

INTERIOR BOARD OF LAND APPEALS

Katherine E. Mathis

160 IBLA 277 (January 15, 2004)

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KATHERINE E. MATHIS

IBLA 2001-63

Decided January 15, 2004

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting a Native Allotment Act application. F-19114, Parcels A and B.

Affirmed.

1. Alaska Native Allotments–Contests and Protests: Government Contests–Rules of Practice: Government Contests

When a Native Allotment Act applicant does not respond to a Government contest complaint within 30 days, as required by 43 CFR 4.450-6, the Bureau of Land Management properly takes the allegations of the complaint as admitted and rejects the application without a hearing, in accordance with 43 CFR 4.450-7.

APPEARANCES: Harold J. Curran, Esq., Alaska Legal Services Corporation, Anchorage, Alaska; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Katherine E. Mathis has appealed the September 26, 2000, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting her Native allotment application, F-19114.

Mathis failed to submit an answer to BLM's contest complaint, issued June 26, 2000, within 30 days, as required by 43 CFR 4.450-6. Therefore, in accordance with 43 CFR 4.450-7(a), BLM decided her case without a hearing, taking the allegations of the contest complaint as admitted – e.g., that she did not make substantially continuous use and occupancy of the land she claimed for a period of five years – and rejecting her application.

The Bureau of Indian Affairs (BIA) submitted an application to BLM for two 80-acre parcels of land near Hooper Bay on behalf of Katherine E. Hoelscher in 1972.

The application states she made seasonal use of the land for berry picking and fishing beginning in 1937. BLM conducted a field examination of the land in July 1983 but could not conclude “that the applicant has met, nor has failed to meet, the use and occupancy requirements of the Native Allotment Act of 1906.” January 10, 1984, Field Report at N.A. 4.

In March 1985, BLM wrote Hoelscher, suspending action on her application for 60 days from her receipt of the letter

to give you time to submit evidence in support of your claim. We need notarized witness statements from you which show with clear and credible evidence you occupied the land. Should you need assistance in completing witness statements or if you have any questions, you should contact the Bureau of Indian Affairs. If you fail to submit the supporting evidence in the time allowed, or if the information is not sufficient to meet the requirements of the regulations, action will be taken to allow for an oral hearing in accordance with Pence v. Kleppe [529 F.2d 135 (9th Cir. 1976)].

In May 1985, the Alaska Legal Services Corporation (ALSC) office in Bethel, Alaska, requested an extension of time from BLM for Hoelscher to respond. BLM granted this request; there is no BLM response in the record to a second request made by the ALSC office in Anchorage in October 1985.

In June 1988, the Association of Village Council Presidents (AVCP) in Bethel, Alaska, submitted an affidavit written by the applicant stating that she was “now Katherine E. Mathis.” Her affidavit states that she started “going to my parcels with my parents in 1937 and started going to those lands independently in 1947 when I married.” It states she was born November 4, 1932. AVCP’s cover letter referred to the affidavit “by Katherine E. Hoelscher Mathis” and stated: “On behalf of Ms. Mathis, we request that her Native Allotment be adjudicated and approved.” AVCP sent a copy of its letter to the ALSC office in Bethel.

In August 1989, ALSC filed a withdrawal of its appearance on behalf of the applicant with BLM and requested that all future written communications be sent directly to the applicant.

In December 1996, BLM sent the applicant a second notice requesting evidence in support of her application, stating “any assistance the applicant needs in completing witness statements or questions the applicant has should be directed to the [AVCP],” and repeating that, if evidence was not submitted or was not sufficient, action would be taken to allow for an oral hearing. The record contains communications between BLM and AVCP following up on this notice and extending

the time for AVCP to respond. An August 1997 BLM memorandum to the file states that AVCP reported it could not find any qualified witnesses and that BLM would proceed to a contest of the application.

In February 1998, BLM sent the applicant a notice with maps depicting the land that was shown to the field examiner in 1983; the notice gave her 60 days to notify BLM if it was not the land for which she intended to apply. The notice again referred her to AVCP if she needed assistance, and a copy of it was sent to AVCP. In March 1998, AVCP returned the form to BLM, signed by the applicant, indicating the location in the notice was correct.

In July 1999, the Solicitor's Office approved the adequacy of a proposed contest complaint BLM had drafted and returned it to BLM. In August, BLM contacted AVCP and urged it to submit witness statements on behalf of the applicant.

A note to the file by Sharon Warren, Chief of the Branch of Native Allotment Adjudication for BLM, states:

On January 6, 2000, I spoke with Willie Andrews [of AVCP] about case F-19114. He said this case is in the process of being transferred to a new service provider in Chevak. He did check with Hooper Bay residents and Chevak residents concerning the applicant's use and trying to obtain witness statements in 1997. He said he was unsuccessful as individuals he contacted did not have knowledge of the applicant's use. I told him we would proceed with the contest.

A January 14, 2000, transmittal note from Danny Dildine, a land law examiner in BLM's Branch of Native Allotment Adjudication, to Glenda Miller, Regional Realty Officer for BIA in Juneau, states in part:

According to Willie Andrews at AVCP, cases AA-53957 par. B and F 11914 A & B are on their way to you for transfer to Chevak who will be the new service provider.

Willie has provided a list of NAs [Native Allotments] that are being moved to other service providers. I assume Scott Houck will update the Master list as soon as everything is confirmed. Call me if you have any questions.

On June 26, 2000, BLM sent the applicant a letter telling her that it had "determined that you have not shown sufficient use and occupancy of the lands you claim," and advising her that if she disagreed she could "request a hearing so you can tell an Administrative Law Judge how and when you used the land." The letter

explained that two important papers were attached, a complaint telling why BLM had determined the allotment should be rejected and one-page form answer to the complaint that she could complete, if she disagreed with BLM's determination, by signing and dating it and filling in a blank indicating where she would like a hearing to be held. The letter also stated that if BLM did not receive her answer within 30 days of her receiving the letter, her application would be rejected. Copies of the letter were sent to BIA offices in Juneau and Anchorage and ALSC offices in Bethel and Anchorage. The applicant signed the return receipt card accompanying the letter on June 30, 2000.

On September 26, 2000, BLM issued its decision rejecting her application because no answer was received within 30 days. ALSC filed a timely appeal on her behalf.

Counsel from ALSC states that appellant is a Yupik Eskimo with a seasonal sense of time who reads English at the 5th grade level. In addition, she is elderly and suffers a loss of short-term memory. Under these circumstances, counsel argues, "it would obviously be difficult to meaningfully comprehend the [contest] Complaint or accompanying documents." (Statement of Reasons (SOR) at 3; see SOR, Exhibits A and F.)

The regulations require an Alaska Native allotment applicant to understand and answer the Government Contest Complaint within 30 days of service. In [Donald Peters (On Reconsideration), 28 IBLA 153, 165-66, 83 I.D. 564, 570-71 (1976)] the Board said in part that even though Alaska Natives "are even less educated and literate than most American welfare recipients" their level of education and literacy would not raise a problem in applying the regulations because in the overwhelming number of cases Native allotment applicants are represented by Alaska Legal Services Corporation. So, in the overwhelming number of cases the contest complaint will be served on an attorney of record, 43 CFR § 4.22(b), and the problems that allegedly emanate from educational status of the Natives will not arise. But the problems did arise for Katherine E. Mathis.

(SOR at 2 (footnote omitted)). ^{1/}

Counsel argues that, although BLM appropriately sent a copy of the complaint to BIA, BIA did not follow its policy of counseling a Native Allotment applicant who

^{1/} Actually, the quoted language is from the court's opinion in Pence v. Kleppe, 529 F.2d 135, 142 (9th Cir. 1976).

receives a contest complaint in this case. (SOR at 8.) In a letter to ALSC, BIA's Glenda Miller acknowledges BIA did not follow its normal procedures:

The BIA or Service Provider usually contacts the Native allotment applicant when a Government Contest Complaint is received. * * * [A]s recent[ly] as August of 2000, we reminded the Realty staff that they should refer any Notices or Complaints received from BLM to [ALSC] because the ALSC staff is under BIA contract to provide legal assistance to Native allotment applicants.

* * * [I]n the subject case[,] [w]hen the copy of the Complaint letter for Ms. Mathis was received at our office, James Howard, the Realty Specialist assigned to Chevak[,] was working on a priority right-of-way project * * * . Mr. Howard noticed the letter when it came into our office and put it into his "IN" box to look at later. However, he got caught up doing several other things and didn't notice the letter again until after the 30 days had passed. Unfortunately[,] because of a combination of things happening at one time, there was no follow-up by my staff to contact Ms. Mathis.

Obviously, we will have to look at ways to improve the communication between the client and the offices involved, so that this situation does not happen again.

If we can assist in any way in getting this case reinstated, please contact me * * * .

(SOR Exhibit B.) "Katherine Mathis was relying on BIA or AVCP to counsel her about the Complaint. With appropriate counseling, she would have contacted ALSC to represent her so she could timely respond to the Complaint and tell the government in her own words how she used the land." (SOR at 8-9; see SOR, Exhibit A at 3.)

Counsel also observes that, according to the return receipt card, BLM mailed the June 26, 2000, cover letter and enclosed complaint and answer form to "Katherine E. (Hoelscher) Mathis," but that the address on the cover letter, complaint, and answer was "Katherine E. Mathis."

43 CFR § 4.422(c) allows BLM to serve the Complaint on Ms. Mathis at her "address of record in the Bureau." The green card for the Complaint shows her address of record as Katherine E. (Hoelscher) Mathis * * * . The Complaint must contain the name and address of the interested parties. It did not include the address or name of Katherine E. (Hoelscher) Mathis, and instead listed the address or name as

Katherine E. Mathis. * * * BLM knew, based on the record[,] that ALSC had withdrawn as attorney of record for Katherine E. Hoelscher, in 1989, about the time Ms. Mathis c[h]anged her name; and [when] BLM sent the Complaint to ALSC as an interested party 11 years later, [it knew] such notice was not reasonably calculated, under all the circumstances, to apprise ALSC of the pendency of the action and afford it an opportunity to present objections for Ms. Mathis. * * * Leaving “Hoelscher” off the letter, Complaint and Answer significantly reduced the opportunity of ALSC to contact its former client and advise her of the opportunity to present her case to the ALJ. * * * The failure to use “Hoelscher” in the name and address on the Complaint is a violation of the Department’s regulations.

(SOR at 14.)

ALSC also argues that BLM’s complaint did not give applicant adequate notice of the reasons it proposed to deny her application because the notice did not discuss what “quantum of use” would constitute substantially continuous use and occupancy. Id. at 16.

Counsel concludes that “[t]he Board, exercising its equitable powers, should overturn BLM’s Decision rejecting Ms. Mathis’ application and closing her file. On remand, BLM should issue another government contest complaint, but this time it must give Katherine Mathis adequate notice.” Id.

We have recognized that Native allotment applications rejected for failure to timely file evidence of use and occupancy may, under appropriate circumstances, be reinstated and remanded for further consideration in accordance with equitable adjudication pursuant to 43 CFR 1871.1-1.^{2/} In Herbert Herrmann, 45 IBLA 43 (1980), and Julius F. Pleasant, 5 IBLA 171 (1972), BIA mishandled appellants’ Alaska Native allotment applications, and, as a result, their evidence of occupancy documents were filed late with BLM. BLM subsequently rejected the untimely filings. On appeal we held that the applications should be reinstated and the cases remanded for further consideration in accordance with equitable adjudication on the grounds that the appellants should be absolved of blame when the error was satisfactorily explained as being the result of an obstacle over which they had no control. Herbert Herrmann, 45 IBLA at 48-49; Julius F. Pleasant, 5 IBLA at 177.

^{2/} 43 CFR 1871.1-1 allows for equitable adjudication relief in “* * * special cases deemed proper by the Director, Bureau of Land Management, where the error or informality is satisfactorily explained as being the result of ignorance, mistake, or some obstacle over which the party had no control, or any other sufficient reason not indicating bad faith there being no lawful adverse claim.”

In this case, however, the error cannot be explained as one over which the applicant had no control. While it is regrettable that BIA, upon whom the applicant clearly relied from the outset, did not provide her with its customary counseling, the fact remains that she received the letter, along with the enclosed complaint and answer, and did not respond at all. As the applicant, that was her responsibility.

Nor can we give any credence to ALSC's complaint that BLM did not properly address the letter and its enclosures and thereby deprived ALSC of an opportunity to counsel her. ALSC's office in Bethel received a copy of AVCP's June 1988 letter advising BLM that the applicant had changed her name to Mathis, before it withdrew as her counsel in 1989. Further, the serial number of the application was on BLM's June 26, 2000, letter and both enclosures and both ALSC's Bethel and Anchorage offices received copies of the letter and enclosures. In any event, we cannot agree that addressing the letter and complaint to the applicant as "Katherine E. Mathis," rather than "Katherine E. (Hoelscher) Mathis" is a violation of the regulation requiring BLM to send the document to her address of record.

[1] We have held on numerous occasions that compliance with 43 CFR 4.450-6 – which is incorporated by reference in 43 CFR 4.451, applicable in the adjudication of Native allotment applications, Donald Peters, 26 IBLA 235, 241, 83 I.D. 308, 311 (1976) – is mandatory and may not be waived. Robert W. Gossum, 158 IBLA 1, 2-3 (2002); United States v. Grooms, 146 IBLA 289, 292 (1998); Robert D. McGoldrick, 115 IBLA 242, 245 (1990); United States v. Evalt, 62 IBLA 116, 118 (1982); United States v. Soren, 47 IBLA 226, 227 (1980); United States v. Sainberg, 5 IBLA 270, 272-274 (1972), aff'd, Sainberg v. Morton, 363 F. Supp. 1259, 1262-63 (D. Ariz. 1973). See Pence v. Andrus, 586 F.2d 733, 741 (9th Cir. 1978). When an answer is not timely filed, the allegations of the complaint will be taken as admitted, and BLM will decide the case without a hearing. 43 CFR 4.450-7; United States v. Grooms, 146 IBLA 289, 292 (1998); United States v. Weiss, 15 IBLA 198 (1974).

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's September 26, 2000, decision is affirmed.

Will A. Irwin
Administrative Judge

I concur:

H. Barry Holt
Chief Administrative Judge