

THOMAS JOHNSON

IBLA 82-1166

Decided October 31, 1983

Appeal from decision of the Alaska State Office, Bureau of Land Management, approving certain lands for village selection by the Solomon Village Corporation. F-19570 A.

Affirmed.

1. Evidence: Presumptions--Evidence: Sufficiency--Rules of Practice: Evidence

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, the presumption is not overcome merely by the submission of an affidavit that the document was mailed. Rather, BLM's denial of its receipt can be rebutted only by substantial countervailing evidence, as an instrument is not "filed" by depositing it in the mail, but only when it is delivered to and received by the proper BLM office.

2. Alaska: Generally--Alaska: Possessory Rights--Alaska: Trade and Manufacturing Sites

A claimant's occupancy of a trade and manufacturing site prior to a withdrawal does not establish a "valid existing right" excepted from Native village selection where credit for his occupancy prior to the selection cannot be given under the Act of Apr. 29, 1950, because the claimant initiated his occupancy more than 90 days prior to the filing of his notice with BLM and did not file a notice of location with BLM prior to the selection.

APPEARANCES: Thomas Johnson, pro se; Robert Charles Babson, Esq., Office of the Regional Solicitor, Alaska Region, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Thomas Johnson has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated March 24, 1982, which approved a selection application, F-19570-A, filed by the Native village of Solomon for conveyance of approximately 67,000 acres to the village corporation pursuant

to section 14(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601, 1611 (1976). ^{1/}

Appellant has appealed this decision alleging entitlement to a trade and manufacturing (T&M) site, within the limits of the conveyance, pursuant to the provisions of section 1328(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), Act of December 2, 1980, 94 Stat. 2371, 2489, 16 U.S.C. § 3215(a) (Supp. V 1981). This provided in pertinent part:

Subject to valid existing rights, all applications made pursuant to the Acts * * * [of] May 14, 1898 (30 Stat. 413) * * * which were filed with the Department of the Interior within the time provided by applicable law, and which describe land in Alaska that was available for entry under the aforementioned statutes when such entry occurred, are hereby approved on the one hundred and eightieth day following the effective date of this Act, except where provided otherwise by paragraph (3) or (4) of this subsection, or where the land description of the entry must be adjusted pursuant to subsection (b) of this section, in which cases approval pursuant to the terms of this subsection shall be effective at the time the adjustment becomes final.

The facts of record show that appellant filed a notice of settlement or occupancy in the Fairbanks District Office dated March 12, 1981, claiming occupancy for a T&M site of 80 acres described by metes and bounds on the Solomon River at Penny Creek. Appellant alleges occupancy from July of 1966 for the purposes of slaughtering and handling of reindeer. Appellant alleges that the 1981 application is a copy of an original application filed with BLM in 1966. He indicates the form was sent in many years ago "but somewhere it must have been lost or misplaced." In support of his contention that he filed such application, he has submitted to BLM copies of correspondence from the Bethel Area Field Office, BIA, dated September 6, 1966, transmitting to him three copies of an application to be filed with the BLM in Fairbanks.

By letter of February 19, 1981, BLM informed appellant that his 1966 notice of location had never been received and was not pending on the date ANILCA was enacted stating:

We have searched our land records and computer file of applicants and have been unable to discover a trade and manufacturing site application filed by you on the Solomon River at Penny Creek. Since it seems you never filed your application with BLM, we believe you cannot obtain ownership to your trade and manufacturing site under PL 96-487.

Subsequently, BLM did not accept the application for filing and returned the filing fee March 16, 1981, by a notice of return remittance pointing out that the land on Penny Creek was within the Solomon Village withdrawal and was not open to filing. BLM then approved the Native selection application March 24, 1982.

^{1/} This appeal was originally filed with the Alaska Native Claims Appeal Board April 27, 1982, docketed AN CAB VLS 82-10. The case was transferred to this Board Aug. 3, 1982, and docketed as IBLA 82-1166.

Appellant has taken this appeal alleging that he had filed for this T&M site in two places in the Department (with BIA and BLM) back in 1966. Although appellant acknowledges that BLM in Fairbanks never received his first application, he submits a letter dated April 30, 1982, from the Realty Officer, Nome Agency, BIA, indicating that: "According to our records, this application was on file approximately 1966, and for some unknown reason, never proceeded to completion."

Appellant alleges a timely filing with BLM in 1966, but has provided no evidence with the appeal to substantiate that the documents were, in fact, received by BLM. The records of the BIA only reflect that they assisted in the preparation of an application to be filed with BLM at a later date. In fact, however, the BIA records do not contain a completed application. The document on record there is neither signed nor dated, nor are any of the other items filled in except for appellant's name and address and the description of the land sought.

[1] When an appellant asserts that a document was sent to BLM, and BLM has no record of having received it, the presumption of regularity militates against a finding that it was, in fact, received by BLM and then lost through mishandling without any record or recollection of it by BLM personnel. Glen W. Gallagher, 66 IBLA 49 (1982). This Board has held repeatedly that while the presumption of regularity may be rebutted by probative evidence (see, e.g., Bruce L. Baker, 55 IBLA 55 (1981); L. E. Garrison, 52 IBLA 131 (1981)), the presumption is not overcome merely by a self-serving affidavit that the missing document was mailed to BLM. James Heldman, 65 IBLA 180 (1982); Bernard S. Storper, 60 IBLA 67 (1981); H. S. Rademacher, 58 IBLA 152, 88 I.D. 873 (1981); Metro Energy, Inc., 52 IBLA 369 (1981), and cases cited therein. Depositing a document in the mails does not constitute filing. 43 CFR 1821.2-2(f). Filing is accomplished only when a document is delivered to and received by the proper BLM office. Philip Cramer, 57 IBLA 386 (1981). Rebuttal of the presumption of official regularity entails the presentation of "substantial countervailing evidence." Stone v. Stone, 136 F.2d 761, 763 (D.C. Cir. 1943).

Under the circumstances, we cannot find that appellant has provided such evidence that he filed a completed application with either BIA or BLM in 1966.

[2] Appellant contends, in effect, that his occupancy and filing predates the Native village application and, therefore, the lands involved in his T&M site were excepted from the application as a "valid existing right." Unfortunately, we must conclude that appellant's occupancy did not qualify as a "valid existing right" where he failed to complete the filing requirements of the statute and the regulations. Under the Act of April 29, 1950, 43 U.S.C. § 687a-1 (1976), a T&M site claimant is required to file a notice of location of settlement in the appropriate land office within 90 days of initiation of the claim, failing in which the claimant "shall not be given credit for occupancy maintained in the claim" prior to filing a notice of location or application to purchase. Henrietta Roberts Vaden, 70 IBLA 171, 176 (1983). While the failure to notify BLM will not nullify a claim, it will prevent the claimant from obtaining any credit for his occupancy prior to a proper filing. 43 CFR 2562.1. Stuart Grant Ramsted, 55 IBLA 223 (1981); United States v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981).

In this case, although appellant claims occupancy from 1966, his duplicate application, filed March 1, 1981, was not actually received in the appropriate BLM land office within the time provided by the governing law. Appellant's contact with the BIA and his preliminary preparation of an application with that agency did not meet the filing requirements with BLM. Accordingly, BLM could not properly give appellant credit for any occupancy prior to 1981 and correctly refused to accept the application, as the land was not then available for appropriation or settlement as a T&M site. Similarly, it follows that appellant's T&M site could not automatically be legislatively approved by section 1328(a)(1) of ANILCA, supra, because the facts herein establish that the application was not filed until after ANILCA was adopted and, hence, the application could not have been legislatively approved.

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 affirmed.

James L. Burski
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Franklin D. Arness
Administrative Judge
Alternate Member

