

NICKY NICKOLI

IBLA 76-491

Decided October 17, 1979

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA-7429.

Dismissed.

1. Appeals -- Rules of Practice: Appeals: Notice of Appeal -- Rules of Practice: Appeals: Timely Filing

Where a person moves from his record address without leaving a forwarding address, and a copy of a BLM decision affecting him is mailed to this last address of record and returned by the postal service as underdeliverable, the decision is considered to have been "served" him as of the date it is returned to BLM. 43 CFR 4.401(c). Accordingly, the deadline for filing a notice of appeal is 30 days after the date the decision is returned to BLM.

2. Appeals -- Rules of Practice: Appeals: Notice of Appeal -- Rules of Practice: Appeals: Timely Filing

BLM may not properly waive the untimely filing of a notice of appeal under 43 CFR 4.401(a) where it is clear that the notice of appeal was not transmitted to BLM until after the end of the time in which it was required to be filed.

3. Appeals -- Rules of Practice: Appeals: Notice of Appeal -- Rules of Practice: Appeals: Timely Filing

Where a notice of appeal is not timely filed, it must be dismissed.

## 4. Alaska: Native Allotments

An application pending on Dec. 18, 1971, which is amended after this date to embrace different lands not described in the original application in order to avoid conflicts with earlier claims must be rejected as untimely.

## 5. Alaska: Native Allotments -- Settlements on Public Lands -- Withdrawals and Reservations: Generally -- Withdrawals and Reservations -- Effect of

A Native allotment applicant, who was 5 years old at the time when the land was withdrawn from all forms of appropriation, is properly deemed to be incapable as a matter of law of having exerted independent use and occupancy of the land to the exclusion of others prior to the withdrawal, and consequently the allotment application is properly rejected.

## 6. Administrative Procedure: Hearings -- Evidence Generally -- Hearings

Where legal conclusions are reached in an appellate decision upon undisputed facts, and there has been no proffer of further facts which could compel different legal conclusions, no useful purpose would be served for a hearing, and a request therefor is properly denied.

APPEARANCES: Frederick Torrasi, Esq., Alaska Legal Services, Fairbanks, Alaska, for appellant. 1/

## OPINION BY ADMINISTRATIVE JUDGE STUEBING

On March 2, 1972, the Bureau of Indian Affairs (BIA) filed a Native allotment application on behalf of Nicky Nickoli, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed in 1971 subject to pending applications), for two parcels of land in Alaska. Nickoli alleged that he occupied the land from 1937 to the present, that he had erected a "tent camp" there, and that he used the lands seasonally for hunting, fishing, and trapping from 1937 to the present.

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1/ See n.2, below.

Parcel "A" of these lands was subject to previous applications by Jenny N. Tibbets (A-061592) and Irene Johnson (AA-7770). On May 1, 1973, BIA filed an amended application in which parcel "A" was redescribed so that it embraced other lands than those covered by these previous applications.

On March 14, 1974, BLM wrote to Nickoli requesting that he supply additional information in order to cure apparent discrepancies in his application. This letter was returned to BLM unclaimed, with the notation that Nickoli was no longer at this address of record. On May 12, 1975, BLM attempted to contact Nickoli by certified mail regarding his apparent failure to have substantially continuously used and occupied the land, and his apparent failure to have used the lands in parcel "B" for 5 years before the withdrawal of the lands in 1942. This letter was also returned by the postal service as unforwardable.

On December 30, 1975, BLM issued a decision rejecting Nickoli's application and attempted to provide him with a copy by certified mail. Once again, on January 2, 1976, this decision was returned to BLM by the postal service, owing to its inability to forward it to Nickoli's correct address. On February 9, 1976, Carmen L. Massey, Esq., of Alaska Legal Services Corp., mailed a notice of appeal of this decision, purportedly on Nickoli's behalf, 2/ which notice arrived at BLM on February 10, 1976.

[1] The notice of appeal purportedly filed in Nickoli's (appellant's) behalf was untimely, and the appeal therefore must be dismissed. Under 43 CFR 4.411(a), a notice of appeal is required to be filed in the office of the officer who made the decision within 30 days after the person taking the appeal is "served" with the decision from which he is appealing. Section 4.401(c) of 43 CFR provides that wherever the regulations in subpart E, including 43 CFR 4.411(a), require that a copy of a document be "served" a person, personal service may be proved by a showing that the document could

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2/ The circumstances in this matter cast serious doubt on whether Nickoli actually retained and authorized Alaska Legal Services Corp. (ALS) to bring this appeal. Nickoli probably did not have actual notice that this decision had been made, as he did not receive his copy of it, owing to his failure to keep his record address current or to advise the postal service of his forwarding address, and it is therefore unlikely that he even knew that he could bring an appeal, let alone that he authorized ALS to do so. ALS did not know Nickoli's current address, as it used his outdated address on the notice of appeal, and so had no way to reach him in order to gain his authority to file the appeal. While these circumstances present the question of whether the present appeal is invalid owing to the probable absence of Nickoli's retention of ALS to pursue it, it is unnecessary to resolve this question in view of our holding here.

not be delivered to such person at his record address because he had moved therefrom without leaving a forwarding address, and that such document is considered to have been served at the time of return by the post office of an undelivered registered or certified letter. <sup>3/</sup>

Appellant failed to apprise BLM of his new address. <sup>4/</sup> BLM's mailing a copy of its decision to his last address of record gave appellant constructive notice of the decision, and he was constructively served with his copy of this decision as of January 2, 1976, the date the postal service returned the decision to BLM as undeliverable. Accordingly, appellant had until February 2, 1976, 30 days following this date of service, to file a notice of appeal with BLM. 43 CFR 4.411(a).

[2] Appellant's notice of appeal was untimely, as it was not filed with BLM until February 10, 1976, 8 days after the deadline of receipt. BLM did not declare the filing untimely, believing that the untimeliness was waived per 43 CFR 4.401(a). However, under the terms of this section, in order for the delay in filing to be excused, it is essential that it appear that the document in question was transmitted or probably transmitted to BLM before the end of the period in which it was required to be filed. See United States v. Becker, 33 IBLA 301, 304 (1978). Here, it is clear that the document was transmitted on February 9, 1976, the date of the postmark on the envelope bearing the notice of appeal, 7 days after the end of the time in which it was required to be filed. Thus, 43 CFR 4.401(a) is of no benefit to appellant, and BLM incorrectly applied it here.

[3] Where a notice of appeal is not timely filed, it must be dismissed, as the Board is without jurisdiction to consider it. 43 CFR 4.411(b); Ralph Dickinson, 39 IBLA 258, 263 (1979); Jerrold R. Cooley, 32 IBLA 387, 388 (1977); Lavonne E. Grewell, 23 IBLA 190, 191 (1976).

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<sup>3/</sup> The general rules governing BLM practice provide that the requirement for mailing is met when BLM deposits a communication in the mail, having addressed it to the addressee's last address of record, and that the addressee will be deemed to have received it if an offer of delivery is made, but cannot be consummated at this last address because the addressee moved therefrom without leaving a forwarding address, where the offer of delivery is substantiated by postal authorities. 43 CFR 1810.2. In public land matters, certified mail may be utilized except where registered mail is specifically required by statute. 43 CFR 1821.2-4.

<sup>4/</sup> One who deals with the Department has an obligation to keep it informed of an address at which communications from the Department will reach him, and where he fails to provide a correct, current address of record, he must bear the consequences of this failure. James W. Heyer, 2 IBLA 318, 320 (1971); Kewanee Oil Company, 67 I.D. 305, 307 (1960); see 43 CFR 4.401(c), 1810.2.

[4] We note that, were we to consider the merits of the appeal, we would hold as a matter of law that appellant's application was properly denied. As to parcel "A", it was improper for appellant to amend his application in May 1973 by substituting an entirely different parcel for the one included in his original application. Section 18 of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. § 1617 (1976), repealed the Act of May 17, 1906, supra. However, applications pending on December 18, 1971, were allowed to proceed. Any applications filed after this date are untimely and may not be considered. Susie Ondola, 17 IBLA 359, 360 (1974). It is equally true that applications which are amended after December 18, 1971, to embrace different lands not described in an application pending on this date must be rejected as untimely. Andrew Petla, 43 IBLA 186 (1979); Raymond Paneak, 19 IBLA 68, 69 (1975); George Ondola, 17 IBLA 363, 365 (1974).

These holdings are consistent with the policy announced by the Assistant Secretary, Land and Water Resources, on October 18, 1973: "All amendments to allotment applications must be closely scrutinized. Amendments which result in the relocation of the allotment will not be accepted unless it appears that the original descriptions arose from the inability to properly identify the site on protraction diagrams." (Emphasis added.) Such is not the case here. Rather, it is apparent from the record that Nickoli was attempting to avoid conflicts with earlier, and probably superior, claims to the land originally applied for, and that he elected to shift his application to lands not previously selected. In such circumstances, his amended application must be rejected as untimely.

[5] It is also clear as a matter of law that appellant's application could not be allowed as to parcel "B" of the lands in question. The lands in parcel "B" were withdrawn from selection on March 4, 1942, by Exec. Order No. 9085, for use as an administrative site. This withdrawal has been continued under the provisions of Public Land Order 5149. The record indicates that appellant was born on January 4, 1937. Thus, appellant was but 5 years of age, at the oldest, during the 5 years prior to the withdrawal of the land. Even assuming the truth of appellant's allegations of use from 1937 onwards, he cannot prevail, as a Native allotment applicant who was 5 years old at the time when the land was withdrawn from appropriation is incapable, as a matter of law, of having exerted independent use and occupancy of the land to the exclusion of others prior to the withdrawal of the land. This is because occupancy by a youth of such tender years does not constitute the type of substantial, independent use and occupancy to the exclusion of others required by the Native Allotment Act, supra. Floyd L. Anderson, Sr., 41 IBLA 280, 86 I.D. 345, 347 (1979), and cases cited.

[6] Appellant also argues that Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), provides that appellant's application cannot be

finally denied without a hearing on the application. Where, such as here, legal conclusions may be based on undisputed facts, and there has been no proffer of evidence to compel different legal conclusions, a request for a hearing is properly denied. Norma E. Richards, 43 IBLA 288 (1979); Andrew Petla, supra; Floyd L. Anderson, 41 IBLA 280, 286, 86 I.D. 345, 348 (1979).

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 dismissed.

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Edward W. Stuebing  
Administrative Judge

We concur:

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Frederick Fishman  
Administrative Judge

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Douglas E. Henriques  
Administrative Judge

