification) would clearly have been subject to the erosive tidal forces of Hood Bay. Not surprisingly, there is no section of shoreline depicted on current plats of T. 52 S., Rs. 68 or 69 E., Copper River Meridian, which evinces a perfect fit with the description provided on George Brown's application.

However, notwithstanding the foregoing, we believe that there is sufficient evidence in the record to surmise that the likely location of the land described by George Brown was in the extreme NE $\frac{1}{4}$ sec. 7, SE $\frac{1}{4}$ sec. 6, and SW $\frac{1}{4}$ sec 5, T. 52 S., R. 69 E., Copper River Meridian, which would place George Brown's application directly in conflict with not only land conveyed pursuant to allotment application AA-6580 of Jimmie George, Sr., (see Native Allotment Certificate 50-92-0620), but also land within Village Selection application AA-6978-B, as well as land originally included within Parcel B of the Native allotment application filed by George W. Nelson, Jr., AA-7730. 11/

The first set of courses and distances of the description (from corner No. 1 to corner No. 2) clearly represents the meandered north boundary of a water body. The calls describe an initial finger of land jutting generally southeasterly for approximately 318 feet (4.82 chains), then turning abruptly north for 600 feet (9.09 chains) and then continuing in a generally NNE direction for 1,203 feet (18.23 chains), before bending more easterly for a final 848 feet (12.85 chains).

The case file contains a Master Title Plat (MTP), current to July 27, 1990, for the entire township as well as a supplemental plat for sec. 7.

11/ This application was ultimately rejected because it was not founded on occupancy of the land sought prior to its inclusion in the Tongass National Forest. This rejection was affirmed in Arthur R. Martin, 41 IBLA 224 (1979). See also Shields v. United States, 698 F.2d 987 (9th Cir. 1983).

The supplemental plat shows a parcel of land, roughly in the shape of a comma, protruding into the North Arm of Hood Bay. The shoreline then proceeds rapidly northward. While, admittedly, the MTP shows a meander line that proceeds much more directly north than that depicted in George Brown's description, we believe that this is a result of erosion of the north bank of the North Arm.

We find support for this conclusion in two other plats contained in the case file. Thus, there are earlier MTP's, current to December 19, 1980, which depict the same area. While the depiction of the north bank in these MTP's is, in fact, the same as that depicted in the 1990 MTP's, the township MTP also depicts Parcel B of George W. Nelson, Jr.'s Native allotment application, AA-7730. This application is shown as not only embracing the shoreline in sec. 5, but as protruding into the North Arm well into the NE corner of sec. 8 (an area now depicted as within Hood Bay). Moreover, the general shape of Nelson's application along its southern boundaries closely accords with the description provided in George Brown's application. The only reasonable conclusion from the foregoing is that, at the time that Nelson commenced occupancy of this parcel (and, presumably, earlier when George Brown sought to acquire it), the north shore extended considerably south and east of where it can now be found.

Finally, we note that the case file also contains a supplemental MTP for sec. 7, dated September 21, 1994, which depicts the result of a survey of Jimmie George's allotment. This shows that the parcel in question has noticeably decreased in size along its east boundary since the 1980 MTP, indicating that the historical process of erosion has continued to date. Based on the foregoing, we feel relatively confident in locating the George Brown application in secs. 5, 6, and 7, T. 52 S., R. 69 E.

The fact that we might be able to fix the location of the land sought in George Brown's application, however, does not support a finding that it would be a manifest injustice not to reinstate his application. On the contrary, it shows that reinstatement might itself constitute an injustice to others. Even if one were to assume that George Brown had actually "occupied" the land in question (and we reiterate that his application contained no allegation that he had done so), it is undisputed that he died in 1921. Obviously, as can be seen from the fact of Jimmie George's application, the land became subject to the use and occupancy of another. ^{12/} Such use and occupancy could have been initiated and continued in total good faith since there was nothing of record which could have alerted

^{12/} We are aware, of course, that, in his application, Jimmie George, Sr., had alleged use of this parcel commencing in 1913, while George Brown was still alive. See Jimmie A. George, Sr., 60 IBLA 14 (1981), rev'd, Civ. No. A86-113 (D. Alaska Apr. 30, 1987).

anyone of Brown's claim. ^{13/} To permit the reinstatement of a dormant claim after the passage of half of a century in such circumstances could, in this case, have the effect not of avoiding an injustice but of creating one. Equity does not support, much less compel, the reinstatement of George Brown's allotment application under the present facts.

We conclude, therefore, that it was error for BLM to reinstate the allotment application of George Brown and, on this basis, we deny the instant appeal.

Accordingly, pursuant to authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the appeal is denied for the reasons provided above.

James L. Burski
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge

^{13/} Not only had the application been rejected in 1924, but, as we noted above (see note 3, supra), under the procedures being applied during this period, the application would never have been placed "on record." As was pointed out in David Cavanaugh, 89 IBLA 285, 297 n.7, 92 I.D. 564, 571 n.7 (1985), case files are not status records for the purpose of imputing knowledge under the "notation" rule.

