

INTERIOR BOARD OF LAND APPEALS

Robert F. Paul, Sr.

159 IBLA 357 (July 16, 2003)

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ROBERT F. PAUL, SR.

IBLA 99-337

Decided July 16, 2003

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying reinstatement and amendment of a terminated Alaska Native allotment application, F-024768, and rejecting another Alaska Native allotment application, F-092393.

Affirmed in part; set aside and remanded in part.

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

A decision denying reinstatement of an Alaska Native allotment application is properly affirmed when no evidence of use and occupancy was filed with BLM as required by regulation at 43 CFR 2561.1(f), because the application terminated as a matter of law. Although due process has been held to require notice and an opportunity for a hearing before a Native allotment application is rejected on the ground of the sufficiency of the evidence of use and occupancy, no hearing is required when no evidence of 5 years of use and occupancy was tendered in support of the application and, hence, the application is deficient as a matter of law.

2. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Applications and Entries: Filing

An Alaska Native allotment application is deemed pending before the Department of the Interior on Dec. 18, 1971, if it was filed in any bureau, division, or agency of the Department on or before that date. Evidence of pendency before the Department on or before Dec. 18, 1971, shall be satisfied by any bureau, division, or agency

time stamp, or by affidavit of any bureau, division, or agency officer that the application was received on or before Dec. 18, 1971. If a signed declaration found in the record and attributed to a BIA official indicates the application was filed timely but fails to give a basis for that conclusion, further examination as to this material fact is necessary before the application can be accepted or rejected.

APPEARANCES: Andrew Harrington, Esq., Alaska Legal Service Corporation, Fairbanks, Alaska, for Robert F. Paul, Sr.; James R. Mothershead, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Robert F. Paul, Sr., has appealed from a May 26, 1999, decision of the Alaska State Office, Bureau of Land Management (BLM), denying his request to reinstate his Native allotment application (F-024768) and his request to amend that application. The decision also rejected his other Native allotment application (F-092393).

Our review of BLM's decision begins with his first Native allotment application filed pursuant to the Alaska Native Allotment Act of 1906, as amended.^{1/} The application was signed by Paul on November 1, 1959, and filed with BLM on January 25, 1960. This application, serial number F-024768, described a 160-acre tract located on the west side of Mansfield Lake.^{2/} Item 9 on the application form, relating to applicant's use and occupancy, required the applicant to provide the date when his occupancy of the tract commenced. This blank on the application form was marked out and no date was provided by the applicant. Item 10 of the application form called on the applicant to indicate whether evidence of substantially continuous use and occupancy of the land for a period of 5 years is attached. Despite the fact that the applicant responded to this inquiry in the affirmative, no evidence was submitted with the application. Accordingly, by notice dated May 9, 1960, BLM informed Paul that "[a]lthough Item 10 of your application indicated that the required proof was attached, it was not received in this office." That notice further advised Paul that he must submit proof of substantially continuous use and occupancy of the land for a period of 5 years by January 29, 1966, (6 years after the date of filing the application) or the application would terminate without prejudice to his right to file a new application.

^{1/} 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed effective Dec. 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (2000), subject to pending applications.

^{2/} The tract was described by metes and bounds, and was situated along the shoreline of Lake Mansfield in sec. 23, T. 20 N., R. 10 E., Copper River Meridian.

On August 2, 1965, BLM sent a reminder that the submission period would expire on January 29, 1966. No evidence was filed on behalf of the applicant in response to that notice.^{3/} By decision issued February 10, 1966, BLM declared application F-024768 terminated because Paul had failed to submit proof of qualifying use and occupancy within 6 years of the date of filing the application as required by 43 CFR 2219.9-4(a). That decision was not appealed and the administrative record was closed.

Subsequently, by letter dated March 20, 1990, the Tanana Chiefs Conference, Inc. (TCC), a realty contractor with the Bureau of Indian Affairs (BIA), submitted a list of Native allotment applications “that are either reconstructed or have missing parcels from the Tanacross area,” which were purportedly received by BIA but lost in the rush of filings prior to ANCSA. Included among those listed was an application from Paul for 40 acres in secs. 20, 21, 28, and 29, T. 32 N., R. 10 E., Copper River Meridian (Billy Creek area). On January 21, 1994, TCC submitted the following on behalf of Paul: (1) An original application signed and dated October 26, 1966, for “TRACT #1[,] Billy Creek[,] 40 acres,” (2) a signed but undated Evidence of Occupancy, (3) a reconstructed application signed and dated May 16, 1989, and (4) affidavits signed by Paul on May 16, 1989, stating that he first applied for the 160-acre parcel at Lake Mansfield but later applied on October 26, 1966, for the 40-acre tract at Billy Creek when the rules changed. In one of the affidavits, Paul indicates that “[t]he person who took my application was someone who came to Tanacross.”

In a subsequent letter submitted on December 5, 1997, TCC asserted that Paul’s original application was amended to include the 40-acre parcel at Billy Creek and this should have reduced the Lake Mansfield tract to 120-acres. In a responsive letter to TCC dated January 7, 1998, BLM denied reinstatement of F-024768, but accepted the application for 40 acres at Billy Creek as a new application (F-092393).

Upon review, BLM issued the decision appealed from. BLM reasserted its decision to deny reconsideration of the 1966 decision declaring the original application for 160 acres at Lake Mansfield terminated as prescribed by the pertinent regulations. Since no amended land description had been received prior to the termination of the first application (F-024768), BLM declined to recognize the

^{3/} In a form letter received by BLM on Jan. 3, 1966, Paul stated that he desired to amend his application to comprise several tracts, but did not provide any revised land description to amend his pending application. Appellant had been advised by BLM in a Dec. 1965 letter of a change in the regulations at 43 CFR 2212.9-2(a) allowing an applicant to select non-contiguous tracts.

application for the Billy Creek parcel as an amendment to the prior application. Further, BLM rejected the application for 40 acres at Billy Creek because of the lack of independent corroborating evidence establishing that the 40-acre application was actually received by a Departmental office on or before December 18, 1971.

In support of his appeal in the matter of F-024768, Paul contends that the regulation at 43 CFR 2561.1(f), the so-called “stat life”^{4/} regulation providing for termination of the application without prejudice to the applicant’s right to file later based on the same use and occupancy period, should not be applied to bar reinstatement of his application. Appellant contends that applying the regulation to bar filing proof of use and occupancy more than 6 years after the date the application was filed is inconsistent with the intent of Congress in passing the Allotment Act. Further, appellant contends it is inconsistent with the proviso in the regulation that the termination of the allotment application will not affect the applicant’s rights gained by virtue of his occupancy or his right to file another application.^{5/}

Paul sets forth a lengthy history of Native allotment application “stat life” and reinstatement cases decided by the Board and several decided by the Federal courts. Many of these precedents were addressed in our decision in Jacqueline Dilts. Appellant seeks to distinguish both the Jacqueline Dilts case and Heirs of Edward Peter, 122 IBLA 109 (1992), arguing that the applications in those cases affirmatively stated that the applicant had not completed 5 years of use and occupancy. Paul contends that since his application recited that evidence of 5 years of use and occupancy is being submitted with the application, his case is controlled by the

^{4/} The term “stat life,” as used by appellant and others, comes from the expression “statutory life,” and refers to the requirement of filing proof of 5 years use and occupancy within 6 years of the filing of the application. See, e.g., Jacqueline Dilts, 145 IBLA 109, 110 n.1 (1998). This regulation was originally enacted as 43 CFR 67.5(f) on Dec. 6, 1958 (23 FR 9484). At the time Paul’s application was deemed terminated, the requirement was codified at 43 CFR 2212.9-3(f) and 2212.9-4 (1966). It is now found at 43 CFR 2561.1(f) and 2561.2. Appellant points out that there was no language in the statute itself imposing a deadline of 6 years from the date the application is filed in which to file evidence of use and occupancy with BLM. (Statement of Reasons (SOR) at 8-13.)

^{5/} Thus the 1966 decision terminating Paul’s application noted that: “This decision does not affect the rights of the applicant to make another application.” That notation was based upon the following language found in 43 CFR 2212.9-3(f) (1966): “If the applicant does not submit the required proof within six years of the filing of his application in the land office, his application for allotment will terminate without affecting the rights he gained by virtue of his occupancy of the land or his right to make another application.”

Heirs of Saul Sockpealuk, 115 IBLA 317 (1990), in which the application itself indicated use and occupancy had commenced more than 5 years prior to filing the application and, hence, the Board held the application gave rise to an issue of fact regarding sufficiency of the use and occupancy requiring a hearing.

Appellant notes that since March of 1965, prior to the termination of his application, the BIA was authorized to file evidence of use and occupancy on behalf of Native allotment applicants. In support, appellant cites the regulation at 43 CFR 2212.9-4 (1966) providing that evidence of 5 years use and occupancy filed either by the applicant or the authorized officer of BIA is a prerequisite for an allotment. Accordingly, Paul argues that he was not required to provide to BLM the information which he had already supplied to the BIA. Hence, appellant asserts that there exists a factual issue of what information he provided orally or in writing to BIA.

Appellant also argues that “BLM reinstated [his] application for the Mansfield parcel in a [February 25, 1986,] decision by Adjudicator Janice Pratz” as “part of a comprehensive review.” (SOR at 5.) Consequently, appellant asserts BLM was “under an obligation to give him notice and an opportunity to be heard prior to terminating it.” (SOR at 38.)

As for BLM’s determination that he could not amend a terminated application, Paul argues that the Board has approved the practice of allowing amendments to such applications. As for the determination that the application for F-092393 was not received before the 1971 deadline, Paul contends that this is an issue of material fact upon which BLM should have granted a hearing.

In its answer, BLM contends that the stat life regulation, currently codified at 43 CFR 2561.1(f), was duly promulgated pursuant to the discretionary authority conferred upon the Secretary by the Native Allotment Act to promulgate rules for Native allotments. As such, BLM asserts it has the force and effect of law and is binding on Departmental officials. Further, BLM contends that the reasonableness of requiring submission of evidence of use and occupancy within 6 years of filing the allotment application is apparent when it is recognized that the mere filing of an application had the effect of segregating the lands described therein from other types of application and entry. 43 CFR 2561.1(e). It is pointed out by BLM that application of this regulation to find Native allotment applications terminated in the absence of submission of evidence of use and occupancy within the 6-year period was upheld in Heirs of Edward Peter, *supra*, and Jacqueline Dilts, *supra*. Further, BLM contends that no hearing is required prior to termination under these precedents as no issue of the sufficiency of the evidence of use and occupancy is presented because no evidence was filed.

Termination of a Native allotment application under the stat life regulation constitutes a final decision adversely affecting the applicant's ability to obtain an allotment pursuant to the terminated application, BLM asserts. Thus, BLM argues the provision in the regulation recognizing the right of the applicant to file another application for the same land based on his use and occupancy is properly distinguished from, and is not contrary to, the termination of an application not supported by filing of evidence of use and occupancy within 6 years of the time the application was filed.^{6/} However, BLM also asserts that, to survive as a vested right, the new application had to be filed prior to repeal of the Alaska Native Allotment Act on December 18, 1971, pursuant to section 18 of ANCSA, 43 U.S.C. § 1617 (2000). Similarly, BLM argues section 905 of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634 (2000), calling for legislative approval or adjudication of Native allotment applications pending in the Department on or before December 18, 1971, did not resuscitate applications terminated pursuant to the stat life regulation if there was no factual dispute as to the sufficiency of the evidence of occupancy.^{7/}

Several reviews of the file were conducted by BLM personnel subsequent to termination of the application for the purpose of determining whether changes in the law or new legal precedents required further consideration of appellant's application. BLM states that it found no basis for reinstatement of the application or further adjudication. It is also asserted by BLM that this case is distinguishable from Heirs of Saul Sockpealuk, *supra*, in that although appellant's application indicated on its face that evidence of use and occupancy was attached, no evidence was filed with the application and Paul was promptly notified of this deficiency. No evidence of use and occupancy was ever filed, BLM points out. Additionally, BLM contends the record raises no issue of fact regarding evidence of use and occupancy for application F-024768 provided to BIA which was not filed with BLM. Unlike the "lost" application for the Billy Creek parcel, BLM notes that no evidence of use and occupancy submitted to BIA, but not filed with BLM, has been provided. With respect to appellant's claim that the original application was amended by the subsequent

^{6/} In this regard, BLM notes the argument that an allotment applicant's preference right pursuant to an application was not adversely affected by a termination pursuant to the stat life regulation because of the proviso that termination was without prejudice to an allotment applicant's right to file another application was rejected by the court in Lord v. Babbitt, 991 F. Supp. 1150, 1159 n.6 (D. Alaska 1997), *aff'd*, 188 F.2d 513 (9th Cir. 1999) (mem.), *cert. denied*, __ U.S. __, 120 S.Ct. 2217, 147 L.Ed.2d 250 (2000). The court held this would be contrary to the plain meaning of the regulation. *Id.*

^{7/} In support, BLM cites Lord v. Babbitt, 991 F. Supp. at 1164-65.

application for the Billy Creek parcel, BLM contends that there can be no amendment of an application that had terminated before the subsequent application was filed.

Finally, BLM asserts that the second application (F-092393) was properly rejected because of the lack of evidence that it was filed with the Department prior to the statutory deadline of December 18, 1971, when the Native Allotment Act was repealed. Noting that neither Paul nor TCC state that the application was filed with the Department before that time, BLM challenges the unsworn statement to that effect made by the Superintendent of the BIA Fairbanks Agency pointing out that BIA has provided nothing to corroborate that conclusion.

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. Subsequent to termination of appellant's application, the decision in Pence v. Kleppe, 529 F.2d 135, 143 (9th Cir. 1976), held that, prior to rejection of an application on the ground that the evidence of record filed with BLM is insufficient to establish that the applicant achieved 5 years of qualifying use and occupancy, a Native allotment applicant has a due process right to notice and an opportunity for a hearing to present evidence.

Section 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (2000), enacted in 1980, 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 section 905, in which event such applications shall be adjudicated. As we noted in Heirs of George Brown, 143 IBLA 221 (1998), "this provision removed the jurisdictional bar which the Board held in Mary Olympic, 47 IBLA 58 (1980), and Mary Olympic (On Reconsideration), [65 IBLA 26, 34-35 (1982) ^{8/}] prohibited reinstatement of any allotment application which had been finally rejected prior to December 18, 1971." Heirs of George Brown, 143 IBLA at 228 (footnote omitted). In addressing reinstatement of terminated Native allotment applications pursuant to ANILCA, the Board has observed that the legislative history of section 905 of ANILCA indicates that the phrase "or before" was added to clarify that "applications which were erroneously rejected by the Secretary prior to December 18,

^{8/} Reversed Olympic v. United States, 615 F. Supp. 990 (D. Alaska 1985). The Brown decision pointed out the confession of error by the Department of Justice in Olympic was prompted by passage of sec. 905 of ANILCA. 143 IBLA at 228 n.7.

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. Code Cong. & Admin. News 5182.

[1] In examining the propriety of reinstating previously terminated Native allotment applications, the Board noted in the Brown case:

[T]he fact that any specific 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, [586 F.2d 733 (9th Cir. 1978)], where rejection was premised on a matter of law, no hearing was required. 586 F.2d at 743.

Heirs of George Brown, 143 IBLA at 228-29. This distinction in which due process has not been held to require a hearing when rejection of the application is based on a matter of law has since been reaffirmed by the court. Silas v. Babbitt, 96 F.3d 355 (9th Cir. 1996). Applying this standard, we held in Brown that the Native allotment application should not have been reinstated. 143 IBLA at 229-30.^{2/}

In the Jacqueline Dilts case we examined the propriety of reinstating a Native allotment application terminated pursuant to the stat life regulation at 43 CFR 2561(f) for failure to provide evidence of use and occupancy within 6 years of filing the application. Our analysis in Dilts reviewed our decision in Heirs of Edward Peter:

In that case, the Native allotment application at issue was filed in February 1962 alleging commencement of use and occupancy in June 1961. When the applicant failed to provide evidence of 5 years of use and occupancy within 6 years of filing the allotment application despite notice from BLM of the necessity of submitting evidence, BLM notified the applicant that the allotment application had terminated pursuant to the regulation currently codified at 43 C.F.R. § 2561.1(f). After noting that the language of the regulation provided in its own terms that an application will terminate if the allotment applicant does not provide evidence within 6 years, the Board held that no hearing was required under Pence when no evidence of 5 years of use and occupancy was

^{2/} Appellant argues that BLM, in fact, reinstated his application even if it was not required to do so, and hence was obligated to provide a hearing. Our review of the record does not disclose that BLM reinstated the allotment application, but we need not resolve this question in view of our holding in Brown that erroneous reinstatement of an application is properly reversed.

submitted within 6 years of filing the application. Rejecting the assertion that a hearing was required to review the evidence as to whether the applicant established qualifying use and occupancy, the Peter decision held the “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.” 122 IBLA at 115. We found the Socketluk case to be distinguishable in that the allotment applications reviewed in that case asserted that 5 years of use and occupancy had been completed by the time the applications were filed and, hence, BLM rejection of the allotment applications constituted a finding that the evidence of use and occupancy tendered was insufficient. Id.

Jacqueline Dilts, 145 IBLA 114-15.

In following the precedent of Peter, we acknowledged the decisions in Michael Gloko, 116 IBLA 145 (1990), and Andrew Balluta, 122 IBLA 30 (1992), in which the Board had failed to consider the BLM argument that section 905 of ANILCA required approval or adjudication of those allotments “erroneously” rejected without a hearing and that the failure to file any evidence of 5 years of use and occupancy within 6 years of filing the application gave rise to no issue of fact which would justify a hearing. Jacqueline Dilts, 145 IBLA at 115. In Dilts we found that under the relevant regulation, the failure to file evidence of 5 years of use and occupancy within 6 years of filing the application itself caused the application to terminate, noting the language of the regulation provides that in the absence of submission of proof within 6 years the application “will terminate.” 43 CFR 2561.1(f). Because the applicant in Dilts failed to provide any evidence of 5 years of use and occupancy, we held the precedent in Peter is controlling and we found that the application was properly rejected without a hearing for failure to provide any evidence of the statutorily required use and occupancy. Jacqueline Dilts, 145 IBLA at 116. We expressly overruled our prior decisions in Gloko and Balluta to the extent they are construed to require a different result. Id.

Appellant challenges our stat life decisions on the ground that application of the stat life regulation to terminate a Native allotment application is inconsistent with the proviso in that regulation to the effect that such termination is without prejudice to the applicant's rights gained by virtue of his occupancy of the land or his right to make another application. Application of the regulation did not abridge appellant's rights to file a further application for the Mansfield Lake tract prior to repeal of the Alaska Native Allotment Act by Congress. Indeed, Paul did file an additional application (F-092393) seeking another tract of land, the Billy Creek parcel. To hold that the regulation did not provide for termination of a Native allotment application

when no evidence of use and occupancy was filed within 6 years of filing the application would be inconsistent with the purpose of the regulation^{10/} and contrary to the plain meaning of the regulatory language. Lord v. Babbitt, 991 F. Supp. at 1159 n.6.

The Peter and Dilts decisions have been reaffirmed by the Board in response to subsequent challenges. See Beatrice Halkett, 150 IBLA 98 (1999).^{11/} The precedent in Jacqueline Dilts is controlling in the present case. Appellant seeks to distinguish this case on the ground that his application recites that evidence of use and occupancy is being submitted with the application. He notes that the applications in Peter and Dilts indicated on their face that use and occupancy had commenced less than 5 years prior to the time the application was filed, thus precluding a finding that evidence of 5 years of use and occupancy had been provided. The difficulty with appellant's position is that no evidence of use and occupancy was filed in his case, and appellant was promptly advised of this fact. Paul's application failed to even provide a date of commencement of use and occupancy. The blank on the application for inserting the date of initiation of use and occupancy was marked out with a series of dashes. Thus, there was no showing of use and occupancy which could potentially be qualifying. Accordingly, Paul's application was properly deemed terminated as a matter of law pursuant to the relevant regulations. 43 CFR 2561.1(f). This distinguishes Paul's case from Heirs of Saul Sockpealuk. As we noted in our Peter decision, when the allotment applications involved in Sockpealuk were filed, the applicants asserted there had been compliance with the use and occupancy requirements of the Act of May 17, 1906, because they had initiated such use and occupancy by a date which was more than 5 years prior to filing their applications. 145 IBLA at 115. This is distinguishable from Paul's application for which no evidence of use and occupancy was filed.

We must reject appellant's contention that the conclusory assertion on the face of the application that evidence of use and occupancy is attached, when in fact none was filed, is sufficient to generate an issue of fact regarding the sufficiency of the evidence and require an evidentiary hearing as a matter of due process. This is especially true in a case such as this in which appellant was notified of the absence of evidence shortly after the application was filed and again 5 years later, before the application terminated. No evidence of use and occupancy has ever been filed with respect to the Mansfield Lake tract (F-024768). Rather, appellant requests a hearing

^{10/} The reasonableness of requiring submission of evidence of use and occupancy within 6 years of filing the allotment application is apparent when it is recognized that the mere filing of an application had the effect under the regulations of segregating the lands described therein from other types of application and entry.

^{11/} Overruling Winifred Otten, 136 IBLA 166 (1996), to the extent inconsistent.

to find out what information he gave to BIA which was not filed with BLM. This does not establish a denial of due process. *Cf. Silas v. Babbitt*, 96 F.3d at 358 (Even proffering further evidence 14 years after rejection of an application will not give rise to a due process right to a hearing when the applicant fails to explain why the information was not available sooner.)

Appellant also contends on appeal that the October 1966 application for the Billy Creek parcel (F-092393) should be considered as an amendment to the application for the Mansfield Lake parcel (F-024768), effectively reviving that application. In support, Paul asserts that the Board in *Heirs of George Titus*, 124 IBLA 1 (1992), “implicitly approv[ed] the practice of allowing amendments to be filed to already-terminated applications.” Appellant’s argument does not withstand analysis. In *Titus*, the Native applicant filed a form letter stating that he wanted to amend his present application to include several tracts after BLM had closed the application almost 3 years earlier. An amendment was never filed. However, BIA, acting on behalf of Titus, later filed another application for those parcels based on use and occupancy initiated before conflicting State selection applications. Although proof was filed, the length of the claimed use and occupancy became an issue. 124 IBLA at 2. Hence, BLM rejected the application in 1968 because Titus had not shown substantial use and occupancy for 5 years. Although BLM reinstated the application in 1979 without explanation, it rejected it again in 1990 based on the 1968 determination. The Board reversed on appeal from the 1990 decision, holding that the 1968 rejection did not afford the applicant the opportunity for a hearing regarding whether the nature of the use and occupancy described was sufficient. 124 IBLA at 5-6. A new application was filed in *Titus* which BLM reviewed independently of the original application^{12/} and, thus, *Titus* is distinguishable.

Regarding appellant’s Native allotment application signed by him on October 26, 1966 (the Billy Creek parcel), BLM concluded in its decision that an examination of its records and the evidence compiled by Paul and BIA does not establish that the application was timely filed with the Department. Thus, BLM noted in its decision that the Billy Creek application was “not time stamped by the Department” and that contemporary “quad maps” depicting known applications for neighboring lands did not reveal any information regarding the subject application. (Dec. at 6-7.)

[2] The language of the savings proviso of section 18(a) of ANCSA expressly limited the exception to repeal of the Native Allotment Act to applications “pending before the Department of the Interior on December 18, 1971.” 43 U.S.C. § 1617(a)

^{12/} Indeed, we see in *Titus* an example of how rejection of an application for lack of evidence of use and occupancy was not prejudicial to the right of the applicant to file a new application prior to repeal of the Alaska Native Allotment Act.

(2000). In numerous cases, this Board has upheld the application of the guidelines outlined in a memorandum to the Director, BLM, dated October 18, 1973, from Jack O. Horton, Assistant Secretary for Land and Water Resources, in construing the savings proviso to determine whether a Native allotment application was pending before the Department on December 18, 1971. See, e.g., Ouzinkie Native Corp. v. Opheim, 83 IBLA 225, 228-29 (1984); Katmailand, Inc., 77 IBLA 347, 354 (1983). The Horton memorandum stated:

This phrase [pending before the Department on December 18, 1971] is interpreted as meaning that an application for a Native allotment must have been on file in any bureau, division, or agency of the Department of the Interior on or before December 18, 1971. The Department has no authority to consider any application not filed with any bureau, division, or agency of the Department of the Interior on or before said date. Evidence of pendency before the Department of the Interior on or before December 18, 1971, shall be satisfied by any bureau, agency or division time stamp, the affidavit of any bureau, division or agency officer that he received said application on or before December 18, 1971, and may also include an affidavit executed by the area director of BIA stating that all applications transferred to BLM from BIA were filed with BIA on or before December 18, 1971.

There is no “time stamp” that has been placed on Paul’s Billy Creek application by any bureau, agency, or division of the Department. However, BLM does not analyze in its decision a memorandum dated December 1, 1993, from Susan Paskvan, an allotment specialist with TCC, to the Chief, Branch of Doyon Adjudication, BLM, through the Superintendent, Fairbanks Agency, BIA. This document, received by BLM on January 14, 1994, and found in the case record for F-092393, was the cover memorandum for the forms and affidavits submitted for Paul’s Billy Creek application. Therein Paskvan explains:

When I was informed that Mr. Paul had a lost application I reviewed his original file and found the enclosed application and evidence of use and occupancy. They are dated 10/26/66. The original file was handled by the BIA until 1977 when they were transferred to TCC. These documents are originals that were never forwarded to BLM.

The author of the memorandum follows this explanation with a request that the application be deemed timely filed. There also appears on the face of the memorandum a signed declaration of the Superintendent, BIA Fairbanks Agency, stating his concurrence with the fact that the application was filed prior to December 18, 1971. The BLM decision did not consider whether this affirmation

qualifies as an “affidavit of any bureau, division or agency officer that he received said application on or before December 18, 1971.”

We find that BLM should have considered whether the Horton guidelines were satisfied by this declaration or, if it was indeed insufficient on its face in that regard, whether further inquiry to BIA was necessary to establish the true facts of the matter. As neither inquiry occurred as far as the record shows, we find BLM’s conclusion that no evidence of timeliness exists is without support. Accordingly, we must set aside this determination as to F-092393 and remand the matter to BLM for further consideration of the declaration by a BIA official that the application was timely.

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 affirmed in part regarding denial of reinstatement and amendment of Native allotment application F-024768 and set aside in part and remanded with respect to the rejection of Native allotment application F-092393 as untimely.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Robert W. Mullen
Administrative Judge