

INTERIOR BOARD OF LAND APPEALS

Alice D. Brean

159 IBLA 310 (July 14, 2003)

Title page added by:
ibiadecisions.com

ALICE D. BREAN

IBLA 2001-30

Decided July 14, 2003

Appeal from a decision of the Bureau of Land Management, Alaska State Office, rejecting appellant's Native allotment application as not timely filed. F-031218, Parcel D.

Set aside and referred for hearing.

1. Alaska: Native Allotments--Rules of Practice: Appeals: Generally

Affidavits attesting to a timely filing of a Native allotment application on Dec. 18, 1971, standing alone, may not be sufficient to establish that such filing occurred. However, affidavits may be sufficient to raise a material factual question as to whether the application was timely filed.

2. Alaska Native Claims Settlement Act: Administrative Procedure: Applications--Alaska: Native Allotments--Applications and Entries: Filing--Alaska: Native Allotments--Rules of Practice: Appeals: Generally

Where on appeal from a BLM decision rejecting a Native allotment application because the application was not pending before the Department on Dec. 18, 1971, the Board determines that there is a question of fact whether the application was pending on that date, the Board will set aside the BLM decision and refer the case for a hearing before an Administrative Law Judge.

APPEARANCES: Carol Yeatman, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for Alice D. Brean; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Alice D. Brean appeals from a September 19, 2000, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting Brean's reconstructed Native allotment application, F-031218, Parcel D, as a matter of law because it was untimely filed. Brean's reconstructed application for Parcel D was submitted to BLM on January 21, 1994, by the Tanana Chiefs Conference, Inc. (TCCI), a service provider for the Bureau of Indian Affairs (BIA), under the terms of the Native Allotment Act of May 17, 1906, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed with a savings provision by sec. 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (2000). The savings provision provides that "[n]otwithstanding the foregoing provisions [repealing the Native Allotment Act of 1906] any application for an allotment that is pending before the Department of the Interior on December 18, 1971, may, at the option of the applicant, be approved and a patent issued." According to Brean the application was submitted to BIA in 1970. BLM concluded, to the contrary, that it was not.

Background

It is not disputed that Brean timely submitted applications for three Native allotments to BIA which, in turn, submitted them to BLM. BLM received Brean's first application, serialized as F-031218A (Parcel A), in sec. 7, T. 13 N., R. 9 E., Copper River Meridian, Alaska, on April 26, 1963. She alleged use and occupancy of the land from no later than 1947 for fishing, trapping, and hunting. (Apr. 26, 1963, Parcel A allotment application; Mar. 23, 1969, Evidence of Occupancy (referencing period of use from 1942).) The allotment certificate for this parcel was issued on June 13, 1990. (Certificate of Allotment, F-031218, Parcel A.)

The record reflects that Brean submitted to BIA two more allotment applications signed and dated January 2, 1970. BLM received the second application, serialized as F-031218B (Parcel B), in sec. 24, T. 26 N., R. 14 E., Copper River Meridian, on February 20, 1970. Brean alleged use and occupancy from 1928 for fishing, hunting, trapping, and berry-picking. As of the date of the record submitted in this appeal, Brean has not received a certificate for Parcel B, as it requires further adjudication. (Aug. 26, 1998, "Decisions of July 24 and August 3, 1998 Vacated.")

BLM received the third application, serialized as F-031218C (Parcel C), sec. 26, T. 20 N., R. 10 E., Copper River Meridian, on April 14, 1970. Brean alleged use and occupancy of Parcel C from 1928 for, inter alia, fishing, hunting, and berry-picking. The allotment certificate for this parcel was issued on September 23, 1997. (Certificate of Allotment, F-031218, Parcel C.)

Brean alleges she submitted a fourth application for an allotment (Parcel D), located within secs. 27 and 34, T. 19 N., R. 13 E., Copper River Meridian, to BIA employee Edward Isaac on December 2, 1970. She alleges that the application for Parcel D was subsequently lost. In an affidavit submitted with TCCI's 1990 notification to BLM that it would be filing a reconstructed application for her, Brean explains that after she had applied for Parcel A in 1963 totaling 40 acres, several BIA employees including Isaac "came around and told everyone to apply" for up to a total of 160 acres. Brean asserts that she filled out applications for three more parcels, B, C, and D, and submitted them to Isaac. (Feb. 25, 1990, Brean affidavit at 1.) With respect to Parcel D, Brean alleges that she used the land for trapping, hunting, and berry-picking, and that the land is associated with broader acreage used by her entire family. Id.

In 1990, TCCI submitted to BLM a list of Native allotment applications from the Tanacross area that were either reconstructed or had missing parcels. The list, entitled "List of Lost Native Allotment Applications From Tanacross" contains 19 names and 38 allotments. Alice Brean's Parcel D heads the alphabetical list. The letter to which the list was attached states that the applications "were apparently lost during the rush prior to the Alaska Native Claims Settlement Act." (Mar. 20, 1990, TCCI letter to Don Runberg, BLM.) The letter explains that the applications from the Tanacross area were received by BIA, and when TCCI entered into a realty contract with BIA in 1978 all the maps and applications were transferred to TCCI. The maps allegedly displayed locations of allotments for which Tanacross residents had applied. Id. TCCI notes that "we are trying to contact [Edward Isaac] to get an affidavit about which applications he accepted as an employee." Id.

Apparently as a result of TCCI's effort, Isaac prepared an affidavit describing his activities for BIA during the 1970 time period and identifying applications he asserts that he accepted in 1970. Isaac states that he was hired by BIA during September of 1970 in order to "be a draftsman for maps and taking applica[tion]s from people." (Nov. 22, 1993, Isaac affidavit at 1.) Isaac states that the job required him to travel from village to village in order to assist applicants with the filing process. One of the villages Isaac visited was Tanacross, Brean's village. Id. He explains:

I fill out the applications for the people of Tanacross and the other villages. They sign their own name. We had a big meeting at the school (1st trip) and the Community Hall (2nd trip). This was at the old village. The applicants told me where their land was and how many acres there. Most of them selected four 40 acres lots. * * * They pointed on the map and I wrote their name.

Id. Isaac states that he brought the applications he took to the BIA office “and we were supposed to give description and draft maps.” (Isaac affidavit at 1.) Isaac then states that in December of 1970 he was called to another job and that he informed BIA supervisors Bill Mattice, Kathy Adams, and Ralph Solomon that he did not finish the descriptions. Isaac states that Solomon and Adams were to do so. Id.

Attached to Isaac’s affidavit is a chart he created of 24 Native applicants whose 34 applications he took, containing a handwritten description of where the allotments were located. (Isaac affidavit at 3.) The first name that appears on this chart is Alice Brean’s, and the parcel for which Isaac took her application is identified as Parcel D. The chart states that the map for Brean’s application, along with the maps for nine other applications, is “not original.”^{1/} (Isaac chart.) According to the chart, Isaac was aware that Brean had prepared an affidavit, as well as a reconstructed application dated November 2, 1989. Id. With respect to Brean’s application for Parcel D, “Ed Isaac identifies handwriting as his.” Id. The chart states that the map pertaining to Brean’s application for Parcel D is “B-5.” Id. All but one of the 19 names on the 1990 TCCI list mirror the names and parcels on Isaac’s list.

In 1994, TCCI sent another letter through BIA to BLM requesting that Brean’s reconstructed application be deemed timely filed. (Nov. 24, 1993, letter to Chief, Branch of Doyon Adjudication, BLM.) The letter enclosed Brean and Isaac’s affidavits, Brean’s reconstructed application dated November 2, 1989, and a map for Parcel D. The letter was signed by the BIA Superintendent on January 14, 1994, who stated his concurrence that the application was filed prior to December 18, 1971. Id. BLM received the materials on January 21, 1994.

On May 18, 1995, TCCI received a notice from Patricia Holm, Land Law Examiner for the Branch of Northern Adjudication, indicating that BLM had reviewed the case files and had determined that reinstatement or timely filing of ten of the nineteen applications submitted on TCCI’s 1990 list would be denied due to lack of supporting evidence. Brean’s Parcel D was included on the list for rejection. There is significant but incomplete correlation between rejected applications and those for which the map was identified as “not original.”

On September 19, 2000, BLM issued its decision rejecting Brean’s application as untimely filed. In support of its decision, BLM stated that its records did not support Brean’s statement that she filed with Isaac the applications for Parcels B, C,

^{1/} According to the affidavit, Isaac attached “copies of U.S.G.S. Quad maps which have allotments drawn on them. I have reviewed each of the maps and have indicated which allotments were drawn by me. We had these maps when we visited the applicants.” Id. at 2. These maps are not attached to any copy of the affidavit in the record.

and D simultaneously on December 2, 1970. (Sept. 19, 2000, Decision at 2.) BLM stated:

After depicting allotments on the master quad maps, Edward Isaac assisted the applicants in completing other information required on the Native allotment application forms. The applicants then signed the applications. The applications were taken back to the BIA Fairbanks Office. Based on the information TCCI provided, it is BLM's understanding that the land descriptions were then transcribed by BIA employees onto the applications from the information depicted on the master quad maps. It is BIA's standard practice to attach a copy of the master quad map to the Native allotment application prior to submission to BLM. The master quad maps depicted timely filed Native allotment applications of record within an area by township and range.

(Decision at 2.)

BLM explained that Isaac "checked the column next to Alice Brean's name signifying that he recognized his handwriting on the master quad maps in association with Parcel D." (Decision at 3.) BLM states that it reviewed the master quad maps numbered 0004-0008 in case file F-92675 and that Parcel D was not depicted there. BLM concluded that the "absence of Parcel D [or Brean's name] on the master quad maps does not corroborate" Isaac's or Brean's statements in their affidavits. *Id.* BLM determined that "if an application is timely filed with the Department, there must be independent corroborating evidence that the Native allotment application was actually received by a Departmental office on or before December 18, 1971. Affidavits attesting to a timely filing alone are not sufficient to show timely filing." *Id.*, citing Heirs of Linda Anelon, 101 IBLA 333 (1988).

Brean timely appealed. In her Statement of Reasons (SOR), Brean argues that BLM's basis for rejecting her application, that Isaac's affidavit and hers are insufficient evidence of timeliness, is inconsistent with "BLM's own manual and IBLA decisions." (SOR at 3.) Brean argues that BLM erred because the record contains sufficient evidence to show that BIA received her application for Parcel D on or before December 18, 1971. *Id.* at 3-4.

BLM, in response, argues that affidavits of timely filing, alone, will be insufficient to prove that an application is timely. Rather, BLM asserts that there must be independent, corroborating evidence that the Native allotment application was actually received by a Departmental office on or before December 18, 1971. (Answer of BLM at 5.) BLM maintains that, according to Isaac's affidavit, the applicants identified the location of their allotments on quadrangle maps, and the applicants' names were written next to the selected location. (Answer at 6.) BLM

also contends that it was BIA's standard practice to attach a copy of the quadrangle map to the Native allotment application prior to submission to BLM. *Id.* From this BLM reasons that Isaac would necessarily have drawn a quadrangle map showing a parcel chosen by Brean, that this map would have been provided by BIA to TCCI, and that this map is the same map in a file of such maps numbered F-92675. *Id.* BLM attaches an affidavit of a BLM Land Law Examiner who states that he examined maps at TCCI offices on March 24, 1994. (BLM Ex. 2, Nov. 5, 1998, Affidavit of G. Steve Flippen.) Flippen identifies 25 maps in TCCI offices which are maps "[TCCI] claims were used by the [BIA], in the field and the office, for the Native allotment applications near Tanacross." He identifies the maps 0004-0008 mentioned by BLM in its decision. BLM concludes that the presence of those quadrangle maps would indicate that a Native allotment application was timely filed, and conversely, that its absence refutes any claim that an application was timely filed.

Analysis

[1] As argued by BLM, this appeal presents a legal question of whether affidavits may be sufficient to establish evidence of timely filing of a Native allotment application. BLM argues that affidavits, standing alone, are so invaluable as to compel rejection of the application. The issue is not that simple. While BLM is correct in citing Heirs of Linda Anelon, 101 IBLA 333 (1988), for its proposition that affidavits attesting to a timely filing, standing alone, are not sufficient to establish such filing, it fails to note that the Board held that affidavits are sufficient to raise a factual question as to whether appellants' application was timely filed. There, the Board stated:

We conclude that * * * affidavits are sufficient by themselves to raise a question of fact whether Linda Anelon's original Native allotment application was pending before the Department on December 18, 1971. This is because, accepting the truth of the affidavits, as we must do in determining whether there is a question of fact (Donald Peters, 26 IBLA 235, 241 n.1, 83 I.D. 308, 311 n.1 (1976)), the affidavits state affirmatively that the application had been filed with BIA prior to December 18, 1971. On the other hand, BLM's position is supported by the presumption, which stems from the absence of Linda Anelon's original application from the record, that the application was not filed timely. *E.g.*, David A. Gitlitz, 95 IBLA 221, 224 (1987). In such a situation, there clearly is a factual question whether Linda Anelon's Native allotment application was pending before the Department on December 18, 1971.

Accordingly, we will set aside the December 1985 BLM decision and refer the case to the Hearings Division * * *.

Id. at 337-38 (footnote omitted). See also William Carlo, Jr., 133 IBLA 206, 211 (1995) (testimony at hearing may be sufficient to overcome presumption); June I. Degnan, 108 IBLA 282, 287 (1989), aff'd sub nom. June I. Degnan (On Reconsideration), 114 IBLA 375 (1990). Our decision in Eleanor H. Wood, 46 IBLA 373 (1980), likewise, stated the general proposition that an affidavit executed by an authorized officer of the BIA is generally sufficient evidence of pendency of an application before the Department. Id. at 378.

This precedent in turn stems from Board cases which presume, in Native allotment cases, regularity in receipt and processing of documents submitted to the Department, so that it is assumed documents are not lost. It is a presumption rebuttable by the applicant, depending on whether the issue is one of fact or law, and, if it is a factual question, whether the factual question can be answered on the record. Alice Thompson, 149 IBLA 98, 103 (1999). The Board described this analysis in Boy Dexter Ogle, 140 IBLA 362, 371-72 (1997):

An evidentiary hearing is properly ordered when a case on appeal discloses an issue of fact which is material to the case that can be resolved only by introduction of evidence not found in the record before the Board. Commission for the Preservation of Wild Horses, 133 IBLA 97, 100 (1995); Mobil Oil Corp., 115 IBLA 304, 311 (1990); see Woods Petroleum Co., 86 IBLA 46, 55 (1985). This principle has frequently been applied to Native allotment applications when the record discloses an issue of fact with respect to when the application was actually filed with an agency of the Department. See, e.g., Heirs of Linda Anelon, [101 IBLA] at 337-38; Eleanor H. Wood, 46 IBLA 373, 377-79 (1980). It has long been held, however, that a hearing is not required where there is no material issue of fact, and resolution of the case hinges on a conclusion of law to be drawn from an accepted set of facts. See, e.g., James N. Tibbals, 58 IBLA 42, 45 (1981); John J. Schnable, 50 IBLA 201, 204 (1980). This same principle applies to Native allotment cases. Thus, when it is determined that an application must be rejected as a matter of law, assuming the truth of relevant matters set forth in support of the application, the application may be rejected without a hearing. Donald Peters, 26 IBLA 235, 241 n.1, 83 Interior Dec. 308, 311 n.1, reaffirmed, Donald Peters (On Reconsideration), 28 IBLA 153, 83 Interior Dec. 564 (1976); see Pence v. Andrus, 586 F.2d 733, 743 (9th Cir. 1978) (finding that procedures set forth in the Peters decisions comply at least facially with the due process requirements set forth in Pence v. Kleppe, [529 F.2d 135 (9th Cir. 1976)]). We find that accepting the truth of the extensive evidentiary record compiled by Appellant with the assistance of counsel and BIA, the decision in this case hinges on an issue of law: whether

[Alaska Legal Services Corporation] may be considered to be an agent of the Department for purposes of receipt of Native allotment applications.

While that case hinged on a question of law, the Board noted that “with respect to Native allotment applications, due process has been held to require a fact-finding hearing when issues of material fact are in dispute.” Id. at 370 n.11, citing Pence v. Kleppe, 529 F.2d 135, 143 (9th Cir. 1976).

BLM’s decision is dependent on facts. The question, as presented by BLM, should be whether the affidavits before us present sufficient issues of fact to call into question or overcome the presumption of regularity that ordinarily would attend the Department’s handling of Brean’s application or map. Accordingly, we turn to the facts.

[2] With respect to the facts of this particular case, precise application of the precedential analysis set forth above is complicated by the fact that the entire underpinning of the dispute is that BIA lost a significant number of applications. BLM appears to concede that many applications from Tanacross did not properly wind up timely in TCCI or BLM hands. To the extent regularity may be identified in the BIA process in 1970 in Tanacross, it nonetheless admittedly resulted in missing applications. As shown below, that this process was regular or reliable is substantially undercut by evidence in the record. Thus, Brean argues that a regular process cannot be substantiated to have occurred.

The evidence of this, and other evidence in the record, further bedevils BLM’s efforts to conform this case to the description in Heirs of Linda Anelon of a case where the only evidence in the record is “affidavits, standing alone.” (Answer at 5.) Accordingly, we turn to describe all the evidence we find in the record, before further attempting to construe it under the legal standards above.

The affidavits of Brean and Isaac in large part corroborate each other. They tell a story that Isaac worked for BIA, went to Tanacross with other BIA employees, participated in meetings in which BIA employees told residents to supplement Native allotment applications with requests for up to 160 acres, and accepted requests from individuals. They consistently state that Brean submitted to Isaac, in some manner, a desire that an application for Parcel D be prepared on her behalf, on December 2, 1970. The question before us is whether the absence of record evidence on relevant maps found by Flippen in TCCI’s office in 1994 of a handwritten Parcel D, or Brean’s name, is sufficient to permit us to conclude Brean and Isaac were, even unintentionally, providing incorrect information in their affidavits.

On the one hand, BLM's position is entirely understandable. The affidavits were prepared 20 and 23 years after the fact. Brean indicates that she remembers three applications when two had already been submitted. Isaac remembered Brean's application, but also indicates awareness of her affidavit and her 1989 reconstructed application. This awareness could have come from TCCI's relating of events to him, or its providing him with the actual documents. He states that the original map was missing. It is conceivable that his affidavit, prepared with such information, was based on remembering what the evidence suggested to him, as opposed to his actual memory of events.

On the other hand, this construction of events is supposition based on record facts; it does not entirely square with all the evidence in the record. Other data in the record creates similar queries about BLM's construction of events.

For example, it is impossible to determine how BLM searched the maps. We may not make the leap from Flippen's affidavit to the conclusion that he searched TCCI maps for Brean's application or name. Flippen does not mention Brean. Rather, the decision states that TCCI provided copies of the maps and BLM reviewed maps 0004-0008. (Decision at 2 n.2, 3 n.4.) Maps 0004-0008 are identified as "Tanacross (B-4)" on Flippen's affidavit. (BLM Ex. 2, Nov. 5, 1998, Flippen affidavit.) Yet, Isaac identifies the map on which Brean's Parcel D is located as "B-5." (Isaac Chart.) Thus, while Brean concedes that BLM correctly concludes that her name and application are not on the maps and we do the same,^{2/} it is not clear whether BLM reviewed the correct map or the map cited by Isaac, or whether any of the above information contains a typographical error.

Further, TCCI's letter and Flippen's affidavit reflect other questions regarding the nature of the maps. TCCI's letter to BLM in 1990 states that it received the maps from BIA in 1978, pursuant to a realty contract. (Mar. 20, 1990, letter from TCCI to BLM.) Thus, what BLM reviewed in preparing its decision was maps transferred from BIA to TCCI eight years after the fact. Second, even if they are the correct maps, Flippen describes maps 0004-0008, which BLM stated that it reviewed, as ambiguous. According to Flippen's notes there are "[n]o markings on map" 0004, maps 0005 and 0008 "[a]ppear to have been prepared in the office," and maps 0006 and 0007 "[a]ppear to have been prepared in the field." (BLM Ex. 2, Flippen affidavit.) He states that the maps were ones TCCI "claimed were used" by BIA and that he reproduced and numbered the maps and that they "are stored in case file No. F-92675." *Id.* Thus, while it is clear based on this affidavit that the maps in file No. F-92675 should be the ones obtained from TCCI by Flippen in 1994, it is also

^{2/} BLM did not include these maps in the record before us. For purposes of deciding this case, we acknowledge the parties' agreement that the quadrangle maps do not contain Brean's information.

clear that Flippen did not ascertain for certain where they were prepared, who prepared them, that they were in fact the ones “used by” BIA in 1970, or that all of the maps had been properly kept and then transferred eight years later.

Significantly, BLM does not actually assert and the record does not substantiate that the maps BLM reviewed were ones prepared by, or reviewed by, Isaac and attached to Isaac’s affidavit. Nothing in the record, BLM Decision, or Flippen’s affidavit compels the conclusion, taken as fact by BLM, that these maps were (a) prepared based on Isaac’s notes to his co-workers, (b) ones used by Isaac to record Brean’s application, or (c) the ones attached to Isaac’s affidavit. Proof of at least one of these presumed correspondences is critical to agreeing with BLM that the absence of Brean’s application information on TCCI’s maps is probative of what happened.

BLM makes a partial connection to these points by concluding that Isaac stated that he found where he had recorded Brean’s name on a master quad map, presumably in TCCI’s possession. As noted, BLM concluded that Isaac’s affidavit “checked the column next to Alice Brean’s name signifying that he recognized his handwriting on the master quad maps in association with Parcel D.” (Decision at 3.) Finding no indication of Brean’s parcel on the quadrangle map examined by BLM, BLM concludes that the affidavit is not correct as to Parcel D. However, BLM construction of Isaac’s affidavit is not precise. Isaac’s affidavit states: “Attached is a list of Native Allotment applications I remember taking.” (Isaac affidavit at 1.) The next sentences aver that he took information and gave it to Solomon, Adams, and Mattice and moved on to another job, expecting that the others were to complete them. While Isaac goes on to describe attached maps and the fact that he indicated “which allotments were drawn by me,” *id.* at 2, the attached Isaac chart states, with respect to Brean’s parcel D, that the map is “not original.” Isaac states that he recognizes his handwriting but, if the map was not original, it is not clear what handwriting he refers to.

Further, BLM’s assertions regarding the usual allotment application process, with respect to the Tanacross area, are not entirely consistent with the record, at least with respect to what Isaac claims he did. His affidavit states that applicants “pointed on the map and I wrote their name,” and “the applications I took I brought them to the BIA office and we were supposed to give description and draft maps.” As noted above, he informed his supervisors that the documentation still needed to be completed. (Isaac affidavit at 1-2.)

Nothing in the record refutes Isaac’s recitation of events. To the contrary, BLM ignores evidence that corroborates Isaac’s statements which apparently pre-dates his affidavit by several years. The record contains deposition testimony provided by Isaac that appears to be attached to the March 20, 1990, TCCI letter. The deposition

took place in a proceeding concerning another Native allotment applicant, Stephen Northway. It was not prepared to support or substantiate Brean's application. In this deposition, Isaac explained his role in the allotment application process and what happened during the relevant time period in 1970. Isaac's deposition testimony corroborates and clarifies the subsequent discussion of his approach to the Native allotment application process in his affidavit.

Q: When you worked at the BIA what did your job consist of? What were you doing?

A: My main job consisted of Native allotments, such as, taking applications and giving descriptions and identifying on the map where its location is at.

* * * * *

Q: All right. When you took these applications, how would people describe to you the land that they want?

A: They described it, such as, they wanted it here. Like, for example, say they wanted a 1311, then, I just mark that down and say how many acres they wanted there, and that's it.

Q: Okay. So, pretty much, the applicant would tell you verbally where the land was?

A: Verbally, yes.

* * * * *

Q: And, then, at the end they would sign the application; is that right?

A: Yes, that is about it. After...

Q: And, then, after they signed it, what would you do with the application?

A: After they signed the applicant-application, I take them back to Fairbanks and suppose-I mean, I give it back to them. And our job is, that we were supposed to chase all the location and give the description and have Bill Mattice or Kathy notarize it and stamp it.

Q: All right. Now, you say you took it back to the office and, then, what you were supposed to do is kind of draw the map?

A: Drew the map. But I haven't got to because I went to work in Eielson.

Q: Okay.

A: I just left everything there.

Q: All right. Now, then, after you were to draw it on the map, you would give the package to Kathy or Bill?

A: Kathy or Bill Mattice. One of them.

Q: Okay. And, then, they were to certify it and they conveyed it to the BLM; is that right?

A: That's correct.

* * * * *

Q: Okay. Now, when you left, were there applications on which you had worked that were still in process?

A: They were still there when I left. I haven't even started on the applicants—I mean, the applications because this was taken somewhere around November, November of 1970. And I left that job on the first week on December of '70. * * *

Q: Okay. You left that job sometime during—

A: A week after I took all the applications. Week or two after I took all the applications.

Q: Okay. So you hadn't had the time at that point to do the map description?

A: No.

(Isaac Deposition Transcript at 63-65.)

This testimony undermines BLM's analysis of the standard practice employed at Tanacross as well as its assumptions as to how it would have played out in reality. BLM's logic appears to be founded on the premise that if Isaac and Brean accurately recalled events, Isaac would have prepared a map and this map would have been properly transferred to TCCI and then sent to BLM. That the latter actions did not occur is evidence that BLM does not have such a map in its hands; such absence does not refute the veracity of the affidavits BLM does have, given that Isaac has testified that he did not prepare some maps.^{3/} It is only from the absence of map evidence Isaac testifies he may not have created that BLM calls into question the veracity of his affidavit.^{4/}

Turning to Brean's affidavit, BLM is correct that a discrepancy exists between it and the dates she submitted her applications. Brean alleges that all applications for Parcels B, C, and D were filed on December 2, 1970, when Isaac traveled to her village. Yet, the record shows that the applications for Parcels B and C were filed with BLM on February 20, 1970, and April 14, 1970, respectively. Both filing dates occurred well before the December 2, 1970, date Brean alleges in her affidavit that she discussed them with Isaac. Whether Brean did or did not also present information to Isaac regarding Parcels B and C on December 2, 1970, the fact that both she and Isaac alleged a December 2, 1970, meeting regarding her parcel remains unchallenged. The logical consequence of BLM's presumption that Brean could not have really mentioned parcels for which applications were already filed (B and C), is that the only thing it was reasonable for her to have discussed was a parcel not yet applied for (D). This is what Isaac alleges happened.

Instead, BLM presumes that since Brean had already submitted applications for Parcels B and C, that she must be telling a falsehood about meeting with Isaac at all. We do not find this to be the most likely meaning of her affidavit. A construction more consistent with all the evidence in the record is that, at a minimum, she spoke with Isaac about Parcel D.

^{3/} Curiously, the record reflects that BLM vacated a prior decision regarding Brean's Parcel B because the decision was "issued based on information provided by the Tanana Chiefs Conference, Inc. (TCC). The TCC has notified the BLM that the information they provided was incorrect." (Aug. 26, 1998, "Decisions of July 24 and August 3, 1998 Vacated" at 1.) In the circumstances surrounding the record before us, we find it difficult to make any finding that the lack of an allegedly necessary map from TCCI is "evidence" that it was never prepared, when in another matter relating to the same applicant BLM vacated a decision for errors in the TCCI data.

^{4/} The 1990 TCCI letter to BLM refers to a deposition transcript from Bill Mattice, which is not in the record; whether Mattice's transcript would shed any light on the process is unclear.

It is clear that BLM's decision, by contrast with the affidavits in Heirs of Linda Anelon, 101 IBLA at 336, the affidavits at issue here do not stand alone in supporting Brean's description of events. The information above contains sufficient evidence raising a factual question as to whether Brean's application was timely filed which justifies a hearing. Boy Dexter Ogle, 140 IBLA at 371-72. Because the BLM decision fails to take into account the entire record, and possibly documents outside the record before us, we could remand to require BLM to state at the outset its construction of the information in the record. However, the information in the record raises too many questions about events to permit BLM to answer them now. A hearing is justified to permit inquiry into such questions. Accordingly, we set aside BLM's decision and find that due process requires a fact-finding hearing because issues of material fact are in dispute. Pence v. Kleppe, 529 F.2d at 143.

We address a final point not discussed above. Brean argues that BLM's decision impermissibly relies on the Horton Memorandum in violation of the Administrative Procedure Act, 5 U.S.C. § 553 (2000). This document is a Departmental memorandum issued by Assistant Secretary Jack O. Horton on October 18, 1973, which described evidence which would assist the agency in determining whether Native allotment applications would be considered "pending before the Department" on or before Dec. 18, 1971. BLM's decision does not rely on the Memorandum as a basis for rejecting Brean's application, does not apply it to the facts of this case, or construe it. It is not at issue in this appeal.

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 set aside and the case is referred to the Hearings Division, Office of Hearings and Appeals, for further action consistent with this decision.

Lisa Hemmer
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge