

INTERIOR BOARD OF LAND APPEALS

Winifred A. Otten

136 IBLA 166 (July 25, 1996)

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WINIFRED A. OTTEN

IBLA 93-423

Decided July 25, 1996

Appeal from a decision of the Alaska State Office, Bureau of Land Management, declaring Native allotment application F-982, Parcels D and E, terminated as a matter of law.

Reversed and remanded.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

Sec. 905(a) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a) (1994), which requires either approval or adjudication of Native allotment applications pending before the Department of the Interior on or before Dec. 18, 1971, applies to otherwise acceptable allotment applications filed before that date but terminated after that date for failure to submit evidence of use and occupancy within 6 years of the application date. A BLM decision declaring that an application pending on Dec. 18, 1971, which was not legislatively approved because a protest had been filed against it, had terminated as a matter of law under 43 CFR 2561.1(f) will be reversed and the application reinstated and remanded for adjudication pursuant to the Alaska Native Allotment Act of May 17, 1906, when, although timely evidence of use and occupancy was not filed, the record contains a BLM field report describing the applicant's use and occupancy of the claimed land.

APPEARANCES: Judith K. Bush, Esq., Fairbanks, Alaska, for appellant; James R. Mothershead, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Winifred A. Otten has appealed from an April 29, 1993, decision of the Alaska State Office, Bureau of Land Management (BLM), declaring Native allotment application F-982, Parcels D and E, terminated as a matter of law for failure to file proof of 5 years substantially continuous use and occupancy within 6 years of the filing of the application.

On May 2, 1968, the Bureau of Indian Affairs (BIA) filed Native allotment application F-982 on behalf of Winifred A. Otten, pursuant to the Alaska Native Allotment Act of May 17, 1906 (Native Allotment Act), as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed effective December 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1994), subject to applications then pending. Otten, who listed 1613 23rd Avenue, Fairbanks, Alaska, as her address on the application, sought approximately 160 acres of land in 2 parcels: Parcel No. 1 embracing 80 acres within sec. 12, T. 10 S., R. 9 W., Fairbanks Meridian, Alaska, and Parcel No. 2 containing 80 acres in sec. 5, T. 10 S., R. 9 W., Fairbanks Meridian, Alaska. Otten claimed use and occupancy beginning on March 19, 1968. By notice dated November 29, 1968, BLM accepted Otten's application and advised her that she was required to submit proof of substantially continuous use and occupancy of the lands for a period of 5 years no later than May 2, 1974, or her application would terminate without prejudice to her filing a new application at that time.

On March 20, 1972, BIA filed a second application, signed on January 12, 1971, on Otten's behalf. This application, which identified Otten's address as General Delivery, Stebbins, Alaska, described three parcels: Parcel A consisting of approximately 80 acres in sec. 33, T. 21 S., R. 20 W., Kateel River Meridian, Alaska; Parcel B encompassing several islands containing about 40 acres in sec. 28, T. 21 S., R. 20 W., Kateel River Meridian, Alaska; and Parcel C including roughly 40 acres in sec. 28, T. 24 S., R. 19 W., Kateel River Meridian, Alaska. Otten claimed seasonal use and occupancy of those lands since July 1934 for hunting, fishing, and egg picking. BLM considered the second application to be an amendment of the application originally filed on May 2, 1968, and redesignated Parcel Nos. 1 and 2 of the 1968 application as Parcels D and E, respectively.

BLM conducted a field examination of Parcels A, B, and C. After requesting and receiving additional information, BLM concluded that this was the land Otten actually used. <sup>1/</sup> By letter dated June 30, 1975, BLM informed Otten that the Native Allotment Act authorized the Secretary of the Interior to allot up to 160 acres of land to a qualified applicant and that, since her applications sought approximately 320 acres, she would be required to relinquish the 160 acres in T. 10 S., R. 9 W., Fairbanks Meridian, described in her original application, in order not to exceed the 160-acre limit. Otten did not reply to the relinquishment request.

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<sup>1/</sup> We note that BLM's June 6, 1974, letter requesting additional evidence describes Parcels D and E as the applied-for lands, but recites the material submitted in the 1972 application for Parcels A, B, and C and the conclusions reached in the field report for those three parcels as justifying its need for further information.

On February 9, 1976, counsel for Otten requested that, if the information submitted on her behalf or then present in her case file were not sufficient to approve her entire allotment claim, a hearing be held before any adverse decision was made as to any portion of her claim. <sup>2/</sup>

On April 29, 1976, BLM approved Parcels A, B, and C of Native allotment application F-982, and on March 20, 1985, following a survey which determined that the three approved parcels totaled 123.09 acres, BLM issued Certificate of Allotment No. 50-85-0263 to Otten for those three parcels.

By decision dated May 16, 1979, BLM rejected Parcels D and E of the May 2, 1968, application because the "statutory life" of that application had expired on May 1, 1974, without evidence of use and occupancy being filed, and Otten had failed to respond to BLM's June 30, 1975, relinquishment request. After citing the 160-acre limit on the amount of land the Native Allotment Act authorized the Secretary to allot to qualified applicants, BLM rejected the May 2, 1968, application, and advised Otten that the application would be removed from the records when the decision became final. This rejection decision was mailed to Otten at the Fairbanks address listed in the May 2, 1968, application, rather than the Stebbins address identified on the later application, and was returned by the Post Office as unclaimed. A copy was also served on her attorney of record, John Scott Evans, at ALSC, but this copy was refused with the handwritten note "Otten not client and Evans no longer works here." Otten did not appeal this decision.

On May 29, 1981, in accordance with section 905 of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634 (1994), Cook Inlet Region, Inc. (CIRI) protested approval of Otten's Native allotment application. <sup>3/</sup> BLM summarily dismissed CIRI's protest on January 4, 1985, citing the April 29, 1976, approval of the allotment as the basis for the dismissal.

After conducting a review pursuant to Olympic v. United States, 615 F. Supp. 990 (D. Alaska 1985), BLM reinstated Otten's Native allotment application for Parcels D and E on February 21, 1986, and, in March 1986,

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<sup>2/</sup> An Entry of Appearance by Counsel, dated July 18, 1974, identifies Bruce Abramson of Alaska Legal Services Corporation (ALSC) as attorney of record for Otten. By letter dated Oct. 17, 1974, an ALSC legal assistant informed BLM that John Scott Evans had replaced Abramson as attorney of record for ALSC's clients.

<sup>3/</sup> In accordance with the provisions of section 12(c) of ANCSA, 43 U.S.C. § 1611(c) (1994), CIRI had filed regional selection F-35320-1 on Feb. 21, 1978, requesting lands in T. 10 S., R. 9 W., Fairbanks Meridian, including lands within Otten's Parcels D and E.

requested a field examination of those parcels. In the May 27, 1987, field report documenting the May 16, 1987, field examination, the examiner noted that, although the 2 parcels totalled 160 acres, Otten was entitled to only 36.91 acres and that, accordingly, she had decided to relinquish all of Parcel E and retain only the described land within Parcel D near her daughter's cabin. The examiner concluded from the evidence on the ground and the statements of Otten's daughter and former son-in-law, who had accompanied him on the examination, that Otten had used and occupied the land in compliance with the Native Allotment Act and recommended that the 36.91-acre parcel described in the survey instructions attached to the report be approved.

Otten relinquished Parcel E on September 9, 1988, and BIA approved the relinquishment on September 22, 1988. In a letter dated March 2, 1990, Otten relinquished the excess acreage within Parcel D in order to reduce the size of the retained land to 36.91 acres. BIA approved the relinquishment on March 30, 1990. On April 12, 1990, BIA amended the relinquishment to correct the acreage being surrendered.

Otten's Parcel D was surveyed and the plat officially filed on September 12, 1991.

On April 29, 1993, BLM issued a decision captioned "Native Allotment Application F-982, Parcels D and E, Terminated as a Matter of Law." After reciting the history of Otten's Native allotment application, BLM determined that the application had been erroneously reinstated on February 21, 1986, because the May 16, 1979, decision rejecting Otten's 1968 application was legally sound. Citing 43 CFR 2561.2(a), which requires an allotment applicant to submit proof of substantially continuous use and occupancy for a period of 5 years at any time within 6 years of filing a Native allotment application, and 43 CFR 2561.1(f), which provides that an allotment will terminate if an applicant does not submit the required proof within the 6-year period, BLM found that Otten had failed to submit the evidence of 5 years use and occupancy within the 6-year period as required by the regulations. Since, according to BLM, the regulations, which Otten was charged with knowing, did not require any action on BLM's part in order to terminate an application for failure to timely file proof of use and occupancy, BLM concluded that, in accordance with the Board's decision in Heirs of Edward Peter, 122 IBLA 109 (1992), Otten's application terminated by operation of law on May 1, 1974, when the required proof was not submitted.

In her statement of reasons for appeal (SOR), Otten argues that the Board's decision in Frederick Howard, 67 IBLA 157 (1982), rather than Heirs of Edward Peter, *supra*, controls the disposition of her appeal and mandates reinstatement of her 1968 application. Otten interprets Frederick Howard as establishing that, in accordance with section 905 of ANILCA, 43 U.S.C. § 1634 (1994), the failure to provide evidence of use and occupancy does

not bar approval of a Native allotment application which was pending before the Department on December 18, 1971, since that statutory section provides that all Native allotment applications pending before the Department on or before that date would either be legislatively approved or adjudicated pursuant to the requirements of the Native Allotment Act.

BLM's statutory life ("stat life") policy, Otten asserts, is invalid since not only is the 6-year requirement a regulatory creation with no statutory foundation, but also the regulation itself explicitly provides that the termination of the application does not affect the Native's right to make another application, a right which has been nullified by ANCSA's 1971 repeal of the Native Allotment Act. Otten contends that, since the court decision in Olympic v. United States, *supra*, the Board has reinstated every "stat life" termination appealed to it except for the termination at issue in Heirs of Edward Peter, *supra*. Otten avers that Heirs of Edward Peter was improperly decided and should be overturned since the "stat life" policy as currently applied by BLM violates the terms of the regulation itself and ANCSA's savings clause for applications pending on December 18, 1971, as well as the legislative approval or adjudication requirement of section 905 of ANILCA, 43 U.S.C. § 1634 (1994). Otten further insists that BLM's use of the "stat life" regulation to terminate applications ignores the mandate of Pence v. Kleppe, 529 F.2d 135, 142 (9th Cir. 1976) (Pence), that due process requires notice and an opportunity for a hearing before a Native allotment application can be rejected since, according to Otten, all "stat life" terminations invariably involve disputed questions of fact concerning an applicant's use and occupancy of the claimed land which can only be resolved by a hearing. Accordingly, Otten requests that BLM's decision be reversed and the application reinstated and approved.

In its answer, BLM impugns Otten's reliance on Frederick Howard, *supra*, as dispositive of the issues presented in her appeal by distinguishing Otten's situation from the facts presented in Frederick Howard. The record in Frederick Howard, BLM observes, did not reveal any circumstances which would preclude automatic approval and require adjudication of Howard's application, thus prompting the Board to direct BLM on remand to hold the application for approval subject to the identification of any such circumstances. In Otten's case, however, BLM asserts that CIRI's May 29, 1981, protest of Otten's allotment application precluded legislative approval of the application under section 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1994), and compelled adjudication of the application in accordance with section 905(a)(5) of that Act, 43 U.S.C. § 1634(a)(5) (1994). BLM maintains that the fact that Otten's application must be adjudicated pursuant to the provisions of the Native Allotment Act also renders inapposite cases such as Olympic v. United States, *supra*, where the application at issue was subject to legislative approval.

BLM insists that Otten's unperfected application automatically terminated under the self-executing provisions of 43 CFR 2561.1(f) upon her failure to timely file proof of use and occupancy. BLM explains that when it

rejected Otten's application for Parcels D and E on May 16, 1979, the only evidence in the administrative record concerning her use and occupancy of those lands was the statement in her application that her use and occupancy had begun on March 19, 1968. According to BLM, Otten's failure to submit any proof of substantially continuous use and occupancy for the requisite 5-year period by the May 2, 1974, deadline or even by May 16, 1979, when BLM rejected the application, prevented her from presenting a prima facie case of compliance with the requirements of the Native Allotment Act. BLM contends that, absent any such proof, no disputed factual issues existed in the record and, therefore, no hearing was required prior to rejecting the application for failure to file the required proof.

BLM argues that 43 CFR 2561.1(f) is a duly promulgated regulation falling well within the broad discretion the Native Allotment Act grants to the Secretary to establish the rules under which allotments will be issued, has the force and effect of law, and is binding on the Department. BLM further insists that failure to file the required proof within the 6-year period caused the application to automatically terminate under the self-executing provisions of 43 CFR 2561.1(f) and that, therefore, its 1979 decision did not effectuate the termination of the application but merely acknowledged and notified Otten that the termination had already occurred by operation of the regulation. BLM cites Heirs of Edward Peter, *supra*, as support for its contention that the regulation does not require any action on its part in order to terminate an application for failure to timely submit proof of use and occupancy since that event occurred by operation of law.

BLM avers that the "stat life" policy applied to her application even though the 6-year period for the submission of proof expired after ANCSA's repeal of the Native Allotment Act. Although the repeal of the Native Allotment Act prevented an applicant from filing a new application after termination of an application under 43 CFR 2561.1(f), thus nullifying the portion of the regulation recognizing the right to make another application, BLM argues that basic rules of statutory construction bolster its position that the repeal left unaffected and intact the automatic termination provision of that regulation.

Even assuming that BLM's 1979 decision, rather than the self-executing regulatory provision, effectuated the termination of Otten's application, BLM maintains that the termination involved no factual determinations requiring a hearing under Pence. The only factual issue relevant to this case, BLM suggests, is whether Otten filed proof of 5 years use and occupancy of Parcels D and E within 6 years of filing her application for those parcels. Since the record establishes that no such proof was submitted and Otten's application for the parcels indicates that her use and occupancy began only a few months prior to the filing of the application, BLM contends that this appeal does not concern a controverted statement of fact but rather a complete absence of facts showing the requisite use and occupancy by Otten. BLM argues that at the time it issued its 1979 decision the record contained no evidence Otten had used and occupied the lands

for 5 years, and that, therefore, no factual issues are in dispute and no hearing is required. BLM asserts that its 1979 decision properly notified Otten of the automatic termination of her application and that the decision, which was based on a conclusion of law, became final for the Department when it was not appealed. <sup>4/</sup> Thus, BLM contends that its February 21, 1986, reinstatement of the application was erroneous and that its April 29, 1993, decision recognizing the error and reaffirming the 1979 decision was proper and must be affirmed.

In reply, Otten reiterates that the decision in Frederick Howard, *supra*, controls the outcome of her appeal even if her application cannot be legislatively approved under section 905(a) of ANILCA, 43 U.S.C. § 1634(a) (1994). <sup>5/</sup> She maintains that the Board in Frederick Howard did not rely on a distinction between legislatively approved applications and those requiring adjudication, emphasizing that the Board's decision did not say that if Howard's application could not be legislatively approved, then the "stat life" termination would be reinstated but rather contemplated that the application would be fully adjudicated if legislative approval were not possible. She insists that the rules of statutory construction support the conclusion that the "stat life" regulation was repealed by the passage of ANCSA and that ANILCA clearly eradicated any possible vitality remaining in the regulation, adding that BLM's narrow statutory construction argument ignores the Federal government's trust responsibility to protect Alaska Natives' land claims and the general rule that statutes passed for the benefit of Natives should be liberally construed in their favor. Thus, Otten contends that the decision in Heirs of Edward Peter, *supra*, which involves a pre-ANCSA termination, does not control the outcome of a post-ANCSA "stat life" termination.

Otten repeats that a "stat life" termination is necessarily based on a factual determination about use and occupancy and requires a Pence hearing. Otten disputes the validity of BLM's differentiation between applicants alleging in their applications that their use and occupancy began more than 5 years before they filed their applications, who are entitled to a hearing even if they fail to file proof of use and occupancy within 6 years of filing their applications, and applicants claiming use and occupancy beginning less than 5 years before the date of their application, who are not entitled to a hearing if they fail to submit timely evidence of use and occupancy. According to Otten, this distinction, first articulated in Heirs of Edward Peter, *supra*, rests on the presumption that applicants applying

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<sup>4/</sup> BLM maintains that, although Otten appears to suggest that BLM's service of that decision on Otten was deficient, service on Otten's ALSC attorney of record satisfied the requirements of 43 CFR 1810.2(b).

<sup>5/</sup> Otten does not concede that her application cannot be legislatively approved and seeks a remand of this case to BLM for a proper evaluation of the effect of CIRI's protest on Parcels D and E (Reply at 2, n.2).

more than 5 years after initiation of use and occupancy have completed the required use and occupancy while applicants submitting applications less than 5 years after commencement of use and occupancy must submit additional written evidence or lose the opportunity for a hearing even though by the date of the rejection more than 5 years will have passed since the beginning of use and occupancy. Otten urges that this is a distinction without a difference and denies equal protection of the laws to Native allotment applicants, and that automatic termination of an allotment applicant under either set of circumstances conflicts with the savings clause of ANCSA, section 905 of ANILCA, and Pence. Otten requests that we reverse BLM's decision, reinstate her application, and remand the application to BLM for a determination of whether the parcels can be legislatively approved or must be adjudicated pursuant to the Native Allotment Act.

[1] The Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), authorized the Secretary of the Interior to allot up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Native Alaskan Indian, Aleut, or Eskimo, 21 years old or the head of a family, upon satisfactory proof of substantially continuous use and occupancy for a 5-year period. The Act was repealed by section 18 of ANCSA, 43 U.S.C. § 1617 (1994), with a savings provision for applications pending before the Department on December 18, 1971. Section 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1994), provides that all Native allotment applications pending before the Department on or before December 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. Under section 905(a)(5)(A) of ANILCA, 43 U.S.C. § 1634(a)(5)(A) (1994), legislative approval does not apply and a Native allotment application must be adjudicated pursuant to the requirements of the Native Allotment Act if a Native Corporation protests the allotment on the grounds that the applicant is not entitled to the described land and that the land has been withdrawn for selection by the Native Corporation pursuant to ANCSA.

There is no dispute that Otten's May 1968 application for Parcels D and E was pending before the Department on December 18, 1971. Thus, the provisions of section 905(a) of ANILCA, 43 U.S.C. § 1634(a) (1994), govern the disposition of her application. Frederick Howard, 67 IBLA at 160. CIRI's May 29, 1981, protest of approval of her application pursuant to 43 U.S.C. § 1634(a)(5)(A) (1994), however, precludes legislative approval of her application for those two parcels and requires that the application be adjudicated under the substantive provisions of the Native Allotment Act. BLM's dismissal of the protest, the propriety of which as to Parcels D and E is not before us, does not revive legislative approval of the application. See United States v. Pestrikoff, 134 IBLA 277, 281 (1995), and cases cited. Accordingly, Otten's Native application for Parcels D and E must be adjudicated pursuant to the requirements of the Native Allotment Act.

BLM's April 29, 1993, and May 16, 1979, decisions rest on 43 CFR 2561.1(f) which provides that, if an applicant does not submit proof of 5 years use and occupancy (as required by 43 CFR 2561.2) within 6 years of the filing of the application, the allotment application terminates. <sup>6/</sup> BLM argues that, since Otten's application was not legislatively approved but was subject to adjudication, the Board's holding in Frederick Howard, *supra*, that failure to provide evidence of use and occupancy does not bar approval of an otherwise acceptable application pending before the Department on December 18, 1971, does not mandate reinstatement of her application. Rather, BLM considers its 1979 decision advising her that the application automatically terminated by operation of law in accordance with 43 CFR 2561.1(f) to be the appropriate disposition of her application under the Native Allotment Act. BLM further contends that no Pence hearing was required prior to terminating Otten's application because the termination occurred as a matter of law, rather than because of a factual assessment of the adequacy of her use and occupancy. BLM cites the Board's decision in Heirs of Edward Peter, *supra*, as support for these contentions.

In Heirs of Edward Peter, Peter originally filed an application in February 1962 for approximately 115 acres of land claiming use and occupancy since June 1961. When, despite notification in November 1962 and September 1967 that proof of use and occupancy was due by February 19, 1968, Peter failed to submit the required proof, BLM informed him by notice dated April 3, 1968, that his application had terminated due to that failure, adding that the termination did not affect his right to make another application. Peter did not appeal that decision. Instead, he filed a new application on May 1, 1968, for 70.3 acres, professing use and occupancy since July 1962 and identifying improvements on the land. This application was eventually approved by BLM. Peter's heirs appealed BLM's July 12, 1989, decision confirming approval of the allotment, apparently seeking reinstatement of Peter's original application which sought more land than the approved application. Although only a barely sufficient SOR was submitted by the heirs, the Board nevertheless considered the appeal and affirmed the BLM decision approving the second allotment application. In so doing, the Board held that Peter's original application terminated by operation of law when he failed to timely submit the required proof and that the termination became final when he failed to appeal BLM's notice of the termination. Absent legal or equitable reasons for reconsidering the termination of the 1962 allotment application, the Board upheld BLM's termination under the doctrine of administrative finality. 122 IBLA at 113-14.

The Board further found that no hearing was required in Peter's case because the application itself, filed as it was less than a year after

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<sup>6/</sup> At the time Otten filed her application for Parcels D and E, the requirement that proof of 5 years use and occupancy, as set out in 43 CFR 2212.9-4 (1968), had to be filed within 6 years of the filing of the application or the application would terminate was found at 43 CFR 2212.9-3(f) (1968).

initiation of use and occupancy, did not on its face indicate compliance with the 5-year use and occupancy requirement. Peter's failure to submit any evidence that he continued occupying and using the land for the remainder of the requisite period left the record bereft of any evidence alleging compliance with the 5-year requirement. The Board, therefore, concluded that the resulting declaration of termination did not constitute an implicit factual assessment of Peter's original application or of any other proof of use and occupancy, but was a legal conclusion derived from the absence of any such proof in the record. Since the hearing required by Pence applies only when BLM rejects a Native allotment based on a factual determination that the applicant has failed to establish the requisite use and occupancy, the Board held that no hearing was necessary when the termination of an allotment occurred as a matter of law, as was the case before it. 122 IBLA at 114-15.

In the case before us, at the time BLM issued its May 16, 1979, decision, the record was devoid of evidence that Otten completed the requisite 5 years use and occupancy of Parcels D and E. <sup>7/</sup> Otten did not appeal this decision. <sup>8/</sup> Thus, if no additional evidence had been added to the record between the May 16, 1979, decision, and the April 29, 1993, decision under appeal, we would be constrained to affirm BLM's decision in accordance with Heirs of Edward Peter, *supra*. The record now before us and the record before BLM when it issued the April 29, 1993, decision, however, contains additional evidence supporting Otten's use and occupancy of Parcels D and E which we cannot ignore. This proof is found in the May 27, 1987, field report generated after BLM reinstated Otten's application in February 1986. In that report the examiner concluded from the evidence on the ground and witness statements that Otten had used and occupied the 36.91-acre parcel of land she wished to retain as Parcel D in compliance with the Native Allotment Act and recommended approval of that parcel. Given these circumstances, we conclude that Otten is entitled to have her application for Parcel D as presently identified reinstated. <sup>9/</sup> See Andrew Balluta.

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<sup>7/</sup> We note, however, that on Feb. 9, 1976, ALSC requested a hearing prior to rejection of any portion of her application if BLM found that the information submitted on Otten's behalf or then contained in her case file was insufficient for approval of her entire allotment claim.

<sup>8/</sup> We agree with BLM that this decision was properly served on Otten's ALSC attorney of record and that such service constitutes service on Otten. See 5M, Inc., 109 IBLA 334, 336 (1989); United States v. Mine Development Corp., 27 IBLA 238, 243 (1976). We note, however, that the copy of the decision mailed to Otten herself was not sent to the most recent address on file for her with BLM.

<sup>9/</sup> We note in passing that the Board has recognized that Native allotment applications rejected for failure to timely file evidence of use and occupancy may nevertheless, under appropriate circumstances, be reinstated and remanded for further consideration in accordance with equitable adjudication pursuant to 43 CFR 1871.1-1. See Julius F. Pleasant, 5 IBLA 171, 177 (1972).

122 IBLA 30, 34 (1992); cf. Heirs of George Titus, 124 IBLA 1, 5 (1992) (BLM's reaffirmance of earlier rejection of application, which was not legislatively approved under ANILCA, because evidence of use and occupancy forms filed on the applicant's behalf referred to only 1 year of use and occupancy was reversed and remanded where field reports prepared after BLM reinstated the application concluded that the applicant had met the use and occupancy requirements for the claimed land). If, on remand, BLM finds the evidence insufficient to establish the requisite use and occupancy of Parcel D, Otten must be afforded a hearing in accordance with Pence before her application can be rejected.

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 matter is remanded to BLM for further action consistent with this decision.

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Will A. Irwin  
Administrative Judge

I concur:

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John H. Kelly  
Administrative Judge