

INTERIOR BOARD OF LAND APPEALS

Hilma M. McKinnon

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HILMA M. MCKINNON

IBLA 2002-402

Decided July 12, 2005

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application for lack of timely filing. F-86931.

Set aside and referred for a hearing.

1. Alaska: Native Allotments--Applications and Entries: Filing--Rules of Practice: Appeals: Hearings

Where, on appeal from a BLM decision rejecting a Native allotment application for untimeliness, appellant presents evidence consisting of her affidavit, attesting to timely filing, and a map, purportedly identifying parcels of land claimed by Native applicants (including appellant), such evidence is sufficient to raise a factual question as to whether appellant's Native allotment application was pending before the Department on December 18, 1971. In such a situation, the Board will set aside the BLM decision and refer the case for hearing before an Administrative Law Judge.

APPEARANCES: Carol Yeatman, Esq., Alaska Legal Services Corp., Anchorage, Alaska, for appellant; Lisa D. Doehl, Esq., Office of the Solicitor, Alaska Region, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Hilma M. McKinnon (formally Hilma Dewey), represented by Alaska Legal Services Corporation (ALSC), has appealed a May 24, 2002, decision (Decision) of the Alaska State Office, Bureau of Land Management (BLM), rejecting her Native allotment application, F-86931, because there was insufficient proof that the application was pending before the Department on December 18, 1971. McKinnon

asks this Board to vacate the Decision, deem her application to be timely filed, and direct that her application be processed under equitable adjudication, or in the alternative, remand this case for a hearing to determine whether McKinnon's application was timely filed.

By memorandum dated January 8, 1990, Susan Jones, Allotment Specialist, Tanana Chiefs Conference, Inc. (TCC), forwarded to the Chief, Branch of Northwest Adjudication, Alaska, BLM, through the Superintendent, Bureau of Indian Affairs (BIA), Nome Agency, appellant's affidavit and reconstructed Native allotment application F-86931, both dated May 12, 1989. TCC transmitted those documents, pursuant to the Alaska Native Allotment Act of May 17, 1906 (Native Allotment Act), as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970).<sup>1/</sup> The application described 160 acres of unsurveyed land on "the Koyuk River about 8 miles up on the left Bank." The January 8, 1990, memorandum identifies the property as "located on the Ko[y]uk River within Sec. 20, T. 6 S., R. 11 W., Kateel River Meridian, containing 160 acres."<sup>2/</sup> BLM's Decision identifies the property as "located in sections 19, 20, 29, and 30, T. 6 S., R 11 W., Kateel River Meridian (KRM), Alaska." (Decision at 1.)<sup>2/</sup> Attached to the application are three witness statements attesting to McKinnon's use and occupancy of the claimed lands for hunting, berry picking, fishing, and food gathering.

<sup>1/</sup> The Native Allotment Act was repealed, effective Dec. 18, 1971, with a savings provision by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (2000).

<sup>2/</sup> The record reflects that Susan Jones, TCC, sent a Jan. 12, 1990, memorandum to BLM through BIA advising that the Jan. 8, 1990, memorandum mistakenly refers to McKinnon's "allotment on the Kobuk River," rather than the Koyuk River.

<sup>3/</sup> Both the surface and subsurface estates of the lands, described by BLM, were conveyed to the Koyuk Native Corporation and the Bering Straits Native Corporation by Interim Conveyance Nos. 597 and 598 on Dec. 27, 1982. Upon conveyance of the land out of Federal ownership, the Department loses jurisdiction to adjudicate Native allotment applications as interests in the land conveyed. Boy Dexter Ogle, 140 IBLA 362, 368 (1997); City of Klawock, 94 IBLA 107, 111-12 (1986); Kenai Natives Association, Inc., 87 IBLA 58, 61 (1985). However, this Board has held that "the Department has a fiduciary duty to Alaskan Natives under the act of May 17, 1906, to determine the validity of Native allotment applications to pursue recovery of the land through negotiation or litigation in the case of valid applications." Heirs of Linda Anelon, 101 IBLA 333, 336 (1988); see Aguilar v. United States, 474 F. Supp. 840, 846-47 (D. Alaska 1979) (reversing the Board's decision in Ethel Aguilar, 15 IBLA 30 (1974)).

Appellant's May 12, 1989, affidavit expresses her belief that, in the winter of 1971, before the December 18, 1971, repeal of the Native Allotment Act, she completed an allotment application:

[A] man, someone from some agency, came to Koyuk. There was a meeting at the National Guard Armory. Everyone went to it to apply for land. He was a white man. \* \* \* I know I signed my name on the map. The people in Koyuk got their land, but I never hear on mine. I ask around with the BLM, BIA and Bering Straits to see where the old maps are. When my step-dad, Henry Adams, died last June (of 1988) my mom found a lot of old maps he had. My name is on this, my dad was the president of Koyuk. I know I applied because I went to the meeting. \* \* \* This land I applied for was 160 acres. Every summer since 1959 I camped there till I left home.

(Statement of Reasons (SOR), at 2; Ex. A at 1.)

Relying on this Board's decision in William Yurioff, 43 IBLA 14 (1979), BLM, in its May 2002 Decision, rejected the Native allotment application as untimely, finding that appellant had failed to provide, with her reconstructed application, either her original application showing a "time stamp" or an "affidavit by any bureau, agency or division officer attesting to the timely filing of the original application." BLM also found that appellant's affidavit, which it alleges "does not indicate how, if or with whom her original application was filed," and a copy of "a map the people of Koyuk marked on to show their claim to land"<sup>4/</sup> are "not sufficient by themselves to establish that Ms. McKinnon's application was pending before the Department on or before December 18, 1971." (Decision at 1-2, 5.)

BLM found that the witness statements in support of the application "only attest to Ms. McKinnon's use and occupancy of the land, but do not offer any specific knowledge of her having filed a timely application for an allotment." (Decision at 2.) BLM also relies on the lack of evidence received from Roy Ashenfelter, Kawerak, Inc., a realty specialist and BIA contractor, in response to BLM's March 8, 1990, request for information and on certain hand-written notes from BLM's files, dated August 27, 1990, reporting a telephone conversation between "K. Dietz," a BLM employee,<sup>5/</sup> and Ashenfelter. The notes state:

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<sup>4/</sup> The map referred to is attached to the SOR as Exhibit C.

<sup>5/</sup> The notes are attached to the SOR as Exhibit D and to BLM's Answer as Exhibit 2. The copy with the SOR is followed by a copy of a document which states, "Left message with Kawerak to call back Monday 8/27/90. K. Dietz 8/22/90 1600."

Each one of the squares on the map indicates individual Native allotments. In Koyuk, everyone went to a central area ‘meeting’ & marked on the map – so there would not be a conflict. (only those who met the NA [Native Allotment] qualifications). The question in Roy[’s] mind is what happened next[.] [H]e believes they each took the application home to mail? According to Roy, Hilma believes her husband at the time mailed the application.

See Answer, Ex. 2. BLM characterizes these notes as showing that “the realty specialist thought that the persons at the meeting had to subsequently mail in application forms and said that McKinnon believed her husband at the time mailed the application.” (Answer at 3.)

BLM argues on appeal that, having failed to provide evidence that an application was ever filed with the Department, appellant fails to overcome the presumption of regularity accorded public officers in the discharge of their official duties. (Answer at 5.) Moreover, BLM denies that appellant is entitled to a fact-finding hearing, finding that this same evidence demonstrates that appellant has failed to raise any issues of material fact. (Answer at 6-7.)<sup>6/</sup> Citing Boy Dexter Ogle, 140 IBLA at 368, BLM rejects appellant’s request for equitable adjudication because the land was conveyed out of Federal ownership through interim conveyances to the Koyuk Native Corporation and the Bering Straits Native Corporation. (Answer at 8.)

In the SOR and Reply to BLM’s Answer, appellant urges this Board to assign greater evidentiary significance to the map and her affidavit. She provides a letter from Ashenfelter to Susan Jones, TCC, dated January 17, 1990, to explain the significance of the map:

We received your letter with Hilma’s maps. I have reviewed each Native Allotment file identified on the Map. All original Native Allotment Applications that were done did use a single legal size map to

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<sup>6/</sup> In its Answer, BLM asserts, for the first time, that the “reconstructed application must be rejected under, 43 CFR 2561.1(d), because BIA did not certify that [McKinnon] qualifies for a Native allotment.” (Answer at 7, referring to an application form, attached to the Answer as Exhibit 1.) We note that the Decision states: “The Bureau of Indian Affairs (BIA) completed the required certification and filed Native allotment application F-86931, with the Bureau of Land Management (BLM) on behalf of Hilma M. McKinnon on February 5, 1990.” (Decision at 1.) We note further that the record contains what appears to be the original reconstructed application and that this document reflects certification by the Superintendent, Nome Agency, BIA, dated Jan. 29, 1990.

identify each own allotment area. As you can see Hilma Dewey was identified on the map. She was also a witness to a[n] applicant, Elsie Adams. The original map had square boxes with a letter inside and on the left hand side of legal size map a name was used to correspond with the letter. The map was used to make sure each applicant had a[n] area selected and that other applicants did not choose the same location and just as important certify each other[’s] application. Hilma Dewey was identified on this legal size map as letter “J”.

(SOR, Ex. B.) Appellant, like BLM, refers to the handwritten telephone notes, dated August 27, 1990, but apparently does so to further confirm the significance of the map. (SOR at 3.) Appellant disputes BLM’s assertion that the map and affidavit are not sufficient by themselves “to prove the Department actually received it [the application]” or, at least, sufficient to raise questions as to “material facts at issue that should be resolved in a hearing.” (Reply to BLM’s Answer at unmarked 2 and 5.) <sup>Z/</sup> While acknowledging that “statements in the record may be incomplete and inartfully written,” appellant asserts “there is no question that Mrs. McKinnon filed an allotment application and a BIA employee received it and documented that receipt by placing Mrs. McKinnon’s name on its map.” (Reply to BLM’s Answer at unmarked 5.)

Appellant argues that, under William Carlo, 133 IBLA 206, 211 (1995), there is “no hard and fast rule that, in order to overcome the presumption of regularity, independent corroboration must necessarily be presented” and relies on Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), Heirs of Linda Anelon, 101 IBLA 333, 338 (1988), William Carlo Jr., 104 IBLA 277, 282 (1988), and Timothy Afcan Sr., 157 IBLA 210, 220 (2002) to support her claim that where, as here, there is an evidentiary question as to whether an application was pending on the relevant date, the applicant is entitled to a hearing. Moreover, appellant asserts that to deprive her of an opportunity to challenge, at a hearing, the hearsay evidence in the telephone notes would constitute a violation of her due process rights, if this hearsay evidence is used against her without providing her an opportunity for a hearing to challenge that document. (SOR at 5-7; Reply to BLM’s Answer at unmarked 3-4.)

[1] The Native Allotment Act authorized the Secretary of the Interior to allot up to 160 acres of “vacant, unappropriated, and unreserved nonmineral land in Alaska \* \* \* to any Indian, Aleut, or Eskimo of full or mixed blood who resides in

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<sup>Z/</sup> In addition to her affidavit and the map, appellant points to her participation as witness on other applications and the subsequent inquiries she claims to have made to Bering Straits Native Corporation, BLM, and BIA, regarding the application at issue, to support her claimed presence at the meeting and timely filed application.

and is a native of Alaska, and who is the head of a family, or is twenty-one years of age.” The Act requires satisfactory proof of substantially continuous use and occupancy of the land for a 5-year period. As noted supra at note 1, the Native Allotment Act was repealed by section 18(a) of ANCSA, with a savings provision for applications pending before the Department on December 18, 1971. If an application was not pending before the Department on December 18, 1971, BLM is without authority to grant a Native allotment. Arthur John, 160 IBLA 211, 217 (2003); Boy Dexter Ogle, 140 IBLA at 369. Thus, the critical question for resolution here is whether appellant’s application was pending before the Department on December 18, 1971.

As in Anelon, we find that “BLM’s position is supported by the presumption, which stems from the absence of \* \* \* [appellant’s] original application from the record, that the application was not filed timely.” 101 IBLA at 338. In that case, we held that “[t]here must be independent corroborating evidence that the Native allotment application was actually received by a departmental office on or before December 18, 1971,” and that “affidavits attesting to a timely filing, standing alone, are not sufficient to establish such a filing.” In this case too, there is insufficient “independent corroborating evidence” to establish such a filing.

Nevertheless, in Anelon, we also held that “Pence v. Kleppe, in conjunction with Pence v. Andrus, 586 F. 2d 733, 743 (9th Cir. 1978), stands for the proposition that due process considerations in the case of an Alaskan Native require an oral hearing prior to Departmental rejection of a Native allotment application if there is a material issue of fact regarding the validity of the application.” Anelon, 101 IBLA at 337; see also Alice D. Brean, 159 IBLA 310 (2003). In the present appeal, we find that appellant’s affidavit and the map (containing appellant’s name on the parcel described in her reconstructed application), the significance of which was described in the January 17, 1990, letter from Roy Ashenfelter, are sufficient to raise a material issue of fact.

While the record is incomplete and factual gaps preclude appellant from proving she timely filed her application, appellant’s affidavit, the map, and Ashenfelter’s letter each offer a consistent counterpoint to the missing application and the presumption undergirding BLM’s position. And, far from proving BLM’s presumption, the handwritten telephone notes do little more than reveal Ashenfelter’s uncertainty about whether, after identifying the claimed parcels on the map, Koyuk Native applicants left their completed applications with BIA officials or took them home for mailing. See SOR at 3. Consequently, we find the record in this case raises questions of material fact regarding whether appellant filed a Native allotment

application which was then pending at the Department on December 18, 1971. Anelon, 101 IBLA at 338.

Accordingly, we set aside the May 24, 2002, BLM Decision and refer the case to the Hearings Division, Office of Hearings and Appeals, for the assignment of an Administrative Law Judge, pursuant to 43 CFR 4.415. The Judge will hold a hearing on the question of whether Hilma M. McKinnon had a Native allotment application pending before the Department on December 18, 1971. At the hearing, appellant shall bear the burden of showing that her application was pending before the Department on December 18, 1971. Timothy Afcan Sr., 157 IBLA at 222; State of Alaska (Mabel S. Brown)(On Reconsideration), 123 IBLA 233, 239B (1993). Following the hearing, the Administrative Law Judge will issue a decision, which will be appealable to the Board pursuant to 43 CFR 4.410. In the absence of an appeal, the decision of the Administrative Law Judge will be final for the Department.

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 referred to the Hearings Division, Office of Hearings and Appeals, for a hearing before an Administrative Law Judge.

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Christina S. Kalavritinos  
Administrative Judge

I concur:

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Bruce R. Harris  
Deputy Chief Administrative Judge