

Appeals from decision of the Alaska State Office, Bureau of Land Management, approving Native allotment application. AA-7604.

Set aside and remanded.

1. Alaska: Native Allotments--Contests and Protests: Generally--Rules of Practice: Government Contests

Where conflicting evidence existing in the case file and submitted on appeal concerning a Native allotment applicant's use and occupancy of the land raises factual issues, the Bureau of Land Management should initiate a Government contest so that the factual issues can be resolved at a hearing.

2. Alaska: Native Allotments--Applications and Entries: Filing

The Department of the Interior is authorized to approve only Native allotment applications that were pending before the Department on or before Dec. 18, 1971. Where the evidence shows that an application was delivered to the Bureau of Indian Affairs before that date but was not transmitted to the Bureau of Land Management until after that date, the application was timely. Where there are factual questions concerning the pendency of an application they must be resolved at a hearing.

3. Alaska: Native Allotments--Applications and Entries: Filing

A Native allotment application was pending before the Department of the Interior on Dec. 18, 1971, if it was filed in any bureau, division, or agency of the Department on or before that date. The Bureau of Land Management is the proper agency to adjudicate all Native allotment applications, however.

4. Alaska: Native Allotments--Evidence: Sufficiency

An inheritable property right in an allotment is created only if an applicant fully complies with the requirements of the Native Allotment Act before his or her death. When an applicant has submitted evidence of the required use and occupancy of the allotment that is disputed during adjudication of the application, the applicant's heirs may properly submit additional evidence to support the applicant's claims.

5. Alaska: Native Allotments--Alaska: Shore Space Reserves and Restrictions

Under 43 CFR 2561.1(b), an application for a Native allotment that extends more than 160 rods along the shore of any navigable waters shall be considered a request for a waiver of the 160-rod limitation on such allotment. Upon a determination that such an allotment meets the requirements of the Native Allotment Act, BLM may either waive the limitation as provided by 43 CFR 2094.2(a) or decrease the size of the approved allotment.

APPEARANCES: J. L. McCarrey III, Esq., Anchorage, Alaska, for Katmailand, Inc.; Edward G. Burton, Esq., and Thomas E. Meacham, Esq., Anchorage, Alaska, for Wien Air Alaska, Inc., and Household-Alaska Properties, Inc.; John W. Burke III, Esq., Office of the Regional Solicitor, Department of the Interior, San Francisco, California, for the National Park Service; Tred Eyerly, Esq., and James D. Grandjean, Esq., Anchorage, Alaska, for Trefon Angasan, Sr.; Roger L. Hudson, Esq., Office of the Regional Solicitor, Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

By memorandum dated March 7, 1983, the Alaska State Office, Bureau of Land Management (BLM), notified the Bureau of Indian Affairs (BIA) that the Native allotment application of Palakia Melgenak, AA-7604, had met the use and occupancy requirements of the Native Allotment Act of 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970). 1/ Melgenak had claimed approximately 120 acres of land in sec. 6, T. 19 S., R. 39 W., Seward meridian, at the confluence of the Brooks River and Lake Naknek within Katmai National Park (Katmai), 2/ an area also now known as Brooks Camp. Katmailand, Inc.,

1/ Repealed subject to pending applications, section 18(a), Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1976).

2/ Katmai was established originally as a national monument by Presidential Proclamation No. 1487, Sept. 24, 1918 (40 Stat. 1855). Its boundaries were expanded by Proclamation No. 1950, Apr. 24, 1931 (47 Stat. 2453), to encompass the lands included in Native allotment application AA-7604 and by other later proclamations. Section 202, Alaska National Interest Lands Conservation Act (ANILCA), 94 Stat. 2382 (Dec. 2, 1980), further expanded Katmai and designated it a national park.

Wien Air Alaska, Inc., Household-Alaska Properties, Inc., and the National Park Service (NPS) (appellants) ^{3/} have appealed BLM's decision. Trefon Angasan, Sr., heir to Melgenak, ^{4/} and BLM (appellees) oppose the appeals.

Melgenak executed her allotment application on March 31, 1971, BIA certified it on April 10, 1972, and BLM received it on April 13, 1972. She claimed actual residence on the land from 1877 to 1913 and use and occupancy for berrypicking and fishing at least 3 months a year in the fall from 1914 through 1971. She added the following explanation in the space on the application for remarks to support her claim of substantially continuous use and occupancy for more than 5 years in compliance with the Native Allotment Act:

Used tents to live in or mud houses to put up fish. Had a log cabin in the vicinity of Brooks camp, which Wien Consolidated tore down to make more room for their tourist camp. Lived there for 36 yrs. until 1913, one year after the eruption of Mt. Katmai, when we were no longer able to support ourselves. Presently, we travel up there every year to put up fish, which is our custom. Wish to claim this land, which rightfully mine.

There is still one log cabin that is still standing, located on the south side of the river, near a small swampy lake. There are other ruins that are visible in that vicinity.

Melgenak died on February 19, 1972. In 1973 the Alaska Legal Services Corporation (ALSC), on behalf of her heir, sought to have a hearing to resolve any factual disputes as to the application. As a hearing was not promptly scheduled, ALSC obtained affidavits from a number of elderly individuals familiar with Melgenak and the area of her requested allotment and submitted them to BLM in support of application AA-7604. Included were the sworn statements of Elmer S. Harrop submitted October 25, 1973; Paul Chukan, submitted December 27, 1973; and Evan Olympic and Evdokia Ansaknok, submitted May 29, 1974.

In March 1973 NPS provided BLM with background information on Brooks Camp including a chronology of development in the area from 1950 to 1968 and details of its present status. In 1973, Brooks Camp served as the NPS summer headquarters, consisting of 11 buildings and 3 tent frames. It also had public campgrounds, including 3 shelters and a food cache, and concessioner facilities consisting of 15 buildings and 8 tent frames. There were two boat docks. NPS also submitted transcripts of recordings of interviews by staff of the University of Oregon done in 1961 with residents of the Mount Katmai area, including Melgenak, about the 1912 eruption of the mountain.

^{3/} The above-named corporations currently use and occupy portions of the land at issue under National Park Service Concession Contract CC-9100-1-0001.

^{4/} Angasan, Melgenak's grandnephew, was determined to be her sole heir following a probate hearing held by Hearings Division, Office of Hearings and Appeals, Department of the Interior, on Sept. 28, 1976. See Order Determining Heirs, dated Nov. 3, 1976, Angasan Response, Exh. 1.

A BLM field examination was made on July 1, 1975. In his report dated November 17, 1975, the examiner indicated that although Melgenak undoubtedly lived in the area and may have a claim, he could not conclude that the requirements of the Native Allotment Act had been met for the land identified in the application. The BLM Area and District Managers concurred in the report in March 1976.

By memorandum dated January 21, 1977, BLM notified BIA of the results of the field examination and its conclusion that Melgenak had not met the use and occupancy requirements of the Native Allotment Act. ^{5/} BLM then afforded BIA 60 days to submit additional information in support of Melgenak's claim. Although BIA did not submit further information, ALSC filed an extensive letter making both legal and factual arguments on behalf of Melgenak's heir. On March 31, 1977, BLM responded to ALSC that if all the information filed was still found to be insufficient, the case would be set for hearing.

No further action on the case appears from the file to have been taken until passage of ANILCA in 1980. ^{6/} Section 905(a)(4) of ANILCA, 43 U.S.C. § 1634(a)(4) (Supp. IV 1980), required adjudication of the application because the land is within the boundaries of a unit of the National Park System. By memorandum dated March 7, 1983, BLM informed BIA that Melgenak's application "has been adjudicated under the Act of May 17, 1906 * * * and has met the use and occupancy requirements of that Act and the subsequent Department regulations." There is no documentation in the case file explaining BLM's conclusion except a subsequent memorandum to the BLM Director dated March 24, 1983, and entitled "Alert of Native Allotment Approval for Lands Encompassing the NPS Headquarters Site in Katmai National Monument. It explained in part:

^{5/} This memorandum does not appear in the case file although it is referred to in a return memorandum from BIA requesting an extension of time to submit the additional information. The former memorandum is attached to NPS' response as exhibit D.

^{6/} The only exception to this is an April 4, 1977, memorandum from the Director of BLM to the Director of the Alaska State Office which reads:

"Subject: Native Allotment Application AA-7604

"This responds to your memorandum of the same subject, dated January 26, 1977.

"The requirement that 'no allotment application will be rejected on the basis of national or public need without prior concurrence of the Director' was not superseded by guidelines issued on October 18, 1973. Our concurrence is still required, if rejections are to be made on such a basis.

"The field report for the subject application and other material submitted clearly indicate that the applicant abandoned any claim to the land about 1912, and at the latest by 1950. Therefore, we recommend that the application be rejected primarily on the basis of abandonment and a lack of use and occupancy. Additionally, the information provided strongly supports the view that there is a national need or at the least a public need for the subject lands. If no evidence to the contrary is timely submitted, we recommend the application also be rejected on the basis that there is a national or public need for the lands. Our concurrence is herewith submitted."

The applicant's claimed use and occupancy, from birth in 1877, is supported by documentation in the case file (see attachment "A"). This shows continuous use from 1877 to 1913 and seasonal use till 1971 (the applicant died in 1972 at the age of 94). Adjudication of subject case established beyond a reasonable doubt that the applicant met the requirements of the 1906 Act and had perfected her claim long before the 1918 withdrawal of the Katmai National Monument.

Attachment A, which was captioned "Background Brief," recited a brief history of the case and provided parenthetical commentary on previous BLM actions and conclusions. It reads in part:

6. May 16, 1973 - Letter from Resource Area, Anchorage District Office, to Gilbert Blinn of the National Park Service, stating that allotment was in the process of being rejected on the basis of National Park Service information. (Rejection not accomplished, case file data supports approval).

7. November 17, 1975 - The Bureau of Land Management Field Report stating that applicant did not meet the requirement of the 1906 Act. (This conclusion is in variance of the factual data in the case file and current policy and procedure).

8. January 21, 1977 - Letter to the Bureau of Indian Affairs from the Chief, Land and Minerals Operations requesting additional information. The letter used abandonment and exclusive use as the reason for request. (The case file supports the applicant's claim and further protection is offered under Pence vs. Kleppe.)

9. March 2, 1977 - Alaska Legal Services Corporation filed a response on behalf of the deceased applicant per the above Bureau of Land Management request. (Response cites factual data in case file).

10. April 4, 1977 - Letter from Director, Bureau of Land Management, recommending rejection on abandonment in 1950. (This recommendation is not supported by case file - applicant perfected claim prior to 1918 and provided proof of use until 1971).

11. March 7, 1983 - Applicant was found under adjudication to meet the requirements of the 1906 Act, and approval given.

Before turning to the issues on appeal, we will address appellee Angasan's motion to strike certain evidence in the form of affidavits submitted by appellants in this appeal. In support of the motion, appellee cites the decision of this Board styled Alexandra Atchak, 23 IBLA 81 (1975), wherein we ruled that the Board "will not give favorable consideration to new or additional evidence submitted with an appeal from a rejection of a Native allotment application in the absence of a satisfactory showing why the evidence was not submitted to [BLM] within the period afforded the applicant

for the submission of such evidence." That decision deals specifically with the BLM practice of providing advance notice of deficiencies in an application to BIA and the applicant and affording a period of time in which BIA or the applicant may submit additional evidence to support the application before its rejection. This was the situation in early 1977 when BLM notified BIA of its proposed rejection of Melgenak's allotment application and ALSC representing Melgenak's heir submitted extensive arguments in support of the application. See NPS Response, Exh. D; letter dated Mar. 2, 1977, to BLM from ALSC. These circumstances are not present now as BLM issued a decision of approval without affording anyone affected a period of time to supply additional evidence. Furthermore, our review of the case file would suggest that appellants had no reason to believe that BLM would approve the application until it did and therefore appellants had no reason to know that their opposition to the allotment needed additional support.

As the Department's final review authority of the initial decision, this Board exercises "all the powers which [the Department] would have in making the initial decision." 5 U.S.C. § 557(b) (1976); 43 CFR 4.1. Among the Board's responsibilities is review of the factual as well as legal bases of an appealed decision. It would make no sense to rule that, even though the Board has the authority to review the factual basis of a decision and order fact-finding hearings under 43 CFR 4.415, an appellant may not present new evidence on appeal challenging that decision. ^{7/} Furthermore, under Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), issued after the Atchak decision, a Native allotment application may not be rejected absent a hearing on the facts. Contrary to appellants' response to the motion to strike, the applicant is not limited to the evidence presented with her application or within the 6-year time limitation as to so find would make the Pence hearing a hollow proceeding.

In their statements of reasons, appellants make six principal arguments:

1. The Melgenak allotment application was not filed timely.
2. The application was not filed in the proper office.
3. Melgenak had not fulfilled the requirements of the Native Allotment Act at her death.
4. The allotment violates the 160-rod shore space limitation of section 1 of the Act of May 14, 1898, 48 U.S.C. § 371 (1976), and the limitation may not be waived.
5. Melgenak had not met the requirement of substantially continuous use and occupancy of the land for 5 years.

^{7/} We note, however, that the Board has held that it will accept new evidence submitted on appeal following a fact-finding hearing only for the purpose of determining if the hearing should be reopened. United States v. Noss, 54 IBLA 355 (1981).

6. Even if the 5 years' use and occupancy were initially fulfilled by the applicant, the application fails because of a substantial period of nonuse since 1950.

Appellees have responded to each in detail.

[1] We have examined thoroughly the case file for allotment application AA-7604, and the briefs and supporting documentation submitted by the parties. In the absence of any analysis of the facts supporting BLM's decision in the case file, and in view of the conflicting evidence in the file as to Melgenak's use and occupancy of the land particularly since 1950 and the additional conflicting evidence presented by the parties on appeal, we have no alternative but to set aside BLM's decision and direct that contest proceedings pursuant to Pence v. Kleppe and the procedures established as a result of that decision be promptly initiated to determine Melgenak's entitlement to receive a patent. See Donald Peters, 26 IBLA 235, 83 I.D. 309, reaffirmed on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976), approved Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978). A copy of the contest complaint shall be served on the appellants herein which, upon the filing of a proper motion, shall be allowed to intervene. See State of Alaska, 28 IBLA 83, 89-90 (1976).

In addition, we will address those issues raised by appellants that would preclude approval of the allotment application as a matter of law were they substantiated by the record.

[2] Appellants urge that the Melgenak application was not filed on or before December 18, 1971, and therefore, was not timely because the earliest Department of the Interior date on the application is the BIA certification date of April 10, 1972. Appellees assert that the application was timely received by BIA on April 22, 1971.

Under section 18 of ANCSA, 43 U.S.C. § 1617(a) (1976), and section 905(a) of ANILCA, 43 U.S.C. § 1634(a) (Supp. IV 1980) the Department of the Interior is authorized to approve Native allotment applications that were pending before the Department on or before December 18, 1971. In a memorandum to the Director, BLM, dated October 18, 1973, Assistant Secretary Horton discussed section 18 of ANCSA:

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 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.]

We have repeatedly confirmed that filing with BIA on or before December 18, 1971, satisfied the requirement that an allotment application be pending before the Department on that date. E.g., Nora L. Sanford (On Reconsideration), 63 IBLA 335 (1982); Eleanor H. Wood, 46 IBLA 373 (1980); William Yurioff, 43 IBLA 14 (1979).

As appellants assert, the application in the case file was executed on March 31, 1971, but has no date stamp showing that it was before the Department until BIA certified it on April 10, 1972. The BLM date stamp shows receipt on April 13, 1972. There are also several documents in the file which BLM received on January 23, 1973, apparently from BIA, including a letter to the Superintendent, BIA, dated March 31, 1971. ^{8/} The letter states: "We, the undersigned, certify that Palakia Melgenak has occupied, marked and posted the land applied for as a Native allotment; and that this land is not claimed by any other Native; and is not an area of Native community use." In addition to Melgenak's mark, the letter was signed by Trefon Angasan, Sr., one of the witnesses on her application, and Paul Chukan. This letter reflects a BIA date stamp of April 22, 1971.

Appellees have presented copies of the BIA file copy of the application reflecting a date stamp of receipt on April 22, 1971. Ordinarily, in the absence of any facts showing that the BIA date stamp is incorrect, we would find such date stamp sufficient evidence of timely filing, Alyeska Pipeline Co., 52 IBLA 222, 224 (1981), and would do so in this case except for one discrepancy. The affidavit of Charles F. Bunch, a BIA realty officer, submitted by appellee Angasan, states that under BIA procedure, "[t]he original date-stamped application was forwarded to BLM and a thermofax copy kept for BIA files" (Angasan Response, Exh. 3, at 2). That cannot be the circumstances in this case as the application in the BLM file does not reflect the BIA date stamp. Further, the BIA file copy submitted in this appeal is not a copy of the same application form as is in the BLM file. While it appears likely that Melgenak did submit an allotment application to BIA before December 18, 1971, we direct that the parties address this discrepancy at the hearing held pursuant to the Government contest.

[3] Appellants' next argument is that the allotment application at issue was never filed "in the proper office which has jurisdiction over the

^{8/} Also included were Melgenak's death certificate, a map of the allotment area, a BIA certification dated Jan. 23, 1973, that Melgenak was the same person as Palikai Melognak, an inquiry dated Apr. 2, 1971, from the Rural Alaska Community Action Program requesting the status of the Melgenak application, and a copy of a handwritten note dated Mar. 27, 1972, from Lisa to Audrey stating, "This application looks ready -- can't see anything to write the applicant about. It was in [p]ending," and bearing the additional notation "OK to process."

lands" as required by 43 CFR 2561.1(a) 9/ because NPS exercises all management authority over Katmai. As appellee BLM suggests, this argument is first answered by noting that the Department accepted applications filed in any agency of the Department before December 18, 1971. See Nora L. Sanford (On Reconsideration), *supra*.

Appellants really argue that NPS, not BLM, should adjudicate this application. That is not correct. In 1971 43 CFR 2561.1(a) (1971) read somewhat differently. Instead of "proper office" it used the term "land office," which when referring to a federal office, is accepted to refer to a BLM office. BLM regulation, 43 CFR 1821.2-1(c) (1971) specified the "[l]ocation of the land offices and area of jurisdiction of each office." Furthermore, the regulations governing Native allotment applications have been part of the regulations of the Bureau of Land Management, formerly the General Land Office, since the original regulatory codifications in 1938. See 43 CFR Part 67 (1940). We find that all Native allotment applications are properly adjudicated by BLM. The current delegation of authority to BLM by the Secretary confirms that BLM is the agency designated to adjudicate Native allotment applications:

G. The Director, Bureau of Land Management, is authorized to exercise the authority of the Secretary of the Interior under the Alaska Native Claims Settlement Act of December 18, 1971 (P.L. 92-203, 85 Stat. 688), as amended, including authority to sign and execute easement agreements between the Department and the Alaska Native corporations. This authority does not include authority granted to the Assistant Secretary - Indian Affairs under 209 DM 8.

235 DM 1.1.

[4] Third, appellants urge that Melgenak had not fulfilled all requirements of the Native Allotment Act and application process prior to her death, and, therefore, there is no vested property right transferrable to her heir. Specifically, appellants assert that BIA had not properly certified the application, neither Melgenak nor BIA had filed proof of use and occupancy as required by 43 CFR 2561.2, and the application itself did not establish prima facie compliance with the Act and regulations because of various alleged irregularities.

We have held that the Native applicant, personally, must meet all of the requirements of the Native Allotment Act and that an inheritable property right in an allotment is created only if an applicant fully complies with all of those requirements before his or her death. Andrew Petla, 43 IBLA 186, 195 (1979); Arthur R. Martin, 41 IBLA 224 (1979); Louis P. Simpson, 20 IBLA 387 (1975); Larry W. Dirks, Sr., 14 IBLA 401 (1974). In this case, the

9/ The complete regulation reads: "(a) Applications for allotment properly and completely executed on a form approved by the Director, Bureau of Land Management, must be filed in the proper office which has jurisdiction over the lands."

question of whether Melgenak fulfilled the requirements of the Native Allotment Act cannot be fully answered until after a hearing has been held on the question of use and occupancy. We are not persuaded, however, that she failed to fulfill the requirements on the grounds identified by appellants. As appellees point out, the BIA certification was not a requirement that the applicant could have fulfilled or for which the applicant should be held responsible. See Herbert Herrmann, 45 IBLA 43, 46 (1980). We also find that there is no question as to what BIA was certifying. The regulation on certification in 43 CFR Part 2212 (1970) referred to on Melgenak's application form was the same as that in the recodified Part 2560. Compare 43 CFR 2212.9-3(d) (1970) with 43 CFR 2561.1(d) (1971). The fact that the form used by Melgenak, and presumably BIA, was out of date is not sufficient cause to reject the application where the applicant provided the information required by the current regulations.

The affidavits submitted by ALSC were not the proof of use and occupancy referred to by 43 CFR 2561.2 as appellants argue but rather were supplementary evidence to support Melgenak's claim of use and occupancy when it was called into question. As suggested by appellees, the BLM form (2212-3 (June 1966)) served as both the application and the evidence of occupancy when an applicant had completed 5 years' use and occupancy prior to submission of the application. ^{10/} Melgenak herself did submit the proof required by 43 CFR 2561.2 by certifying to the truthfulness of the statements on the form. The application shows a prima facie entitlement to an allotment. The sufficiency of her use and occupancy is a question to be resolved generally in the adjudication of the application and in this case at the hearing which may be pursued by her heir. See Thomas S. Thorson, Jr., 17 IBLA 326 (1974).

Finally, a legal description that is not wholly accurate is not fatal to the allotment application. This Board has noted in the past that such an application may be amended to reflect the original intent of the applicant, so long as the applicant has actually occupied the land and the amendment does not constitute a new application for additional land. Raymond Paneak, 19 IBLA 68 (1975). See also section 905(c) of ANILCA, 43 U.S.C. § 1634(c) (Supp. IV 1980). The alleged discrepancies in the factual statements,

^{10/} Prior to the existence of a "form approved by the Director [BLM]," 43 CFR 2212.9-2 (1965) described the required proof submission as follows:

"The showing of five years' use and occupancy may be submitted with the application for allotment if the applicant has then used and occupied the land for five years, or at any time after the filing of the application when the required showing can be made. The proof should give the name of the applicant, identify the application on which it is based, and appropriately describe the land involved. It should show the periods each year applicant has resided on the land; the amount of the land cultivated each year to garden or other crops; the amount of crops harvested each year; the number and kinds of domestic animals kept on the land by the applicant and the years they were kept there; the character and value of the improvements made by the applicant and when they were made; and the use, if any, to which the land has been put for fishing or trapping."

The information required is essentially the same as that now requested on the form.

including the beginning of Melgenak's period of occupancy, are not sufficient to support rejection of the application as not meeting the requirements of the Act. At best they raise factual issues which must be addressed at a hearing, and, in this case, ones with little relevancy as Melgenak's asserted use and occupancy was considerably longer than 5 years. Moreover, as appellees remind us, many of these applications were filled out by BIA and the applicant should not be held accountable for the possible typing errors of BIA. See Herbert Herrmann, supra.

[5] Next we turn to the question of whether approval of Melgenak's application violates the limitation that an entry extend no more than 160 rods along the shore of any navigable water. The applicable regulations in 43 CFR Subpart 2094 governing shore space provide in part:

§ 2094.0-3 Authority.

Section 1 of the Act of May 14, 1898 (30 Stat. 409) as amended by the Acts of March 3, 1903 (32 Stat. 1028) and August 3, 1955 (69 Stat. 444; 48 U.S.C. 371) provides that no entry shall be allowed extending more than 160 rods along the shore of any navigable water. * * *

§ 2094.0-5 Definitions.

The term "navigable waters" is defined in section 2 of the Act of May 14, 1898 (30 Stat. 409; 48 U.S.C. 411), "to include all tidal waters up to the line of ordinary high tide and all nontidal waters navigable in fact up to the line of ordinary highwater mark".

§ 2094.1 Methods of measuring; restrictions.

(a) In the consideration of applications to enter lands shown upon plats of public surveys in Alaska, as abutting upon navigable waters, the restriction as to length of claims shall be determined as follows: The length of the water front of a subdivision will be considered as represented by the longest straight-line distance between the shore corners of the tract, measured along lines parallel to the boundaries of the subdivision; and the sum of the distances of each subdivision of the application abutting on the water, so determined, shall be considered as the total shore length of the application. Where, so measured, the excess of shore length is greater than the deficiency would be if an end tract of tracts were eliminated, such tract or tracts shall be excluded, otherwise the application may be allowed if in other respects proper.

* * * * *

§ 2094.2 Waiver of 160-rod limitation.

(a) The Act of June 5, 1920 (41 Stat. 1059; 48 U.S.C. 372) provides that the Secretary of the Interior in his discretion, may upon application to enter or otherwise, waive the restriction that no entry shall be allowed extending more than 160 rods along the shore of any navigable waters as to such lands as he shall determine are not necessary for harborage, landing, and wharf purposes. * * *

(b) Except as to trade and manufacturing sites, and home and headquarters sites, any applications to enter and notices of settlements which cover lands extending more than 160 rods along the shore of any navigable water will be considered as a petition for waiver of the 160-rod limitation mentioned in paragraph (a) of this section, provided that it is accompanied by a showing that the lands are not necessary for harborage, landing and wharf purposes and that the public interests will not be injured by waiver of the limitation.

In addition, 43 CFR 2561.1(b) regarding Native allotment applications states: "(B) Any application for allotment of lands which extend more than 160 rods along the shore of any navigable waters shall be considered a request for waiver of the 160-rod limitation (see Part 2094 of this chapter)."

Appellants argue that the Brooks River and Lake Naknek are navigable in fact and that the limitation may not be waived because the shore is necessary for harborage, landing, and wharf purposes and has been used for such for many years. They point to the finding of the field examiner that the limitation cannot be waived (see Field Report at 2). Appellants (except NPS) also argue that Melgenak's application cannot be considered a request for a waiver because it was not accompanied by the appropriate showings and, therefore, the application must be rejected because it violates the 160-rod limitation.

Appellee Angasan responds that BLM had made no determination of the navigability of the Brooks River and, therefore, found that the field examiner's conclusion was not correct, referring the Board to an affidavit executed by a BLM adjudicator for submission in this appeal (see Angasan Response, Exh. 8). He argues further that even if the river is navigable, rejection of the application would not be proper, as BLM's policy is to readjust the boundaries of an allotment, if waiver is not appropriate.

Appellee BLM suggests that its approval of the application indicates that either the 160-rod limitation is not applicable because the body of water is not navigable or that the waiver was requested, deemed appropriate, and granted. BLM argues that its summary statement that the application meets the requirements of the Native Allotment Act and Departmental regulations must be given the presumption of regularity attendant official acts of public officers, placing on appellants the burden to show by clear and substantial evidence that such is not the case. BLM also urges that rejection

of an otherwise valid allotment would be inconsistent with the policies governing Native allotments and the shore space limitation, and that adjustment of the allotment boundaries would be the appropriate remedy if the limitation were found to be nonwaivable in this case. Finally, BLM points out that the Board may not rule against the allotment on factual grounds without a hearing on the issue.

At the outset we note that invocation by BLM of the presumption of regularity to support its conclusion of law is inappropriate and unnecessary. ^{11/} In an appeals proceeding, the appellant carries the burden of showing error. Nevertheless, the Secretary of the Interior, and this Board as the Secretary's delegate, have plenary authority to review de novo all official actions and to decide appeals from such actions on the basis of a preponderance of the evidence in cases involving substantive rights, or on the basis of public policy or public interest in cases involving the exercise of discretion. Where the Board perceives that a decision appealed from is in fact arbitrary and capricious, it will not be affirmed. In certain cases involving the judgment of agency personnel who have special authority and/or qualifications to make such decisions, the Board may accord considerable weight or deference to such decisions if they are supported by substantial evidence, but they may be overcome by a preponderance of countervailing evidence. United States Fish & Wildlife Service, 72 IBLA 218 (1983), and cases cited. As we previously noted, BLM's summary decision in this case is not supported in the record by any analysis of the facts on this issue, or any of the issues, and, we suggest, runs the risk on its face of being found arbitrary and capricious.

As to whether the application violated the 160-rod shore space limitation, we find initially that the question is not answered by the response that BLM has not made a navigability determination for the Brooks River, as such nondetermination does not make the river nonnavigable in fact. Absent a specific determination of nonnavigability, BLM's only recourse is to assume navigability and either waive the restriction on the basis provided in 43 CFR 2094.2 or limit the shore space approved for an allotment. Any other course may result in violation of the limitation.

Next we find that 43 CFR 2561.2(b) represents a determination by BLM that any application for a Native allotment, even in the absence of the showing required by 43 CFR 2094.2(b), will be considered a request for waiver of the 160-rod limitation.

^{11/} As we explained in United States v. Hess, 46 IBLA 1, 7-8 (1980):

"Generally speaking, a presumption is an inference of the existence or nonexistence of some fact which courts are required or permitted to draw from proof of other facts. * * *

"* * * '[C]reation of a presumption is inevitably designed to affect the burden of proof by shifting it from the party possessed of the procedural device to his adversary.' Brown v. Oklahoma Transport Co., 588 P.2d 595, 601 (Okl. App. 1978). The effect of this shift is that 'if proof of the basic facts are introduced into evidence, the presumed fact is also taken to be proved in the absence of evidence to the contrary.' State v. Jones, 88 N.M. 107, 537 P.2d 1006, 1009 (N.M. App. 1975). Accord, Connizzo v. General American Life Ins. Co., 520 S.W.2d 661, 665 (Mo. App. 1975)."

As suggested above the appropriate remedy for an entry that extends more than 160 rods along the shore of navigable water is not rejection of an otherwise valid allotment application but adjustment of the size and boundaries of the approved allotment. See 43 CFR 2094.1(a). The statute prohibits only allowance of an entry extending more than 160 rods. BLM is not required to approve an allotment as applied for but typically approves the largest amount of land for which the applicant has met the requirements of the Native Allotment Act and regulations. When that determination is made in this case, the question of compliance with the 160-rod limitation should be addressed according to the regulations and the guidelines presented here.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Alaska State Office is set aside and remanded for further action consistent with this opinion.

Will A. Irwin
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

