

LUCILLE M. FREDERICK

IBLA 72-80

Decided March 8, 1973

Appeal from the decision of the Alaska State Office rejecting appellant's application to purchase headquarters site A-062230. Hearing conducted and recommended decision authorized by Administrative Law Judge L. K. Luoma.

Reversed, recommended decision adopted, case remanded.

Alaska: Headquarters Sites -- Equitable Adjudication: Generally

Where the claimant of a headquarters site alleges the timely filing of an application to purchase and a petition for survey, and such allegation is found worthy of belief despite the absence of any record of the filing, and where her failure to tender the filing fee is satisfactorily explained as being the result of ignorance or mistake within the ambit of 43 CFR 1871.1-1 and there is no indication of bad faith, equitable adjudication will be afforded on the basis of substantial compliance with all other requirements of the law and regulations.

APPEARANCES: Douglas Bailey, Esq., Anchorage, Alaska, for the appellant, James R. Mothershead, Esq., Assistant Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY MR. STUEBING

This case involves the appeal of Lucille M. Frederick, locator of a headquarters site in Alaska pursuant to 43 U.S.C. § 687(a) (1970). Appellant's case record of the location was closed by the Alaska State Office because the statutory life of the entry had expired and there was nothing of record in that office to show that she had filed her application to purchase the site during the term of the entry.

Appellant maintains that she did in fact make a timely visit to the Anchorage Land Office where she was waited upon by an employee to whom she indicated her desire to apply to purchase and to petition for survey. She maintains that she was given a form by this employee which she completed on the spot and handed to the employee before departing. She did not pay the \$10 filing fee, she says, because

she was not aware that it was required, and she was not so informed. She asserts that the site is extensively improved, involving considerable effort and expense, and is a necessary adjunct to her business.

The Land Office has no record of the visit or the alleged filing.

By our decision of May 16, 1972, 6 IBLA 47, this Board ordered that a hearing be held to adduce evidence as to whether the purchase application was filed, and, if so, whether nonpayment of the filing fee is satisfactorily explained as being the result of ignorance or mistake within the ambit of 43 CFR 1871.1-1.

The hearing was held on July 21, 1972, before Administrative Law Judge L. K. Luoma, who thereafter submitted the record there made to this Board, together with his recommended decision. On review, we conclude that the Judge's recommended decision reflects an accurate analysis of the evidence and the applicable law and reaches an appropriate conclusion.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the recommended decision of the Administrative Law Judge, hereto appended, is adopted as the decision of this Board. Favorable action by the Bureau of Land Management is conditioned upon its ultimate determination that the appellant has substantially complied with all of the other requirements of the applicable law and regulations.

Edward W. Steubing, Member

I concur:

Anne Poindexter Lewis, Member.

I dissent:

Martin Ritvo, Member.

RECOMMENDED DECISION

LUCILLE M. FREDERICK,	:	ANCHORAGE A-062230
Appellant	:	
	:	Application to Purchase
	:	Headquarters Site.
	:	Involving approximately
	:	five acres situated in
	:	Sec. 1, T. 7 N., R. 10
	:	E., CRM, Alaska.

Background

Pursuant to the Act of March 3, 1927, 44 Stat. 1364, as amended, 43 U.S.C. § 687(a), et seq., (1970), Appellant, on March 9, 1965, filed a notice of location of a headquarters site claim and, on August 23, 1971, filed an application to purchase the claim. The application to purchase was rejected and reinstatement of the entry denied by decision of the Alaska State Office, Bureau of Land Management, dated September 9, 1971, on the ground that it was not filed within five years after the filing of the notice of location, as prescribed by the statute and the implementing regulation, 43 CFR 2563.1-1(c). The decision

also states that all unreserved public lands in Alaska, including the land embraced within Appellant's claim, were withdrawn from all forms of appropriation and disposition under the public land laws pursuant to Public Land Order 4582 dated January 17, 1969, as amended and modified by Public Land Order 4962 dated December 8, 1970, and Public Land Order 5081 dated June 17, 1971. Accordingly, the decision held that since the Appellant's application to purchase was filed subsequent to the date of withdrawal, it must be rejected and request for reinstatement must be denied.

The decision makes reference to Appellant's contention that she had actually filed an earlier application, as follows:

Mrs. Frederick states that to the best of her knowledge, she filed an application to purchase and a petition for survey in approximately October 1969. However, she failed to substantiate this claim. There is no record of any such document in the land office nor is there record of any receipt issued for the required \$10 filing fee.

Unless the applicant submits proof to support her contention that she filed a timely application to purchase, it must be presumed that it was never received in the land office. Such proof could consist of a copy of the pertinent Bureau of Land Management receipt for the \$ 10 service fee, her canceled check or other similar type document.

The decision was appealed to the Board of Land Appeals, with a request for a hearing.

In her reasons for appeal, Appellant states that she filed a petition for survey and application to purchase on a visit to the State Office in October 1969, well within the 5-year period. According to Appellant, a young lady in the office gave her the appropriate forms which she thereupon completed and returned. The young lady did not ask for a filing fee and the fee admittedly was not paid. Appellant went on to state that she returned to the office in July 1971 to inquire about the status of the application and was informed that her case had been closed. (Adverse to her application.) This revelation prompted her to file the application to purchase dated August 23, 1971, which was rejected as not timely.

The Board, by opinion dated May 16, 1972 (6 IBLA 47), remanded the case for hearing and said:

A factual dispute exists as to whether appellant filed her application to purchase and petition to survey within the time limit. Since appellant's case hinges on this threshold issue, it is necessary to resolve the factual question before considering the merits of the case.

...

Accordingly, the case will be referred to a hearing examiner to adduce evidence as to whether the purchase application was filed as alleged, and, if so, whether non-payment of the filing fee at the time of filing is satisfactorily explained as being the result of ignorance or mistake within the ambit of 43 CFR 1871.1-1. The examiner will submit the record and proposed findings of fact to the Board. 43 CFR 4.439 (1972).

## Equitable Adjudication

The failure to file a timely application to purchase a headquarters site does not necessarily result in mandatory rejection. Where it appears that a claimant has substantially complied with the requirements of the law, but has failed through an error arising out of ignorance, accident or mistake, to file an application for patent within the 5-year statutory period, equitable relief may be afforded to consider the claim on its merits, 43 U.S.C. § 1161-1164 (1970); 43 CFR 1871.1. However, this relief was not available at the time of the State Office decision on September 9, 1971, because the lands had been previously withdrawn by the Public Land Orders cited in the decision. This impediment to consideration of Appellant's application under the principles of equitable adjudication was subsequently removed by the enactment by Congress of the Alaska Native Claims Settlement Act of December 18, 1971 (85 Stat. 688), which terminated the withdrawal. Section 22(b) of that Act provides:

The Secretary is directed to promptly issue patents to all persons who have made a lawful entry on the public lands in compliance with the public land laws for the purpose of gaining title to homesteads, headquarters sites, trade and manufacturing sites, or small tract sites (43 U.S.C. 682), and who have fulfilled all requirements of the law

prerequisite to obtaining a patent. Any person who has made a lawful entry prior to August 31, 1971, for any of the foregoing purposes shall be protected in his right of use and occupancy until all the requirements of law for a patent have been met even though the lands involved have been reserved or withdrawn in accordance with Public Land Order 4582, as amended, or the withdrawal provisions of Public Land Order 4582, as amended, or the withdrawal provisions of this Act: Provided, That occupancy must have been maintained in accordance with the appropriate public land law: Provided further, That any person who entered on public lands in violation of Public Land Order 4582, as amended, shall gain no rights.

Following passage of the above Act the Board of Land Appeals has ruled in at least four cases, involving factual situations quite similar to Appellant's, that untimely applications for patent could be considered favorably under the principles of equitable adjudication. Richard Lee Farrens, 7 IBLA 133 (August 25, 1972); Alvin R. Aspelund, 7 IBLA 165 (August 31, 1972); Carla D. Botner, 7 IBLA 335 (September 26, 1972); Beverly J. Hayes, 8 IBLA 287 (December 6, 1972).

Accordingly, based upon the foregoing decisions and the submissions made by Appellant, it would appear that she has met the requirements for consideration of her application for patent under the principles of equitable adjudication.

## Hearing

On July 21, 1972, prior to the date of issuance of any of the decisions cited above, a hearing was held in Anchorage, Alaska, to adduce evidence on two issues:

1. Whether Appellant in fact filed an application to purchase and petition to survey within the 5-year period, and if so;
  
2. Whether non-payment of the filing fee can be satisfactorily explained as being the result of ignorance or mistake.

At the hearing the Bureau of Land Management (BLM) was represented by James R. Mothershead, Esq., Office of the Solicitor, Department of the Interior, Anchorage, Alaska, and Appellant was represented by Douglas B. Baily, Esq., of Matthews, Dunn & Baily, Anchorage, Alaska.

Appellant, Mrs. Frederick, testified, in essence, as follows: that on June 6, 1960, her husband filed for a headquarters site for sport fishing purposes on the same five acres of land involved in the instant proceeding (Tr. 19-20); that in 1965 he was unable to purchase the site for lack of funds (Tr. 65); that she then filed the notice of location dated March 9, 1965 (Tr. 66); that in 1964 or 1965 she and her husband began bringing sports fishermen to the site where they provided them with living

and boating facilities on a commercial basis (Tr. 21-23); that in 1969 she and her husband built a lodge at mile 28 1/2 on the Nabesna Road which she operates commercially as a restaurant, bar, service station, and lodging facility (Tr. 35); that the headquarters site, which is located on Copper Lake some 10 air miles distant, is used commercially in conjunction with the lodge as a fishing site (Tr. 35, Ex. 29); that during the summer fishing season customers are transported from the lodge to the headquarters site by float plane (Tr. 36); that in approximately October 1969 she went to the BLM office in Anchorage and was advised by a young girl to file an application to purchase and request for survey, the latter to cost about \$ 2,000 and to be completed within about two years (Tr. 40-41); that she never gave a thought to paying the \$10.00 filing fee since it was not brought up or requested by the young lady. "I always figure that when I walk into the office they tell me what to do and I do accordingly." (Tr. 77-78); that at the time she was ready, willing and able to pay the \$10.00 filing fee, if asked (Tr. 97-98); that subsequent to completing and returning the printed form given her by the young lady she went to a girl friend's house in Anchorage and announced that she had just spent \$2,000 in filing for the survey on the site at Copper Lake (Tr. 43, 70); that

following this she and her husband have continued operating the fishing site and have made substantial improvements thereto, including the addition of two log cabins (Tr. 45-46, 51); that in December 1970 they purchased, at a cost of \$ 14,000, five acres of land adjacent to the lodge which is used as a float plane base for transporting customers to the headquarters site (Tr. 47-49; Ex. 25); that in July 1971 she again visited the BLM Land Office to check on the request for survey and was told that her case had been closed. This was her first knowledge that the October 1969 application was not in her file (Tr. 56-58); that she thereupon refiled the application (Tr. 58; Ex. 28); that the improvements and expenditures made on the site following the October 1969 visit to the Land Office were made in the belief that the application to purchase and request for survey had been accomplished (Tr. 58-59); and that she was well aware of the 5-year requirement to perfect the claim (Tr. 67).

Mrs. Louise R. Maciejewski attested to the conversation held with Appellant sometime in October 1969. Her testimony was:

Q. There has been some testimony here today concerning a trip to Anchorage that Mrs. Frederick made during October of

1969 - did you have any occasion to be present in Anchorage during October of 1969 and have any association or conversation with Mrs. Frederick?

- A. Well I live in Anchorage, I was living in Anchorage at the time. She came to my home that day - I can't at this time remember the exact time or exact date, I had no reason to try to remember, but she came in and had a big smile on her face and said "well, I finally did it" - and I said "what do you mean" and she said "I just spent \$ 2,000.00" - I just kind of looked and I said "for what" and she said "I filed on Copper Lake". I smiled and said "oh, you did" and this type of thing - and I said "that ought to make Richard happy" (I'm referring to her husband) - and she said "yes". Then she sat down and we had coffee - and from there on we probably discussed, you know, this thing and that thing. I knew she had talked about it and the time was drawing near for it. We're all very fond of Copper Lake and -- (Tr. 113-114)

She also testified about Appellant's visit to Anchorage in July 1971, as follows:

- Q. Can you tell us, did you at some subsequent time learn that there was a problem or a cloud on Mrs. Frederick's application or final completion of her paper work on Copper Lake?
- A. Yes, very definitely. When her son came back from Viet Nam last July she came in (I believe it was last July) - and said she was going to go down - she said she hadn't heard anything as to when they were going to come for survey. So she made a point to go down that day (I believe it was that day) and check into it -- 'down' - I should say come into town to do this and this is

when she came back -- I know we very definitely tried to keep it quiet because we were very upset and shook-up over the fact that there was no record of it. So this is when we started doing a little research ourselves, as much as we could.

- Q. Was that the first that you learned there might be any problem at all concerning the Copper Lake site, approximately the summer of 1971?
- A. Yes, that was last year, last summer. (Tr. 114-115)
- Q. How did you become aware of her difficulty that she became aware of last July?
- A. She came to my house and told me - after she came back from here, from this building, from the BLM.
- Q. From the BLM Land Office?
- A. Yes.
- Q. What did she indicate was the nature of the difficulty?
- A. She said - let me think here -- she said she went to find out -- she hadn't heard anything on the survey and that the girl at the desk or whatever - had told her the case was close [sic]. I was very astounded myself and I said "what do you mean, closed, how could it be" and she said "I don't know but that's what she told me - something about she couldn't find the paper that I'd filed". Then we had quite a discussion, I can't remember verbatim what we said, like I said, I had no idea I'd have to remember anything like that, so I can't recall everything. I do know though that we were quite disturbed and upset over the fact and wanted to know what happened. (Tr. 116-117)

In endeavoring to show that Appellant is probably mistaken in her belief that she filled out the application to purchase and the request for survey in October 1969, the BLM presented the testimony of several witnesses.

Mrs. Valerie Berg, Chief of Public Service in the Land Office since 1967, testified: that her work is performed in the so-called public room of the Land Office whose function is to make records available to the public, furnish regulations and appropriate forms, and to answer inquiries (Tr. 129); that members of the public desiring to file applications in regard to public lands are informed that it is their own responsibility to fill out the necessary documents and file them at the receiving window where they are time-receipted (Tr. 130-131); that any required filing fees are accepted and receipted by the receiving clerk at that time; that filings are not accepted in any other fashion or by other personnel in the public room (Tr. 131-132); that Public Land Order 4582, effective January 17, 1969, withdrew all open lands in Alaska from entry and had the effect of greatly reducing filings in the public room in 1969 (Tr. 134); that beginning in 1966 a standard form Application to Purchase Headquarters Site And - If Unsurveyed - Petition for Survey (Ex. D) was

provided for filings but its use was discontinued prior to October 1969; that in October 1969 applicants were simply given a circular and asked to provide the prescribed information in letter form of their own making (Tr. 135); that while the form was no longer being distributed in 1969, it is possible that blank forms may yet have been in the office (Tr. 138); that she knew Appellant by sight, having talked to her a number of times in connection with a Trade and Manufacturing Site, but does not recall talking to her about the Headquarters Site (Tr. 144); that she, along with Dorothy Preston, the receiving clerk; Virginia Main and Mary Reed, the public contact specialists; were the persons who had earlier stood up in the hearing room for the purpose of having Appellant point out if any of them was the person who allegedly supplied Appellant with the document about which she testified (Tr. 147); (Appellant testified that none of the three waited on her in October 1969 (Tr. 107)); that she, Mary Reed and Virginia Main were the people who would have been on duty to serve Appellant in October 1969 (Tr. 148); and that she is 41 years of age (Tr. 194).

Mrs. Mary Reed testified, in part, as follows: that in October 1969 she worked every day at the counter in the public room waiting on members of the public (Tr. 158);

that she does not remember seeing Appellant there at that time (Tr. 158); that during that period of time Mrs. Berg and Mrs. Main also worked in the public room (Tr. 159); that they also had several typists who worked there from time to time, possibly during October 1969, and who very occasionally waited on members of the public (Tr. 159-161); and that she is 49 years of age (Tr. 162).

Mrs. Virginia Lee Main testified, in part, as follows: that since November 1968 she has worked at the public room counter serving the public (Tr. 164); that sometime since that date she had occasion to serve Appellant in connection with the Headquarters Site (Tr. 164); that Appellant had come into the office prior to the expiration date of the entry and asked what she should then do (Tr. 165); that she advised her to write a letter as illustrated in the circular (Tr. 165); that she does not know whether Appellant completed the task in the Land Office; that she cannot remember if the old application forms were still on hand (Tr. 166); that Appellant did not return a filing to her (Tr. 167); that at the time there were others in addition to Mrs. Berg, Mrs. Reed and herself who periodically waited on the public (Tr. 170); that about a year later Appellant came into the Land Office to inquire how her case was coming along and upon pulling the file they discovered the case had been closed (Tr. 174-175); that Appellant's reaction to this was one of horror,

shock and surprise (Tr. 176); that typists who worked in the office were in their early twenties (Tr. 180); and that she is 48 years of age (Tr. 168).

### Findings

Appellant was unwavering in her position that in October 1969 she was in the public room of the Land Office and received from a young lady, in her early twenties, an application form for purchase and request for survey which she filled out and handed back to the same young lady. She concedes that she did not go to the receiving window to pay the filing fee because the young lady did not request it. Casting a shadow of doubt upon the trustworthiness of that position is the BLM's evidence which establishes that in October 1969 transactions of this nature with the public were almost exclusively handled by one of three female employees, all in their forties and none of whom recall processing Appellant's application; that as a matter of policy, use of a standard form application had been discontinued; and that Appellant's purported application has never been found. However, the BLM's evidence also leaves open the possibility that the events as described by Appellant could have occurred. There was at least one typist in the office who was in her early twenties and who occasionally would give assistance

to the public. Furthermore, some of the discontinued application forms were still in the office and one could have been handed to Appellant by an inexperienced employee.

The fact that the evidence presented by the BLM does not foreclose the possibility that the events, indeed, occurred as related by Appellant lends plausibility and credence to her testimony. Certainly her acts in making additional improvements to the site and investing a substantial amount of money in additional land in furtherance of the overall business venture do not comport with the notion that she was fearful of shortly losing possession of the site. Nor, does the expression of horror, shock and surprise upon learning that the case file had been closed indicate advance knowledge of failure to have accomplished the requirements of the law.

Giving all this due consideration and having observed the demeanor of Appellant and her supporting witness on the witness stand under oath, I accept their testimony as a truthful accounting of what took place in the public room of the Land Office on the critical day and find that the application was filed as alleged. What became of the document cannot be determined. Her accounting of why the filing fee was not paid is a satisfactory explanation to entitle invocation of equitable adjudication.

ORDER

The case is remanded to the BLM Land Office for consideration of the application to purchase.

L. K. Luoma  
Administrative Law Judge

Dated February 9, 1973

10 IBLA 102

## DISSENTING OPINION BY MR. RITVO

I find that I cannot agree with the decision of the majority to accept the Administrative Law Judge's findings that Mrs. Frederick filed an application to purchase her headquarters site in October 1969 and her failure to pay the filing fee was satisfactorily explained.

The Government's witnesses described the Land Office's normal practice for handling such applications, what personnel ordinarily dealt with the public, and how filing fees were paid. In October of 1969, no form was required, but applicants were instructed to submit a letter setting out the information required by the pertinent circular, the personnel at the counter where public inquiries were answered did not accept filings, and the public was instructed to file documents at the receiving window where the filing fees are accepted and receipts issued.

While the United States offered a great deal of persuasive testimony to support its contention that it was highly unlikely that events transpired as Mrs. Frederick testified, the testimony of Mrs. Main, one of the employees whose duty it was to work at the counter serving the public, is particularly convincing. She testified that she spoke to Mrs. Frederick about her headquarters site when Mrs. Frederick came into the office prior to its expiration date to inquire as to what she should do, that Mrs. Main advised her to write a letter as described in the current circular, and that Mrs. Frederick did not return a filing to her.

Mrs. Frederick stated she was in the office only once in connection with her headquarters site and admitted talking to Mrs. Main, but said that conversation related to her trade and manufacturing site. Mrs. Main, however, was certain that the interview dealt with the headquarters site. The trade and manufacturing site purchase application was filed on August 22, 1968, several months before Mrs. Main began to wait on the public.

Mrs. Berg, another land office employee who served the public, testified that she had dealt with Mrs. Frederick several times about the trade and manufacturing site. Another land office employee, Mrs. Teclaw, stated that persons with papers to file were directed to the receiving window and that it would have been a very unusual occurrence for an employee to accept a filing at the counter.

This testimony presents a strong case that the events occurred as the witnesses stated and that Mrs. Frederick's dealings with the land office followed the usual course.

To adopt Mrs. Frederick's version we must accept several departures from the regular procedures, i.e.:

1. Mrs. Frederick spoke to an inexperienced employee who was not authorized to deal with the public.
2. She was given a form not in current use.
3. The employee accepted the filing at the counter rather than sending Mrs. Frederick to the receiving window.
4. That Mrs. Frederick filed, and the employee accepted, a filing of only an original although the regulation required a filing in duplicate.
5. That no reference was made to the necessity of paying a filing fee.

In the face of the strong testimony that Mrs. Frederick was dealt with in accordance with the ordinary procedure, the likelihood of all these variations having transpired is highly unlikely.

Furthermore, there are other troubling aspects. Mrs. Frederick had no copy of the form she said she filed, yet she had had other experience with the land office and had kept her own records of filings and payments. It is unlikely that she would have maintained no record of so significant a document, especially when she had been informed that if she did not file an application to purchase, her rights to acquire the site would terminate. Furthermore, the form she would have been given, if she had been given one, had on the reverse side just above the line for signature:

9. I enclose a \$10.00 filing fee.

Immediately below came the line for applicant's signature.

Thus again we come upon a contradiction in appellant's version. If she had filled out this form, she must have been aware of the necessity for a filing fee. If she was, then it is extremely unlikely she would have left the form with the employee at the counter, since payments were made at the receiving window.

Finally assuming that she did file the application as she alleged, it wipes out any justification for not having made the payment.

The appellant bears the burden of proof of establishing that the filing took place as she testified. The Government cannot, of

course, prove that events could not have possibly fallen out as appellant says they did. It can only offer evidence that it is highly unlikely that they could have.

I find that the Government's evidence easily establishes by the preponderance of the evidence that the highly improbable events testified to by appellant did not occur.

Therefore, I would affirm the decision of the land office rejecting her application to purchase.

