

DONALD PETER
v.
BUREAU OF LAND MANAGEMENT

IBLA 91-286

Decided March 4, 1996

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer rejecting a request to add an additional 80-acre parcel to Native allotment application F-13737.

Reversed and remanded.

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

A Native allotment applicant who alleges that he timely made application for an allotment of a specific parcel of land with officials of BIA but, through no fault of his own, this parcel was not included within the application which BIA filed with the Bureau of Land Management must show, by a preponderance of the evidence, both that he timely mailed the description to BIA depicting the parcel and that BIA actually received it. The applicant's burden may be satisfied by circumstantial evidence corroborating the applicant's sworn testimony which renders it more likely than not that the application was timely mailed and timely received.

APPEARANCES: Judith K. Bush, Esq., Fairbanks, Alaska, for appellant; Regina L. Sleater, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Donald Peter has appealed from a decision of Administrative Law Judge Harvey C. Sweitzer, dated April 15, 1991, rejecting his request to add an additional 80-acre parcel to his Native allotment application F-13737, filed pursuant to the provisions of the Alaska Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed effective Dec. 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1988), with a savings provision for applications pending on Dec. 18, 1971).

The factual background of this case was succinctly related in Donald Peter, 107 IBLA 272 (1989):

On March 29, 1971, the Bureau of Indian Affairs (BIA) filed appellant's Native allotment application F-13737 with [the Fairbanks District Office, Bureau of Land Management (BLM)]. While the application indicates that it was signed by appellant on December 3, 1970, there is no indication when BIA received it. The mostly handwritten application stated that appellant's subsistence use of the area began on December 12, 1963, and that a cabin was constructed thereon in 1966. A typed land description on the application describes approximately 80 unsurveyed acres in sec. 9, T. 21 N., R. 14 E., Fairbanks Meridian. A map attached to the application shows a roughly rectangular tract in a bend of the Black River Slough. The application does not mention any other parcel.

On December 4, 1972, BLM rejected appellant's application because the land had been withdrawn for a powersite in connection with the Ramparts Power Project prior to appellant's commencement of occupancy. This decision expressly noted that "[t]he claim contains 80 acres and is located in protracted Section 9, Township 21 North, Range 14 East, Fairbanks Meridian, Alaska." No appeal was taken from this determination.

However, pursuant to section 905(d) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(d) [(1988)], BLM reinstated the allotment application in the summer of 1981. On October 1, 1981, BLM notified appellant that his application had been reinstated, stating: "Your Native Allotment application, F-13737 has been reinstated pending further determination. This application was filed in this office on March 29, 1971 for approximately 80 acres located in Sec. 9, T. 21 N., R. 14 E., Fairbanks Meridian."

On April 5, 1983, BLM conducted a field examination and verified appellant's use and occupancy of the 80-acre parcel listed in his application. Appellant accompanied the field examiner and informed the field examiner that he had intended to apply for two 80-acre parcels, not one. The field report concluded:

Based on examination of the parcel, suitability of the land for the uses claimed, testimony of the applicant and his personal knowledge of the land, and absence of any evidence to the contrary, it is concluded that the applicant has met the requirements of the Native Allotment Act of 1906, as amended. Certificate would be subject to Sec. 905(d) of ANILCA. It is believed that the applicant intended to apply

for 160 acres at this location. BIA should be contacted for substantiation.

(Field Report at 5).

Based on appellant's information, the field examiner assembled two sets of corrected metes and bounds land descriptions. Both described his original 80-acre parcel, apparently adjusted by shifting the location slightly in order to eliminate a conflict with his father's Native allotment which was adjacent on the west. One alternative description also included a second 80-acre parcel which appellant told the field examiner he intended to claim. The field examiner's map shows the second parcel adjacent to the first parcel along its southern boundary, forming an L configuration when joined with the original 80-acre parcel.

On May 2, 1983, appellant filed an affidavit asserting his intent to apply for 160 acres, rather than 80:

1) I applied for a native allotment on December 3, 1970, my application was issued the number F-13737.

2) I applied for 160 acres located in protracted Sec. 9, T. 21 N., R. 14 E., Fairbanks Meridian.

3) The Bureau of Land Management came to Fort Yukon on April 5, 1983 to field exam my allotment, at that time the examiner told me my application was for 80 acres.

4) I do not know how this mistake was made, I have used 160 acres, I intended to apply for all of this land. I wish to have the full 160 acres that I believe I applied for.

On September 5, 1986, BLM issued the [challenged] decision. In it, BLM held that the original 80-acre parcel had been legislatively approved subject to a reservation of oil and gas to the United States. BLM also treated appellant's affidavit as a request to amend his application to include an additional 80 acres and denied that request as untimely. Appellant thereupon pursued an appeal to this Board, limited to that part of the BLM decision which denied the additional 80 acres. [Footnote omitted.]

107 IBLA at 273-74.

In his appeal of BLM's decision, Peter essentially argued that his application should have included a second 80-acre tract on the Black River Slough. He explained that Native allotment applicants routinely left the land description blank on their applications, as he did, so that the Bureau of Indian Affairs (BIA) could insert the correct legal land description. Peter maintained that he had attached two separate maps to his application when he initially mailed it to BIA: one map, still affixed to the application, which depicted the original parcel on the Black River Slough, and an additional map, not appearing in the case file, which portrayed an 80-acre parcel on the Sheenjek River. He asserted that, after discovering a conflict with the Sheenjek parcel between his older brother Johnny and himself, he wrote to BIA once again, approximately 2 months after mailing his original application to BIA, requesting to substitute a second 80-acre parcel on the Black River Slough for the Sheenjek River parcel. Peter conjectured that BIA complied with only part of his request: it eliminated the parcel on the Sheenjek River, but neglected to substitute the second 80-acre parcel on the Black River Slough. He asked that he be granted a hearing in which he would have the opportunity to prove his intent to claim 160 acres.

In our decision, we first clarified that section 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(c) (1988), authorizing allotment applicants to amend land descriptions in Native allotment applications where the description in the application designated land other than that which the applicant intended to claim at the time of the application, did not apply here since appellant was not contending that the land description in the application depicted the wrong land but rather that other land should have been included in the application in addition to the described land. We then determined that, in accordance with *Pence v. Kleppe*, 529 F.2d 134, 143 (9th Cir. 1976), appellant should be afforded an opportunity to show that he did timely file with BIA officials a request for the second 80-acre parcel on the Black River Slough. Accordingly, we referred the case for a hearing at which appellant had the burden not only to show that he mailed a second description to BIA portraying the 80-acre parcel, but also to establish, by a preponderance of the evidence, that BIA actually received it and subsequently mislaid it. 107 IBLA at 276.

Judge Sweitzer held the ordered hearing on July 12, 1990, in Fort Yukon, Alaska. BLM called no witnesses at the hearing, choosing instead to rely solely on the documents in the official case file which were admitted as exhibits 1 through 24. Peter presented his own testimony and that of Stanley Jonas and introduced six exhibits (Exhs. A through G).

In his testimony, Peter expanded on the information presented in his earlier affidavits concerning his intent when he applied for his allotment and the steps he took to inform BIA of the land he claimed. He testified that, during the relevant time, he was the director of the Upper Yukon Development Corporation, which was a part of the Rural Alaska Community Action Project (RurALCAP), and that, in accordance with his office's general procedure, on December 3, 1970, he signed his original Native

allotment application which his assistant (Stanley Jonas) had filled in, leaving blank the legal description of the claimed land to be typed in later by BIA based on the attached maps delineating the requested allotment (Tr. 18-19). Peter explained that the original application included two 80-acre parcels, one on the Black River Slough and one on Sheenjek River (Tr. 25-26), and that two signed forms with two maps, one for each parcel, were mailed from Fort Yukon to the BIA office in Fairbanks (Tr. 29-30).

Peter further recounted that he subsequently discovered that his Sheenjek River parcel overlapped his older brother's parcel (Exh. D), so, as the younger brother, he deferred to his brother Johnny Peter and decided to substitute an additional 80-acre parcel on the Black River Slough for the Sheenjek River selection. He testified that he personally mailed another application to BIA for the second Black River Slough parcel approximately 2 to 3 months after sending in his original application (Tr. 29-31, 71). ^{1/}

Peter acknowledged that he received both BLM's December 4, 1972, letter rejecting his allotment application and its October 1, 1981, letter reinstating the application, each of which specifically described the allotment as embracing 80 acres, but was unclear as to whether he responded to either one of them (Tr. 36-37, 65-70). Rather, Peter claimed that the first time he actually became aware that his allotment embraced only 80 acres was during the 1983 field exam, and that, in accordance with the field examiner's suggestion, he immediately submitted an affidavit informing BLM of the error (Tr. 49-50).

Peter's other witness, Jonas, testified that part of his job with RurALCAP involved filling out Native allotment applications and that he had filled out appellant's original application, though it was Peter who usually mailed the completed applications to BIA (Tr. 78-80). He related a conversation he had with Peter in which Peter told him that, because of a conflict with his brother Johnny, he intended to change his second parcel to encompass land at the mouth of Black River (Tr. 86). Jonas admitted, however, that he never saw appellant's second application (Tr. 87-88).

In his decision, Judge Sweitzer found Peter's testimony to be very credible. Judge Sweitzer recognized that no evidence in the original file confirmed Peter's account of a second application, nor had Peter introduced any documentary evidence substantiating several material elements of his story including his application for the Sheenjek River parcel, his letter withdrawing his claim to the Sheenjek River parcel, and his application for a second Black River Slough parcel. Judge Sweitzer

^{1/} When asked whether RurALCAP had retained any copies of these documents, appellant explained that, even though his office had made copies of all of documents which it had submitted to BIA, all of these files were discarded when the Upper Yukon office was closed (Tr. 74).

concluded nonetheless, that the evidence presented sufficed to render it more likely than not that Peter intended to apply for a second parcel on the Black River Slough, that he filled out and mailed an application to BIA for such a parcel, and that he mailed the application within the time prescribed. According to the Judge, the supporting evidence included Peter's credible and uncontroverted testimony that he intended to apply for the second parcel on the Black River Slough, that he filled an application for that parcel, and that he mailed it to BIA prior to March 27, 1971, all of which was corroborated, albeit weakly, by Jonas' testimony and was consistent with Johnny Peter's January 12, 1971, application for the Sheenjok River parcel.

Judge Sweitzer found, however, that no evidence at all had been proffered demonstrating that the application had actually been received by BIA. While recognizing that the legal presumption that a properly addressed envelope containing a document is delivered to the addressee and the legal presumption that Government employees faithfully and properly perform their official duties and, therefore, Government records are presumed to be correct, complete, and accurate, were in conflict, Judge Sweitzer concluded that the presumption of administrative regularity outweighed the presumption that mailed documents are actually delivered to the addressee, citing William R. Gaechter, 66 IBLA 230, 232 (1982).

Though he acknowledged that the presumption of administrative regularity was a rebuttable presumption, Judge Sweitzer ruled that the evidence of irregularities relied upon by appellant was flawed and insufficient to either negate or overcome the presumption in this case.^{2/} Accordingly, the Judge determined that, although Peter's conjecture that when BIA received his second application, it eliminated the Sheenjok River parcel but erroneously discarded the second Black River Slough parcel because it assumed it described the same land as the original Black River Slough parcel was certainly plausible, it remained mere speculation not grounded on any concrete firsthand knowledge and not verified by any specific probative evidence concerning conditions at the relevant time and place which would have prevented his application for the second 80 acres from being processed in the normal course of business. He therefore rejected Peter's application for the second 80-acre parcel on the Black River Slough.

In his statement of reasons for appeal (SOR), while Peter asserts that the evidence supports the Judge's determination that he intended to and did apply for a second 80-acre parcel, he disagrees with Judge Sweitzer's conclusion that there is no evidence that BIA ever received the application

^{2/} The evidence upon which appellant relied in an attempt to establish that a presumption of regularity could not properly apply to the BIA Fairbanks office consisted of depositions of BIA employees William Mattice and Kathy Nunan which had been taken in the course of earlier litigation affecting other allotment applications.

for the second parcel on Black River Slough. Appellant contends that BIA must have received his notice to drop the Sheenjek parcel and the second application to add an additional 80-acre Black River Slough parcel since the Sheenjek parcel was, in fact, removed from the application submitted to BLM. He further observes that the application filed with BLM on March 27, 1971, identifies the described allotment as "Parcel A," thus signifying that at some point there must have been a parcel B contemplated since, unless more than one parcel had been claimed, such terminology would not have been used. Appellant again suggests that whoever discharged the first part of his instructions and eliminated the Sheenjek River acreage somehow failed to realize that the second Black River Slough application was actually a separate request for an additional 80 acres and not a duplicate request for the original 80-acre parcel.

Appellant disputes the relevance of the presumption of regularity to this case, noting that the presumption applies only when an agency engages in regular activities and not when it deviates from its established procedure. He claims that since it has been judicially determined that BIA did not comply with its own regulations regarding field examination and certification of Native allotment applications (*see Fannie Barr v. United States*, No. A 76-160 (D. Alaska Jan. 18, 1980)), there can be no presumption of administrative regularity attached to BIA's handling of allotment applications. Even if the presumption were applicable, appellant insists that it has been overwhelmed by Federal court and Hearings Division judicial findings and statements in BLM's own Handbook outlining various irregularities, including lost, misplaced, and mishandled Native allotment applications, by the Fairbanks BIA office in 1970-71 when it was inundated by applications. Appellant submits that the Judge erred in rejecting substantial uncontroverted evidence of BIA errors in handling allotment applications in 1970-71 which conclusively demonstrates that there was nothing regular about the manner in which BIA in Fairbanks and throughout Alaska operated when the cascade of applications began. Accordingly, appellant requests that BLM be ordered to reinstate his second 80-acre parcel in the location identified during the 1983 BLM field examination.

In its answer, BLM notes that the appellant has the burden of establishing, by a preponderance of the evidence, that he timely mailed and that BIA actually received a description of the additional 80-acre Black River Slough parcel and argues that this burden was not discharged because he failed to submit independent corroborating evidence that the application was actually received by BIA prior to December 18, 1971. BLM contends that the presumption of administrative regularity in the operations of the Federal Government may only be overcome by direct, independently verified evidence and that inferential evidence, standing alone, is inadequate to rebut this presumption. Since, in BLM's view, appellant relies totally on his own uncorroborated and unsupported testimony that he filed for a second parcel and then changed the location of that parcel, BLM concludes that appellant has simply failed to submit the evidence necessary to prove receipt by BIA of the application for the second 80-acre parcel. BLM, therefore, concludes that Judge Sweitzer's decision should be affirmed.

[1] As we noted in our decision referring this matter for a hearing, in order for appellant to succeed in establishing that the application for the second 80-acre parcel at Black River Slough was pending on or before December 18, 1971, as required by section 18 of ANCSA, 43 U.S.C. § 1617 (1988), he was required to establish not only that an application for that parcel was timely prepared and submitted to BIA but that it was actually received by BIA prior to the repeal of the Native Allotment Act. See Donald Peter, *supra* at 276-77. Judge Sweitzer concluded that appellant gave very credible testimony at the hearing and held that his uncontroverted (and somewhat corroborated) testimony sufficiently established that he had intended to apply for a second Black River Slough parcel and that he filled out and mailed an application for that parcel to BIA within the prescribed time (Decision at 6). The Judge concluded, however, that while appellant had carried his burden of proof as to whether or not he had transmitted an application for the parcel to BIA, appellant had failed to establish that an application for this parcel was ever received by BIA.

While both BLM and appellant have argued extensively over application of the presumption of administrative regularity herein, we are of the opinion that, as we noted in our recent decision in BLM v. Carlo, 133 IBLA 206 (1995), both sides have misapprehended both the nature and the scope of the presumption as it applies to cases such as the one at bar. As an initial matter, it is important to keep in mind that, as this Board has repeatedly noted, "rebuttable presumptions are, in essence, procedural devices by which the burden of proof is shifted from one party to another." Bernard S. Storper, 60 IBLA 67, 70 (1981), *aff'd* Civ. No. 82-0449 (D.D.C. Jan. 20, 1983); see also BLM v. Carlo, *supra* at 210; United States v. Hess, 46 IBLA 1, 7-8 (1980). Thus, when, in referring this matter for hearing in Donald Peter, *supra*, we noted that appellant bore the affirmative burden of establishing both the timely submission and the timely receipt of his application for the second parcel, we were implicitly recognizing the applicability of the presumption of administrative regularity. On appeal, appellant, in effect, suggests that this determination should be revisited based on his assertions that the record establishes that no presumption of administrative regularity can be accorded to actions undertaken by the Fairbanks BIA office during the period in question. We do not agree.

The question of whether or not the admitted flood of applications which inundated the Fairbanks BIA office during the period commencing approximately 1970 through 1971 and the difficulties which this occasioned for the processing of applications justifies abandonment of any presumption of administrative regularity with respect to that office's operation has been explored in a number of recent Board decisions and has been consistently answered in the negative. Thus, in BLM v. Carlo, *supra*, we declared:

[W]e must note that the presumption of regularity has never proceeded on the assumption that errors are not made in the normal course of the administration of official functions. Indeed, it

is the recognition that errors can be made which renders the presumption rebuttable in the first instance. Instead, the presumption proceeds from recognition that the procedural safeguards under which an agency generally operates in fulfilling its statutory duties will support an inference, in any specific case, that the agency properly discharged its responsibilities therein. This is not to say that a situation could never arise in which a complaining party could establish either that the general procedures followed were so susceptible to error that no inference of correct handling could properly arise or that the manifest record of specific error establishes that, regardless of procedural safeguards theoretically in place, in practice the level of error requires the abandonment of any inference of regularity. However, Carlo's showing herein, which merely establishes that a high volume of applications were filed with BIA in 1971 and that some errors did, in fact, occur in the handling of these applications, fails to establish that either situation obtained. In short, Carlo has provided a clearly insufficient basis upon which to predicate abandonment of the presumption of regularity with respect to the handling of Native allotment applications by either BLM or BIA. [Footnote omitted.]

133 IBLA at 210. The evidence presented in the instant case is exactly the same as that presented in Carlo and we reiterate and reaffirm the conclusions reached therein on this question. ^{3/} Thus, Judge Sweitzer correctly held that it was appellant's affirmative burden to establish both that he had timely transmitted and that BIA had received his application for the second 80-acre parcel located on the Black River Slough.

As noted above, Judge Sweitzer concluded, based on an express credibility finding, that appellant had timely completed and mailed to BIA an application for the parcel in question. Not only are conclusions of fact based on the credibility findings of an administrative law judge deserving of considerable weight (see BLM v. Carlo, *supra*; Yankee Gulch Joint Venture v. BLM, 113 IBLA 106, 135 (1990)), but we must also agree that there is substantial evidence in the record supporting this finding. We disagree, however, with Judge Sweitzer's subsequent determination that the record is devoid of evidence supporting a finding that BIA actually received this second application. Indeed, as we shall explain, we believe that a review of the evidence in light of Judge Sweitzer's express credibility findings

^{3/} Indeed, a reading of the Mattice deposition (Exh. F), while corroborative of the high volume of applications filed immediately prior to the adoption of ANCSA, provides absolutely no support for appellant's assertion that the process was "riddled with error and demonstrated irregularity" (SOR at 19). On the contrary, the Mattice deposition is testimony to the considerable efforts expended by the employees of the BIA in the face of a voluminous case load.

establishes, as appellant was required to, that it is more likely than not that BIA actually received the second application.

Appellant suggests that when he submitted his subsequent request that the land adjacent to the Sheenjek River be dropped from Parcel B and that a second 80-acre parcel on Black River Slough be substituted, BIA removed the original Parcel B as he requested but, because it erroneously assumed that the 80-acre parcel he described in his second request was the same as that sought as Parcel A of the original application, simply discarded the new Parcel B. BLM, for its part, dismisses appellant's scenario as mere inferential evidence which is insufficient to constitute the "independent corroborative evidence" required to overcome the presumption of regularity (Answer at 6). We believe that BLM's argument is doubly-flawed.

First of all, as we recently explained in BLM v. Carlo, *supra*, there is no absolute requirement that independent corroboration must be presented in order to overcome the presumption of regularity. Rather, as we noted therein, while the absence of any corroboration may weaken the evidentiary weight which might be accorded to an applicant's assertions, situations could nevertheless exist in which, assuming an administrative law judge found the applicant to be credible, the presumption was overcome without independent corroboration. Id. at 210-11.

We recognize, of course, that, insofar as the issue of receipt by BIA of the application for a second 80-acre parcel is concerned, there must be some independent corroboration since appellant cannot testify that BIA received his application, only that he mailed it. The problem with BLM's and, to a lesser extent, Judge Sweitzer's position is that it misses the point that there is independent corroboration in the record establishing that BIA received the second application, viz., the absence of any Parcel B. In this regard, the fact which we believe is of critical importance in determining whether or not the second application was received is that Judge Sweitzer concluded that appellant had included two discrete applications for two parcels of land (one on Black River Slough and the other on the Sheenjek River) in his original submission to BIA. That this submission was received is not open to dispute since BIA transmitted the application for Parcel A (Black River Slough) to BLM. The question, then, becomes what happened to Parcel B?

Once one starts from the premise that BIA received applications for two separate parcels but only transmitted one to BLM, there is no longer any question whether an error was made by BIA. That is established. The sole issue is whether BIA lost the original Parcel B or, as appellant suggests, it properly discarded that document as appellant requested but erroneously failed to include the new description on Black River Slough.

The first scenario requires the commission of two separate errors: an error by BIA and an independent error by either appellant in addressing his second submission (unlikely because of the then-ongoing relationship between RurALCAP and BIA) or the Postal Service in delivering it.

The second scenario, advocated by appellant, requires only a single error to explain what transpired, an error which, considering the unquestioned volume of applications which BIA received, can certainly not be ruled out. ^{4/} While evidence supporting this last scenario is admittedly circumstantial and relies on likely inferences, we believe that the circumstances surrounding this case warrant weighing this evidence in appellant's favor. Cf. State of Alaska, 131 IBLA 121, 124 (1994) (finding circumstantial evidence sufficient to support a conclusion that a Native allotment application was timely received by BIA despite a date-stamp to the contrary).

We therefore conclude that, while certainty can clearly not be achieved, it is more likely than not that BIA received appellant's second description for Parcel B and then erroneously assumed that it was duplicative of the description for Parcel A. Accordingly, we reverse Judge Sweitzer's conclusion that appellant failed to preponderate in showing that the application for a second 80-acre parcel adjacent to Black River Slough was timely received by BIA.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Sweitzer's decision is reversed and appellant's Native allotment application for a second 80-acre parcel on the Black River Slough as described in BLM's field report is reinstated and remanded to BLM for further action.

James L. Burski
Administrative Judge

I concur.

James L. Bymes
Chief Administrative Judge

^{4/} BLM argues that under BIA procedures, BIA would not have substituted a second description for one earlier filed since BIA functioned merely "as a conduit from the Natives to BLM" (Answer at 11). The deposition of William Mattice, however, who was the Realty Officer for the Fairbanks BIA office, totally belies this assertion. Thus, Mattice repeatedly described the efforts which he took to correct entries on submitted application forms that he viewed as problematic, efforts which included returning the form to the Native Allotment applicant for revision. See, e.g., Exh. F at 34, 39, 48, 78, 98-99.

