

ARTHUR JOHN

IBLA 2001-29

Decided December 3, 2003

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native Allotment application F-91054, Parcel A.

Set aside and referred for a hearing.

1. Alaska: Alaska Native Claims Settlement Act--Alaska: Native Allotments--Alaska Native Claims Settlement Act: Administrative Procedure: Applications--Applications and Entries: Filing

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: Harold J. Curran, Esq., Anchorage, Alaska, for appellant; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Arthur John has appealed the September 19, 2000, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting Parcel A of his Native allotment application F-91054 on the basis that the evidence was insufficient to show that a Native allotment application for Parcel A had been timely filed with the Department of the Interior on or before December 18, 1971.

By memorandum dated November 29, 1993, which was received by BLM on January 21, 1994, the Tanana Chiefs Conference, Inc. (Tanana Chiefs), forwarded a reconstructed Native allotment application for John; John's affidavit, dated May 15,

1989; the affidavit of Edward Isaac, a former employee of the Bureau of Indian Affairs (BIA), dated November 22, 1993; and two sets of copies of maps (designated M, O, P, W, and X). The memorandum stated that, according to John's affidavit, he first applied for a Native allotment in the 1960's,^{1/} that he applied again later for three parcels, and that he filed his second application with a white man and possibly Isaac, who worked for BIA at the time. According to the memorandum, Isaac's affidavit stated that he remembered going to Tanacross in October and December 1970 and taking John's application. The memorandum also included a statement from the Superintendent, Fairbanks Agency, BIA, signed on January 14, 1994, concurring that John's application had been filed "prior to December 18, 1971."

In the reconstructed application executed by John on May 15, 1989, and certified by BIA on January 14, 1994, John alleged use and occupancy of three parcels of land: Parcel A, containing 40 acres within sec. 12, T. 19 N., R. 10 E., Copper River Meridian (CRM); Parcel B, embracing 80 acres within secs. 28 and 29, T. 19 N., R. 12 E., CRM; and Parcel C, encompassing 40 acres within sec. 6, T. 20 N., R. 10 E., CRM. John stated that he used (1) Parcel A from the 1950's to the present during the months of May and June and in the "Fall time" for trapping and fishing; (2) Parcel B from the 1950's to the present in the "Fall time" for hunting and trapping and in the "winter time" for trapping; and (3) Parcel C from the 1950's to the present in September for fishing and from 1956 to the present during the months of February, March, and April for trapping, hunting, and fishing. He responded to the question on the application "From what date have you occupied the land applied for?" by responding: "early, 1950's." He listed "Periods of Actual Residence on the Land" as "1950's" beginning in February and ending in April. He stated that he kept dogs on Parcel A, and he listed improvements as "old fish racks" and "camping - cleared area."

In his May 15, 1989, affidavit supporting his reconstructed application, John stated, in relevant part, that:

I first applied for my native allotment in the 1960's when we could only apply for one place. Then when they said we could apply for separate parcels I applied for three parcels for a total of 160 acres.

^{1/} The memorandum also states that a copy of a Sept. 11, 1964, letter from BIA to John with instructions for completing his application was attached to the memorandum. Although that letter does not appear in the case file forwarded to us by BLM, counsel for John submitted a copy of that letter, which is addressed to "John Arthur," as an exhibit to John's Statement of Reasons (SOR). See SOR, Exh. C.

I gave my application to a white man. There was a meeting, I think Eddie Isaac was helping people file too.

Parcel A of my allotment is on the winter trail to Mansfield on a little lake. I use this parcel A for trapping. I fish in Little Fish Creek. I camp under the hill there. I started using this land since the early 1950s. I used to drive dog teams and later use snowmachines. I applied for 40 acres. It is described as sec. 12, T. 19N., R. 10 E., CRM.

* * * * *

On Parcel A there [are] old fish racks and dog barns.

(John Affidavit at 1-2.) ^{2/}

In his November 22, 1993, affidavit, Isaac stated that he worked in the Realty Department of BIA from September through December 15 or 20, 1970, when he started working at Eielson Air Force Base, and that his duties, which included drafting maps and taking Native allotment applications, required him to travel to Tanacross twice. He described the process used to complete the applications as follows:

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. Few of them got mixed acres like 1 acres and other sizes. They pointed on the map and I wrote their name. I was, and still am, very familiar with the land all around Tanacross.

Attached is a list of applications I remember taking. The applications I took I brought them to the BIA office and we were supposed to give description and draft maps. At that time I was called back to work at Eielson. I told Ralph Solomon, Kathy Adams and Bill Mattice that I didn't finish with the descriptions. I told them they need

^{2/} The case file also contains an undated and unnotarized "Affidavit" signed by John which, among other things, states that "Mark Henry and lot of guys at the meeting" saw him apply for his allotment.

to finish it. After that Ralph Solomon and Kathy Adams were to complete the applications. * * *.

Attached are 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.

(Isaac Affidavit at 1-2.) John's application was included in the attached list but the entry for Parcel A of that application contained a mark resembling a "y?" in the column for handwriting identification.^{3/} Map P appended to the reconstructed application depicted the location of a 160-acre allotment, designated by the numeral 4, which the legend identified as that of "John Arthur."^{4/}

By notice dated May 10, 1994, BLM deemed John's application for Parcels B and C to be timely filed, citing the depiction of those parcels, with John's name written next to them, on the copies of the original quadrangle maps and Isaac's identification of the notations on the maps as his handwriting.^{5/} BLM indicated that John's application for Parcel A would be adjudicated in the near future.

By letter dated May 18, 1995, BLM advised Tanana Chiefs that it intended to deny John's application for parcel A, among others, for lack of evidence supporting the timely filing of the application, and that a decision on this issue would be forthcoming.

In its September 19, 2000, decision, BLM rejected John's application for Parcel A. After describing BIA's administrative practices for processing Native allotment applications taken in Tanacross prior to the filing deadline, including BIA's

^{3/} The explanation at bottom of that column list indicated that an "x" represented Isaac's identification of the handwriting as his and a "y" symbolized Mattice's acknowledgment of the handwriting.

^{4/} It appears that this map was created in the 1960's since a copy of it was appended to a Sept. 11 1964, letter from BIA to Gaither Paul concerning the location of Paul's Native allotment which was labeled with the numeral 3 on the map. See SOR, Exh. A.

^{5/} BLM also noted that because the lands in Parcels B and C had been conveyed to the State of Alaska, the application for those parcels would be adjudicated pursuant to the procedures established for implementation of the court's decision in Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979).

usual routine of attaching to the application a copy of the master quadrangle map depicting the allotment prior to submission to BLM, and the history of John's allotment application, BLM determined that the evidence did not support John's assertion that his application for Parcel A had been timely filed.

BLM provided three reasons for its conclusion: First, unlike Parcels B and C of John's application, Parcel A was not depicted on the copies of the master quadrangle maps submitted by Tanana Chiefs; second, neither Isaac nor Mattice identified his handwritten notations in association with Parcel A; and third, Parcel A was not delineated on the copies of the master quadrangle maps attached to the timely applications for two other Native allotments (F-1655, Parcel C, and F-4944, Parcel C) in the same township and range as Parcel A.^{6/} Given the absence of independent corroborating evidence establishing that his Native allotment application was actually received by a Departmental office on or before December 18, 1971, BLM concluded that the affidavits attesting to a timely filing and the evidence compiled by Tanana Chiefs did not establish that Parcel A of John's Native allotment application had been timely filed with the Department. Citing its lack of authority to consider an untimely application, BLM rejected John's application for Parcel A.

On appeal, counsel for John argues that Isaac's affirmation that, as a BIA officer, he remembers accepting a Native allotment application for parcel A from John in 1970 establishes that John's application for parcel A was timely filed. Citing the Horton Memorandum,^{7/} counsel maintains that Isaac's affidavit satisfies the

^{6/} BLM explained that, in addition to the portrayal of a Native allotment on the master quadrangle map and the identification of the handwriting on the map, it also accepted the depiction of the allotment on copies of the master quadrangle maps attached to other Native allotment applications, which had been timely filed, as substantive proof that an application for the allotment was timely filed.

^{7/} In a memorandum to the Director, BLM, dated October 18, 1973, Assistant Secretary Horton discussed section 18 of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617 (2000):

“This phrase [pending before the Department on December 18, 1971] is interpreted as meaning that an application for a Native allotment must have been on file in any bureau, division, or agency of the Department of the Interior on or before December 18, 1971. The Department has no authority to consider any application not filed with any bureau, division, or agency of the Department of the Interior on or before said date. Evidence of pendency before the Department of the Interior on or before December 18, 1971, shall be satisfied by any bureau, agency or division time
(continued...)

requirements established in that memorandum. Counsel further contends that additional evidence in the record confirms that John filed for Parcel A before December 18, 1971. In support of this contention, he cites a map attached to an unsigned September 11, 1964, letter from BIA to Gaither Paul (Map P) which delineates four allotments, one of which (number 4) overlaps the location of Parcel A and is ascribed to “John Arthur,” an apparent transposition of Arthur John’s name (SOR, Exh. A). Counsel also adverts to a September 11, 1964, letter from BIA to “John Arthur” appending “John Arthur’s” unsigned Native allotment application for 160 acres and requesting “Mr. Arthur” to either correct the location of the allotment on the enclosed map,^{8/} or complete the designated portions of the application, sign it, and return it to BIA. (SOR, Exh. C.) According to counsel, John never received this misaddressed letter and therefore never withdrew his application for Parcel A.

Counsel contends that Isaac’s affidavit, Map P, BIA’s 1964 letter to “John Arthur,” and BIA’s Fairbanks Agency Superintendent’s consequent January 14, 1994, concurrence that the application for parcel A was timely filed with BIA render it more likely than not that Paul’s application was pending before the Department on December 18, 1971. Alternatively, counsel submits that John has presented sufficient information to establish the existence of a material question of fact concerning the timeliness of his application for Parcel A and thus to warrant a hearing on that issue.

In its answer, BLM argues that the evidence in the record is not sufficient to show that a Native application for Parcel A was timely filed with the Department. BLM contends that affidavits attesting to timely filing standing alone do not suffice to establish such filing but must be supported by independent corroborating evidence, evidence totally lacking in this case. BLM cites the presumption of regularity which supports the official acts of public officers in the proper discharge of their duties and asserts that neither John’s nor Isaac’s affidavit overcomes this presumption. BLM maintains that the absence of John’s name and Parcel A on the applicable quadrangle

^{7/} (continued...)

stamp, the affidavit of any bureau, division or agency officer that he received said application on or before December 18, 1971, and may also include an affidavit executed by the area director of BIA stating that all applications transferred to BLM from BIA were filed with BIA on or before December 18, 1971. [Emphasis in original.]”

See Katmailand, Inc., 77 IBLA 347, 353-54 (1983).

^{8/} Although the letter refers to an enclosed map showing the location of the allotment, that map is not appended to the copy of the letter provided by John’s counsel.

maps fatally undermines his claim that the application was timely. BLM denies that the additional evidence provided by John suffices to establish that John filed a timely application for Parcel A, contending that, to the contrary, the fact that John never received BIA's September 11, 1964, letter supports the conclusion that he did not timely apply because if he had already submitted an application for that parcel, BIA would not have needed to send him a letter asking him to complete and sign the attached application. BLM further asserts that John is not entitled to a hearing because none of the affidavits overcomes the critical fact that neither John's name nor Parcel A appears on the quadrangle maps and thus they do not raise a question of fact as to the timeliness of his application for Parcel A.

[1] The Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), authorized the Secretary of the Interior to allot up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Native Alaskan Indian, Aleut, or Eskimo, 21 years old or the head of a family, upon satisfactory proof of substantially continuous use and occupancy of the land for a 5-year period. That Act was repealed by section 18 of ANCSA, 43 U.S.C. § 1617 (2000), with a savings provision for applications pending before the Department on December 18, 1971. If an application was not pending before the Department on that date, BLM has no authority to grant the applicant's requested Native allotment. See Gaither Paul, 160 IBLA 77, 83 (2003); Mitchell Allen, 117 IBLA 330, 336 (1991).

BLM determined that no application for Parcel A was pending before the Department on December 18, 1971. John maintains, however, that he originally filed a Native allotment application for one 160-acre parcel in the 1960's and that upon subsequently learning that he could apply for more than one parcel, he submitted an application for three separate parcels to a "white man" at a meeting at which Isaac was helping people file also. John relies on his and Isaac's affidavits as proof of his timely filing. We have long held that "affidavits attesting to timely filing, standing alone, are not sufficient to establish such filing. There must be independent corroborating evidence that the Native allotment application was actually received." Heirs of Linda Anelon, 101 IBLA 333, 337 (1988); see also Alice D. Brean, 159 IBLA 310, 315 (2003); Alice Thompson, 149 IBLA 98, 102 (1999).

None of the indicia accepted by BLM as confirmation of timely filing, as outlined in its decision, is present here: John's parcel A is not depicted on the applicable master quadrangle map nor is his name written on that map; neither Isaac nor Mattice unambiguously identified his handwriting on the map in reference to John's Parcel A; and John's Parcel A is not denoted on the master quadrangle maps for other timely Native allotment applications for land in the same area. While the September 11, 1964, letter from BIA to "John Arthur" with the attached unsigned

Native allotment application for “John Arthur” and Map P appended to BIA’s September 11, 1964, letter to Gaither Paul depicting “John Arthur’s” 160-acre allotment could be interpreted as indications that John did, in fact, at least attempt to apply for an allotment in the 1960’s, their ambiguities preclude them from justifying a finding that John’s Native application was timely filed. We therefore agree with BLM that the evidence currently in the record is insufficient to support John’s claim that his application for Parcel A was timely filed.

Our inquiry does not end there, however, because we find that John’s and Isaac’s affidavits suffice by themselves to raise a question of fact as to whether the application for Parcel A was timely filed. See Heirs of Linda Anelon, 101 IBLA at 337. We base this conclusion on the fact that, accepting the truth of the affidavits, as we must do in determining whether there is a question of fact, the affidavits affirmatively and unambiguously state that the application was filed with BIA prior to December 18, 1971.^{2/} In contrast, BLM’s position finds some support in the presumption of regularity which relies on the absence of the application from the record as proof that the application was not timely filed. Heirs of Linda Anelon, 101 IBLA at 337-338; see also Alice Thompson, 149 IBLA at 103. BIA’s September 11, 1964, letters and attachments, including Map P and the unsigned Native allotment application for “John Arthur” further cloud the matter. Thus, a factual question clearly exists as to whether John’s application for Parcel A was pending before the Department on December 18, 1971. Heirs of Linda Anelon, 101 IBLA at 338.

When disputed issues of material fact exist regarding whether a Native allotment application was timely filed, BLM must normally afford the applicant the opportunity for a hearing before rejecting the application, regardless of whether the applicant has submitted corroborative statements. See, e.g., Timothy Afcan, 157 IBLA 210, 220-222 (2002), and cases cited; Mitchell Allen, *supra*; Donald Peter, 107 IBLA 272, 276 (1989); William Carlo, Jr., 104 IBLA 277, 282 (1988); Heirs of Linda Anelon, 101 IBLA at 337-38. The right to a hearing is not absolute, however, and a Native allotment application may be rejected without a hearing when, assuming the truth of the relevant facts supporting the application, the application is deficient as a matter of law. Boy Dexter Ogle, 140 IBLA 362, 372 (1997), and cases cited. In this case, as noted above, the affidavits support the timely filing of John’s

^{2/} The fact that the affidavits in this case unequivocally support the timely filing of the application distinguishes this case from the situation in Gaither Paul where Paul himself submitted contradictory evidence undermining his assertion that his application was pending before the Department on Dec. 18, 1971. See 160 IBLA at 84.

Native allotment application for Parcel A and there is no apparent legal deficiency. Accordingly, we conclude that a hearing is warranted in this case.

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 for further action consistent with this decision.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge