

INTERIOR BOARD OF LAND APPEALS

Jean F. Boone-Hamar and Esther Samboy

150 IBLA 18 (August 2, 1999)

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JEAN F. BOONE-HAMAR
ESTHER SAMBOY

IBLA 97-292, 97-366

Decided August 2, 1999

Appeals from a notice of the Alaska State Office, Bureau of Land Management, notifying a Native allotment applicant's heirs of the closure of his Native allotment application. A-060987.

Reversed and remanded.

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

Where the Department rejected a Native allotment application prior to Dec. 18, 1971, because the applicant had failed to show that his independent use and occupancy predated a 1909 withdrawal of the land and thus constituted a valid existing right under the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), which survived the withdrawal, and did so without notice and an opportunity for a hearing on the disputed question of fact concerning whether the applicant had engaged in such use and occupancy, BLM is required to reinstate the application and, if it again rejects the application on that basis, to initiate a Government contest.

APPEARANCES: David Voluck, Esq., Sitka, Alaska, for Jean F. Boone-Hamar; Keith A. Christenson, Esq., Eagle River, Alaska, for Esther Samboy; Regina L. Sleater, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Jean F. Boone-Hamar and Esther Samboy, both adopted daughters of Alex Andrews, have separately appealed from a February 12, 1997, Notice of the Alaska State Office, Bureau of Land Management (BLM), notifying Andrews' heirs that his Native allotment application (A-060987) was formally closed on BLM's records. ^{1/} By Order dated July 17, 1997, we consolidated the two appeals, upon request, for resolution by the Board.

^{1/} Samboy reports that she and Boone-Hamar were Andrews' legally recognized heirs at the time of his death in 1976 and each had an undivided one-half interest in his application. (Letter to BLM, dated Apr. 3, 1997, at 1; Statement of Reasons for Appeal (SOR) at 3-4 (citing Ex. E attached to SOR).)

On May 31, 1960, Andrews filed his Native allotment application (formerly JUN-011910), pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), ^{2/} seeking 160 acres of unsurveyed land, described by metes and bounds, situated in protracted sec. 33, T. 53 S., R. 63 E., and sec. 4, T. 54 S., R. 63 E., Copper River Meridian, on the eastern shore of Halleck Island, along Nakwasina Sound, in southeastern Alaska. He claimed occupancy of the land by himself and his ancestors since "[t]ime immemorial," thus clearly predating the February 16, 1909, withdrawal of the land, subject to "valid [existing] right[s]," which accompanied its inclusion within the Tongass National Forest. 35 Stat. 2226, 2228 (1909).

On June 8, 1964, the Forest Service, U.S. Department of Agriculture, which has administrative jurisdiction over the land, reported to BLM, after examining the land and evidently talking to Andrews, that, in its opinion, Andrews' application was "based on his parents' occupancy rather than his own" and that, in that respect, it could not, due to the absence of reliable proof, confirm any occupancy by them prior to the 1909 withdrawal. (Letter, dated June 2, 1964, at 2.) It noted that Andrews had reported that his parents lived on the land in a house, but that it had found "no evidence on the ground of any dwelling." Id. at 1. The Forest Service, thus, recommended the rejection of Andrews' application. It further noted that Andrews had "probably lived on the land prior to 1909 with his parents as a member of the family group" and that it was "doubtful," as a matter of law, that such occupancy qualified under the Act of May 17, 1906. Id.

By decision dated July 18, 1966, BLM rejected Andrews' application, because he had failed to establish use and occupancy of the land, either by himself or his father, prior to the 1909 withdrawal. BLM quickly dispensed with Andrews' reliance on his own use and occupancy. It rejected such reliance, noting that Andrews' "own rights" to the land dated only from when he turned 21 years of age or became the head of a family, thus "qualify[ing] [him] to file for an allotment," and intimating that both occurred after the 1909 withdrawal. ^{3/} (Decision, dated July 18, 1966,

^{2/} Repealed effective Dec. 18, 1971, subject to pending Native allotment applications, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1994).

^{3/} We have since held that, to the extent that the statute provides that an allotment be made to an Alaskan Native who is "21 years of age or the head of a family," 43 U.S.C. § 270-1 (1970), it only requires that the applicant or his heirs satisfy that condition at the time of allotment. United States v. Akootchook, 123 IBLA 6, 10 n.7 (1992), appeal filed, Akootchook v. United States, No. A98-0126 (D. Alaska Apr. 22, 1998). However, beyond that, BLM indicated, in its July 1966 decision, that Andrews was, at the time of the 1909 withdrawal, a minor child who was using and occupying the land in the company and under the supervision of his parents and not as an independent citizen on his own behalf. See Letter to BLM from Forest Service, dated June 2, 1964, at 1. If true, it would disqualify his use and occupancy of the land under the Act of May 17, 1906, prior to the withdrawal. Forest Service (Heirs of Frank M. Williams), 141 IBLA 336, 341 (1997). However, the record elsewhere indicates that Andrews had reached the age of majority well before the withdrawal.

at 2.) BLM also held that Andrews could not rely on his father's use and occupancy predating the withdrawal since that right did not then pass to Andrews by inheritance, thus entitling him to apply for an allotment of the land under that Act:

There is no provision in the 1906 Allotment Act for a son to inherit rights to lands based on his father's use and occupancy of such lands. If it had been intended that the children of an Indian occupying public lands, without ever having filed for an allotment thereon, should be entitled to file an application in the parent's stead or after his death, the law and the regulations would have so provided.

(Decision, dated July 18, 1966, at 1 (relying on Memorandum to Bureau of Indian Affairs from Regional Solicitor, dated Apr. 21, 1966).) Thus, BLM effectively held that Andrews could not rely on his ancestors' use and occupancy of the land for purposes of establishing that he held a valid existing right which survived the withdrawal.

Andrews appealed from BLM's July 1966 decision. In a November 4, 1966, decision, the Acting Chief, Office of Appeals and Hearings, BLM, affirmed BLM's July 1966 decision. He focused on Andrews' contention that he should be allowed to rely on his father's use and occupancy of the land to establish that he held a valid existing right, under the Act of May 17, 1906, which had survived the 1909 withdrawal. The Acting Chief did so because Andrews had stated that "he is not relying on his residence on the lands as a child," and "has submitted no evidence that he himself has made [qualifying] use and occupancy of the subject lands." (Decision, dated Nov. 4, 1966, at 1, 3.) The Acting Chief stated, however, that Andrews had submitted "no factual data whatsoever" to substantiate his assertion that his father's qualifying use and occupancy of the land had been initiated prior to the withdrawal and, assuming it had, that it had continued through the date of withdrawal. Id. at 4. He concluded that Andrews had not rebutted evidence offered by the Forest Service to the effect that any use and occupancy of the land by Andrews' father had terminated before the withdrawal. The Acting Chief, therefore, held that there could have been no valid existing right which survived the withdrawal and which Andrews could have then inherited, even assuming that was legally permissible:

[W]e think it immaterial as to whether or not the appellant can inherit a right to * * * an allotment on the basis of his father's purported prior occupancy, since it is abundantly clear that any right the father may have had, if he had any at all, ceased to exist [in the absence of continuing use and occupancy] sometime prior to 1909. Therefore, there [are] no rights in the lands that could be inherited by the appellant.

Id. at 4-5.

A copy of the Acting Chief's November 1966 decision was served on Andrews by certified mail, return receipt requested, on December 5, 1966.

No further appeal was taken to the Secretary of the Interior from that decision, and it therefore became final for the Department. The case was closed on BLM's records on February 17, 1967. Andrews died in 1976.

BLM reinstated Andrews' application on January 13, 1981. It did so pending a final ruling by the Federal courts, in the case of Shields v. United States, No. A 77-66 (D. Alaska), on the question of whether a Native applicant must establish personal, rather than ancestral, use and occupancy of land prior to its withdrawal, for purposes of establishing that he holds a valid existing right, under the Act of May 17, 1906, which survived that withdrawal.

In Shields v. United States, 504 F. Supp. 1216, 1219-20 (D. Alaska 1981), the District Court held that a Native applicant was required to establish personal use and occupancy of land prior to its withdrawal. Absent that, the court held that the withdrawal attached to the land and the applicant could not thereafter seek an allotment pursuant to the Act of May 17, 1906. This ruling was affirmed by the Circuit Court and the Supreme Court thereafter refused to accept certiorari in the case. See Shields v. United States, 698 F.2d 987 (9th Cir.), cert. denied, 464 U.S. 816 (1983). The result was a final judicial ruling which rejected any reliance on ancestral use and occupancy predating a withdrawal. Eva Wilson Davis, 136 IBLA 258, 261 (1996).

On August 24, 1995, Carol S. Heath, a BLM realty specialist, accompanied by a representative of the Sitka Tribe of Alaska (Tribe), examined the land on the ground. She had learned, as a result of a reported conversation between the Tribe's representative and Mark Jacobs, who resided in nearby Sitka, Alaska, that Andrews had used the land for hunting and salmon fishing and had smoked fish in a smokehouse. (Land Report, dated Nov. 1, 1995, at 2.) However, she reported finding no remains of the smokehouse, which had purportedly burned down, or evidence of other structures or clearings. Id. She stated though that natural resources necessary for Andrews' use "appear to be present on the parcel," which was bounded by a stream. Id. Finally, Heath noted that she was "not able to reach a conclusion" regarding compliance with the use and occupancy requirements of the Act of May 17, 1906. Id. at 3.

In its February 1997 Notice, BLM notified Andrews' heirs that his application was once again closed on BLM's records, since the Department had already finally determined that Andrews had not himself engaged in any "independent use and occupancy" of the land prior to the 1909 withdrawal and the Federal courts had, in Shields, finally concluded that it was not sufficient, for purposes of having a valid existing right which survived the withdrawal, that Andrews' ancestral use predated the withdrawal. (Notice, dated Feb. 12, 1997, at 1.) Boone-Hamar and Samboj appealed from that Notice.

In their SOR's, Appellants contend that BLM, in its February 1997 Notice, improperly closed Andrews' application since BLM had not afforded

him, at the time of its 1966 adjudication, or them (as his heirs), at the present time, a hearing to resolve the longstanding disputed question of fact, whether he had engaged in independent use and occupancy of the land prior to its 1909 withdrawal, before rejecting the application.

BLM has filed an Answer, asserting that, both in submitting his application and at the time of the 1966 adjudication of that application, Andrews had not relied on his own use and occupancy of the land, but rather that of his father, to establish qualifying use and occupancy of the land prior to the 1909 withdrawal, and that whether he was entitled to do so presented a question of law. (Answer at 2-4.) BLM argues that that question was decided by the Acting Chief in November 1966 and ultimately affirmed by the Federal courts in Shields.^{4/} (Answer at 3-4.) BLM further asserts that neither Andrews nor his heirs were ever entitled to a hearing to address the factual question of whether he had initiated independent use and occupancy of the land prior to the withdrawal, since he had never alleged and they do not now allege that he had done so. Id. at 2-5. Rather, BLM concludes that, once the courts in Shields finally resolved the legal question of the effect of ancestral use and occupancy predating a withdrawal, it properly closed the application on its records for the last time. Id. at 4-5 (citing Silas v. Babbitt, 96 F.3d 355, 357-58 (9th Cir. 1996), and Lord v. Babbitt, 991 F. Supp. 1150, 1165-66 (D. Alaska 1997)). As BLM says: "Since the file was closed for legal defect in 1966, it should properly remain closed." (Answer at 5.)

It is clear that, regardless of what BLM now says on appeal, the Acting Chief, in his November 1966 decision, never resolved, nor could he, the question of law whether an applicant may rely on his ancestors' use and occupancy predating a withdrawal to establish that he holds, by virtue of inheritance, a valid existing right, under the Act of May 17, 1906, which survived the withdrawal. Rather, that question was finally resolved by the Federal courts in Shields.

Nor can we otherwise conclude that any of the questions resolved by the Acting Chief in his November 1966 adjudication of Andrews' application was, to his mind, a question of law. The Acting Chief recognized that, in order to establish his entitlement under the Act of May 17, 1906, Andrews

^{4/} BLM never says that the Acting Chief, in his November 1966 decision, specifically held that Andrews was not entitled to rely on his father's use and occupancy of the land to establish a valid existing right which survived the withdrawal. However, it does say that the Acting Chief held that "an applicant must show personal qualification for the granting of an allotment and cannot inherit an allotment for which application was not made." (Answer at 3.) The clear intimation is that an applicant must establish his own qualifying use and occupancy of the land and may not rely, by virtue of inheritance, on any such use and occupancy by his ancestor, and, given the circumstances of this case, that such use and occupancy must predate the withdrawal, thus giving rise to a valid existing right which survived the withdrawal. See id. at 3-4.

was required to demonstrate that qualifying use and occupancy predated the 1909 withdrawal and gave rise to inchoate rights under that Act, which constituted valid existing rights which survived that withdrawal. In order to do so, the Acting Chief further recognized that Andrews could arguably rely on either his own use and occupancy of the land or that of his father. He focused on Andrews' reliance on his father's use and occupancy, concluding that the evidence did not establish, from a factual standpoint, that his father had actually used and occupied the land prior to the withdrawal or continuing thereafter. He also addressed Andrews' reliance on his own use and occupancy of the land, giving it short shrift because he believed that Andrews had eschewed such reliance, based on a statement to that effect and the fact that, in his opinion, Andrews had submitted no evidence in support thereof. Nonetheless, the Acting Chief plainly acknowledged that this was a pertinent factual question, which he must address in some fashion.

In fact, this case has, since its beginning, presented the factual question whether Andrews himself engaged in qualifying use and occupancy of the land prior to the 1909 withdrawal. While BLM argues, on appeal, that Andrews himself never presented and that Appellants have not now presented any evidence, whether by affidavit or otherwise, which gave or now gives rise to that question, we do not agree.

In his 1960 application, Andrews stated that the land had been occupied since "[t]ime immemorial by me and my ancestors." (Emphasis added.) Later, he indicated that he personally occupied the land prior to the 1909 withdrawal. See Andrews' SOR, dated Sept. 15, 1966, at 1 ("[T]he lands * * * have been occupied by me and my father since prior to the [withdrawal]"); Letter to BLM from Andrews, dated July 25, 1966 ("[M]y family occupied and used the place before 1909"). The Forest Service, which examined the land and talked to Andrews, admitted that he had "probably lived on the land prior to 1909," albeit noting that it might have been "with his parents." (Letter to BLM, dated June 2, 1964, at 1.) In addition, Boone-Hamar has provided us with a copy of the letter referred to in the Forest Service's June 2, 1964, letter to BLM, which states that Andrews "used the land * * * prior to the formation of the Tongass National Forest, 1902-1909." (Attachment 3 to SOR (Letter "To Whom It May Concern" from Andrew Hope and Scotty James, dated Dec. 10, 1962).)

Furthermore, we note that a handwritten notation on the July 5, 1979, Case File Abstract for Andrews' application reports that he was born on August 30, 1886, which, if true, means that he was over 22 years old at the time of the 1909 withdrawal, and thus well past the age of majority. 5/

5/ There is another handwritten notation on the Case File Abstract, which reports that, according to the Tlingit and Haida Indian Tribes of Alaska, to which Andrews belonged, he was born on Oct. 10, 1886. See Letter to BLM from Realty Specialist, Central Council, Tlingit and Haida Indian Tribes of Alaska, dated Apr. 18, 1993; Letter to BLM from Boone-Hamar, dated Mar. 15, 1997, at 1 ("Andrews[] was born around 1884"); SOR (Boone-Hamar) at 4 ("There were no records kept for Indian children born at that time and he estimated his birth year between 1884 and 1886"). While the notations differ, they both report that Andrews was born in 1886.

We also note that Andrews had filed an earlier application (JUN-010844), for much the same land, on August 12, 1957, in which he reported that he had occupied the land "since childhood before 1884," thus indicating that he was alive on or before 1884. This is supported by the "Corroborative Statement" on the back of the 1957 application, in which two witnesses attest to Andrews' occupancy "since 1884." Samboy correctly notes that BLM was generally aware in 1960 that the later application, which is at issue here, was intended to be an amendment of that first application. 6/ (SOR at 2 (citing Letter to Andrews from BLM, dated June 21, 1960).) Thus, BLM was clearly on notice, well before its 1966 adjudication, that Andrews had allegedly reached the age of majority prior to the 1909 withdrawal. This fact was also made known to BLM well before its February 1997 Notice, which notified Andrews' heirs that his application was closed. (Letter to BLM from Realty Specialist, Central Council, Tlingit and Haida Indian Tribes of Alaska, dated Apr. 18, 1993.) And there is evidence that BLM found the report of Andrews' age at the time of the withdrawal credible. (Memorandum to District Manager, Anchorage District, Alaska, BLM, from Chief, Branch of Gulf Rim Adjudication, Alaska, BLM, dated June 21, 1995 ("Applicant was 23 years of age at the time of withdrawal for the Tongass National Forest in 1909").)

We note that Andrews did state, on appeal from BLM's July 1966 decision, that he was "not relying on my residence on the lands 'as a child,'" as BLM had reported in that decision. 7/ (SOR, dated Sept. 15, 1966, at 2.) Further, it is clear that he argued that, by virtue of his father's qualifying use and occupancy of the land prior to the 1909 withdrawal, his father had acquired inchoate rights to the land under the Act of May 17, 1906, and that those rights, which were valid existing rights, then passed to Andrews by inheritance. See SOR (Boone-Hamar) at 5 ("To Alex Andrews' detriment, [the SOR] focused on the idea that Alex Andrews should be able to inherit his ancestors' right in the land"); SOR (Samboy) at 3, 6.

However, it is apparent that, for purposes of advancing his claim to the lands, Andrews simply focused on what he then believed was his

6/ We do not accept, however, Samboy's contention that BLM improperly closed application JUN-010844. (SOR at 7.) As BLM stated in its June 21, 1960, letter to Andrews, it had, along with application JUN-011910, received a relinquishment, signed by Andrews, of the earlier application and neither application JUN-011910 nor the relinquishment was noted to reflect any intention to amend the earlier application. Nor is there any evidence that the relinquishment was not voluntary and knowing. Thus, BLM properly held the earlier application to have been relinquished and proceeded to process application JUN-011910. When Andrews was notified that this would occur, also by the June 21, 1960, letter, he did not object. See Letter to BLM from Andrews, dated June 15, 1960 (stating that he had not relinquished his overall allotment "claim," but only his earlier application).

7/ Andrews, thus, rejected the statement in BLM's July 1966 decision that he "is, apparently, relying on his residence on the land as a child while living with his parents, and the prior residence of his father to sustain his claim to the land." (Decision, dated July 18, 1966, at 1.)

strongest argument, *i.e.*, his entitlement to the land by virtue of his father's use and occupancy prior to the withdrawal. In any case, Andrews' statements do not override the fact that he maintained all along and did so in appealing BLM's July 1966 decision that he himself used and occupied the land at the time of the withdrawal, and thus may himself have held a valid existing right to the land. (SOR, dated Sept. 15, 1966, at 2 ("I did reside there then").) In addition, the fact that Andrews stated that he was not relying on his "residence on the lands `as a child'" may be seen simply as an assertion that he was not a child at the time of his occupancy prior to the withdrawal, which appears to be true.

In any event, we cannot ignore the true facts in favor of Andrews' earlier offered view of them. We will not do so, especially given Andrews' apparent age at the time of the withdrawal, and thus his clear ability to engage in independent use and occupancy at that time. At the very least, he should have been given notice and an opportunity in a hearing to clarify the statement and to offer supporting evidence.

In addition, on appeal to the Board, Appellants have offered statements, along with supporting evidence, that Andrews engaged in independent use and occupancy of the land prior to the 1909 withdrawal and thereafter. Boone-Hamar relies on her father's own statements to her, made while she resided with him between 1946 and 1963:

I clearly remember him speaking of using that land as a fish camp where fish was processed (smoked, canned, dried), drying seaweed, collecting clams, hunting and doing all the things that have to do with subsistence living. My father, Alex Andrews, was born around 1884 and he personally used and occupied the land on Halleck Island from that day forward. He definitively used and personally occupied the land on Halleck Island before 1909[.]

(Letter to BLM, dated March 15, 1997, at 1.) ^{8/} Appellants have also presented evidence, in the form of recent affidavits by Tribal elders, that Andrews' use and occupancy of the land continued after the 1909 withdrawal. (SOR (Boone-Hamar) at 4 (citing Attachments 2 and 4 to SOR); see Land Report, dated Nov. 1, 1995, at 2.) This is supported by Samboy's recollection of her father's activities while she resided with him from 1930 until just before World War II. (Letter to BLM, dated April 3, 1997, at 1 ("Every year, right after the commercial fishing season was over, we would pack up and move to the H[a]lleck Island property to put up food for the winter, smoke, dry and salt fish and meat".))

It is, of course, true that the fact that the record, to date, indicates that Andrews used and occupied the land along with his father and possibly other immediate members of his family undermines his assertion that he engaged in the requisite independent use and occupancy of the land prior to the 1909 withdrawal. Indeed, in order to establish qualifying

^{8/} There are also indications that Andrews' father died and Andrews was married, and thus the head of a family, prior to the 1909 withdrawal. (SOR (Samboy) at 8, 10-11.)

use and occupancy under the Act of May 17, 1906, it is necessary to demonstrate that an applicant engaged in substantial actual possession and use of the land to the potential exclusion of others, including immediate family members (except the applicant's husband/wife and minor children). 43 C.F.R. §§ 2561.0-5(a) and 2561.2(a); Forest Service (Heirs of Nellie Aragon Lindoff), 143 IBLA 175, 177-78 (1998); United States v. Heirs of Jake Yaquam, 139 IBLA 376, 383-84 (1997); United States v. Jim, 134 IBLA 294, 296-97 (1995), appeal filed sub nom., Akootchook v. United States, No. A98-0126 (D. Alaska Apr. 22, 1998); United States v. Akootchook, 123 IBLA at 10-12. However, the current record clearly presents a factual question whether Andrews' use and occupancy of the land, prior to the withdrawal, was to the potential exclusion of his father and other immediate members of his family, and thus independent of them. ^{9/}

Further, the assertions regarding Andrews' independent use and occupancy, made by him and now his heirs, are contradicted by the Forest Service, which reported to BLM on June 8, 1964, that no member of the Andrews family used and occupied the land prior to the 1909 withdrawal and, if Andrews did so, he did so only "with his parents as a member of the family group," and was thus not engaged in use and occupancy to the potential exclusion of immediate members of his family. (Letter, dated June 2, 1964, at 1.) BLM adopted this rationale in the course of its 1966 adjudication of Andrews' application and has never revisited the matter since that time. All this had and still has the effect of giving rise to a disputed question of fact, regarding whether Andrews actually engaged in prior independent use and occupancy of the land. This is especially important in light of prior rulings of the Board that an Alaskan Native could qualify as having engaged in prior independent use at the age of 12, and at the age of 14, respectively. See Jimmie A. George, Sr., 134 IBLA 294, 297 (1995); U.S. v. Bennett, 92 IBLA 174, 178 (1986). If born on August 30, 1886, as one notation in the record reflects, Andrews was 22 years old when the land was withdrawn in 1909. He was also apparently married. See SOR (Samboy) at 8.

The factual question of whether Andrews had himself engaged in qualifying use and occupancy prior to the 1909 withdrawal was plainly not resolved by the Federal courts in Shields. Eva Wilson Davis, supra at 261-63. Rather, it was briefly considered and quickly resolved by BLM in its 1966 adjudication of Andrews' application.

[1] However, what was missing from that adjudication and what the Federal courts and the Board now consider essential to an adjudication of a Native allotment application, where a disputed question of fact exists regarding compliance with the use and occupancy requirements of the Act of May 17, 1906, to the detriment of the Native applicant, is notice of the

^{9/} We agree with Boone-Hamar that BLM's August 1995 examination of the land and resulting November 1995 Land Report indicates that BLM was aware that there was an outstanding factual question regarding whether Andrews had engaged in independent use and occupancy prior to the 1909 withdrawal. (Reply at 3-5.) Indeed, we have no other explanation for why BLM undertook that investigation.

lack of satisfactory proof of compliance and an opportunity for a hearing before that adverse action becomes final. Pence v. Kleppe, 529 F.2d 135, 142-43 (9th Cir. 1976); Donald Peters, 26 IBLA 235, 239-43, 83 I.D. 308, 310-12 (1976). Even where Pence and Peters were decided long after BLM rejected an application and closed the case, we have held that the applicant is still entitled to notice and an opportunity for a hearing before that rejection can be considered final, since the application is considered still subject to adjudication under section 905(a) of the Alaska National Interest Lands Conservation Act (ANILCA), as amended, 43 U.S.C. § 1634(a) (1994). ^{10/} Heirs of George Titus, 124 IBLA 1, 4 (1992), and cases cited therein.

In many cases, BLM has itself reinstated an application in order to afford an applicant notice and an opportunity for a Pence hearing. Forest Service (Heirs of Surge Bay Joe), 141 IBLA 211, 212-13 (1997); Forest Service (Heirs of Frank Kitka), 133 IBLA at 220-21; Forest Service (Heirs of Archie Lawrence), 128 IBLA at 394-95. However, we will likewise not hesitate to reinstate an application in order to afford an applicant, or (if necessary) his heirs, the process to which he is due, before the Department finally rejects his application. Ellen Frank, 124 IBLA 349, 351-52 (1992), overruled to extent inconsistent with Heirs of George Brown, 143 IBLA 221 (1998); Heirs of Saul Sockpealuk, 115 IBLA 317, 322, 326 (1990). That is the situation here.

The present case is distinguishable from those in Silas and Lord. In those two cases, the courts concluded that the Department was not required by section 905(a) of ANILCA to readjudicate a Native allotment application which had already been adjudicated by the Department under the Act of May 17, 1906, and had been rejected, in each case, "as a matter of law." Silas v. Babbitt, *supra* at 357; Lord v. Babbitt, *supra* at 1165. In Silas, *supra* at 357-59, the application was rejected for admitted failure to engage in any use and occupancy before State selection, while in Lord, *supra* at 1164-66 the application was terminated for undisputed failure to submit required proof of use and occupancy within a 6-year regulatory period. As the court in Lord recognized, section 905(a) of ANILCA was intended to require readjudication of an application which had been "erroneously rejected by the Secretary prior to December 18, 1971, without an opportunity for hearing [on a disputed question of fact]." Lord v. Babbitt, 991 F. Supp. at 1164 (quoting from S. Rep. No. 413, 96th Cong., 2d Sess. 238 (1979), reprinted in 1980 U.S.C.C.A.N. 5070, 5182).

^{10/} Section 905(a) of ANILCA, which was enacted in 1980, principally provides for the legislative approval of applications pending before the Department "on or before December 18, 1971," including applications which were erroneously rejected by the Department before that date without opportunity for a hearing on a disputed question of fact. 43 U.S.C. § 1634(a)(1) (1994); see Forest Service (Heirs of Archie Lawrence), 128 IBLA 393, 396 (1994). Andrews' application, however, does not qualify for such approval since the land was, by virtue of the 1909 withdrawal, not "unreserved on December 13, 1968." 43 U.S.C. § 1634(a)(1) (1994); see Forest Service (Heirs of Frank Kitka), 133 IBLA 219, 220, 222 n.3 (1995). Rather, BLM is required, also by section 905(a) of ANILCA, to readjudicate the application, pursuant to the Act of May 17, 1906. Forest Service (Paul Edwards), 144 IBLA 217, 218 (1998).

Thus, where rejection was premised on a disputed question of law, section 905(a) of ANILCA does not require that the adjudication be reopened. Roselyn Isaac, 147 IBLA 178, 183-84 (1999); Heirs of Edward Peter, 122 IBLA 109, 114-16 (1992); Irene K. Jimmy, 119 IBLA 226, 229-30 (1991) (application rejected where undisputed reliance on ancestral use prior to withdrawal). The same is not true in the case of an application rejected on the basis of a disputed question of fact, which is the situation here. State of Alaska (Heirs of Willie Takak), 135 IBLA 1, 4 (1996) (statement in application that land "used by me and my ancestors for 50 years[]" * * * sufficient to preclude finding [it] invalid as a matter of law").

Therefore, we conclude that BLM, in its February 1997 Notice, improperly closed the Native allotment application of Alex Andrews, A-060997, on its records. That Notice will be reversed and the case remanded to BLM. See Heirs of George Titus, 124 IBLA at 6.

BLM indicated in its Answer that it is willing to revisit the question of whether Andrews had a valid existing right to the land which survived the 1909 withdrawal and thus, if the Board concludes that the case was not properly closed, it should remand the case to BLM with instructions to begin adjudicating the application anew: "This process would entail applying all current procedures from review of the application for legal defect to, if necessary, requests for additional evidence, contest or approval." (Answer at 5.) BLM may undertake such action when the case is returned to it. Forest Service (Paul Edwards), 144 IBLA at 218-19; Forest Service (Heirs of Frank Kitka), 133 IBLA at 220.

However, if BLM decides again to reject Andrews' application because he did not have a valid existing right to the land which survived the 1909 withdrawal by virtue of his own qualifying use and occupancy thereof or on any other disputed factual basis, BLM is instructed to initiate a contest proceeding pursuant to 43 C.F.R. § 4.451. Forest Service (Heirs of Frank M. Williams), 141 IBLA at 342. The decision of the administrative law judge will be final for the Department, absent a proper appeal to the Board pursuant to 43 C.F.R. Part 4, Subpart E.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Notice appealed from is reversed and the case is remanded to BLM for further action consistent herewith.

James P. Terry
Administrative Judge

I concur:

John H. Kelly
Administrative Judge