

Appeal from a decision of the Alaska State Office, Bureau of Land Management, canceling a trade and manufacturing site claim, F-19218.

Vacated and remanded.

1. Alaska: Generally -- Alaska: Possessory Rights -- Alaska: Trade and Manufacturing Sites -- Alaska National Interest Lands Conservation Act: Generally

Where a pending application for a trade and manufacturing site became approved by passage of sec. 1328 of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3215 (1982), other sections of the Act of May 14, 1898, as amended, 43 U.S.C. § 687a-687a-6 (1982), relating to payment of survey costs and purchase price remained in effect as to the application and satisfaction of these requirements is necessary before the land embraced by such an application can be patented.

2. Appeals -- Rules of Practice: Appeals: Dismissal -- Rules of Practice: Appeals: Timely Filing

A notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

3. Administrative Procedure: Adjudication -- Alaska: Trade and Manufacturing Sites -- Appeals -- Evidence: Sufficiency

Where an applicant for a trade and manufacturing site alleges that she timely mailed a notice of appeal of a decision setting forth estimated cost of survey but there is no evidence to indicate that it was ever received by the proper Bureau of Land Management office, the applicant must bear the consequences.

4. Equitable Adjudication: Generally -- Equitable Adjudication:
Substantial Compliance

Where the claimant of a trade and manufacturing site substantially complies with the requirements of the Act of May 14, 1898, as amended, 43 U.S.C. § 687a-687a-6 (1982), and regulations promulgated pursuant to that Act, equitable adjudication may be invoked; however, where a claimant fails to comply with a requirement which is unrelated to the Act of May 14, 1898, and is jurisdictional in nature, equitable adjudication cannot properly be invoked.

APPEARANCES: Craig J. Tillery, Esq., Anchorage, Alaska, for appellant; James R. Mothershead, Esq., Assistant Regional Solicitor, Anchorage, Alaska, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Donna J. Waidtlow appeals from a decision dated November 15, 1983, of the Alaska State Office, Bureau of Land Management (BLM), which canceled a trade and manufacturing (T&M) site claim.

On February 15, 1983, BLM had issued a decision to Waidtlow which provided that the land encompassed by her T&M site application was unsurveyed and that no further action could be taken to process the application until a deposit of \$4,100 was submitted to cover the estimated cost of executing the survey. Waidtlow was allowed 180 days within which to remit the required amount. The decision stated that failure to comply within 180 days, or to appeal within 30 days of receipt of the decision, would result in cancellation of the claim.

The November 15, 1983, decision, which is the subject of this appeal, states: "[t]he maximum allowable time having elapsed, without response or payment, your Trade and Manufacturing Site, F-19218 is hereby cancelled."

In her statement of reasons for appeal, Waidtlow states that she timely appealed the February 15, 1983, decision which required a survey deposit. Together with the statement of reasons she attached as exhibit A the rough draft of the appeal, together with affidavits from associates who had personal knowledge of her concern about the survey and who had been told that she had mailed a letter appealing the requirement (Exhs. B, C, and D). Waidtlow further states that the appeal should be considered timely filed under 43 CFR 4.411, or under the principle of equitable adjudication; and that she should be permitted to tender the survey deposit subsequent to the running of the 180-day time period.

The facts as set forth by counsel for Waidtlow are as follows:

Notice of location was originally filed for the claim, as a homestead, on July 17, 1972. Occupancy was claimed since July 5,

1972 and the location notice covered approximately 20 acres. Geological reports found that the land was valuable for geothermal purposes, but had no mineral value.

On May 18, 1977, a letter was sent to the applicant, informing her that final proof was due on July 16, 1977. Because of a notation during an interim field examination that Ms. Waidtlow may have wanted to relinquish the claim, a relinquishment form was enclosed. Since the claim was still classified as a homestead, the applicant was informed that no survey expense was required.

In response, the applicant submitted evidence on July 11, 1977 that she had built a cabin and cache and had been leasing it as a business. Ms. Waidtlow simultaneously filed an Application to Purchase Headquarters Site. She also filed a relinquishment form, relinquishing 15 acres of her "homestead" but retaining five acres.

The BLM issued a show cause notice on December 9, 1977. In that notice, the BLM stated that she had failed to show proof of appropriation prior to a withdrawal on March 28, 1974. The notice, treating the claim as one for a headquarters site, found that rental of the cabin was not sufficient to satisfy the requirements of law. Ms. Waidtlow was asked to submit additional proof.

On April 7, 1978, the applicant submitted a substantial amount of proof of her occupancy, demonstrating a continuous period of work improving and using the land from 1972 to the present. Further proof regarding her rental business was submitted. At that time, an application to purchase was filed for the land. Ms. Waidtlow stated in an accompanying note that since it had been brought to her attention that rental was not a valid use under the headquarters site requirements, she had decided to file the claim as a trade and manufacturing site. At this point, the BLM began to review the claim as one for a trade and manufacturing site.
[Footnote omitted.]

(Statement of Reasons at 2-3).

On September 15, 1982, BLM issued a land action decision document concerning the T&M site which concluded that Waidtlow had complied with the requirements of the laws and regulations leading to patent of a 5-acre T&M site surrounding her improvements and that the application was also approved under section 1328 of the Alaska National Interests Lands Conservation Act (ANILCA).

[1] 43 U.S.C. § 687a (1982), in part, provides:

Any citizen of the United States twenty-one years of age, or any association of such citizens, or any corporation

incorporated under the laws of the United States or of any State or Territory authorized on May 14, 1898, by law to hold lands in the Territories, thereafter in the possession of and occupying public lands in Alaska in good faith for the purposes of trade, manufacture, or other productive industry, may each purchase one claim only not exceeding eighty acres of such land for any one person, association, or corporation, at \$2.50 per acre, upon submission of proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry * * *: Provided, That * * * any citizen of the United States twenty-one years of age who is himself engaged in trade, manufacture, or other productive industry may purchase one claim, not exceeding five acres, of unreserved public lands * * * as a homestead or headquarters, under rules and regulations to be prescribed by the Secretary of the Interior, upon payment of \$2.50 per acre: Provided further, That any citizen of the United States, after occupying land of the character described as a homestead or headquarters, in a habitable house, not less than five months each year for three years, may purchase such tract, not exceeding five acres, in a reasonable compact form, without any showing as to his employment or business, upon payment of \$2.50 per acre, under rules and regulations to be prescribed by the Secretary of the Interior, and in such cases surveys may be made without expense to the applicants in like manner as the survey of settlement claims under sections 270-10 and 270-15 of this title * * *.

43 U.S.C. § 687a-6 (1982) provides as follows:

It shall be the duty of any person, association, or corporation entitled to purchase land under sections 687a and 687a-2 to 687a-5 of this title to make an application to such officer as the Secretary of the Interior may designate, for an estimate of the cost of making a survey of the lands occupied by such person, association, or corporation, and the cost of the clerical work necessary to be done in the office of such officer; and on the receipt of such estimate from such officer, the said person, association, or corporation shall deposit the amount in a United States depository * * *.^[1/]

Under section 1328 of ANILCA (P.L. 96-487, 94 Stat. 2489, Dec. 2, 1980), 16 U.S.C. § 3215 (1982), all applications made pursuant to the Act of May 14, 1898, as amended, 43 U.S.C. § 687 (1982), which were filed within the time provided by applicable law, and which describe land in Alaska that was available for entry under the statute when the entry occurred, were approved subject to valid existing rights.

^{1/} 43 U.S.C. §§ 687a-687a-6 have been repealed by P.L. 94-579, Title VII, § 703(a), Oct. 21, 1976, 90 Stat. 2789, but the repeal is not effective until on and after the 10th anniversary of the date of approval of that Act, Oct. 21, 1976.

The regulation, 43 CFR 2562.4, provides in pertinent part:

(a) If the land applied for be unsurveyed and no objection to its survey is known to the authorizing officer, he will furnish the applicant with a certificate stating the facts, and, after receiving such certificate, the applicant may make application to the State Director for the survey of the land. Upon receipt of an application, the State Director will, if conditions make such procedure practicable and no objection is shown by his records, furnish the applicant with an estimate of the cost of field and office work, and upon receipt of the deposit required will issue appropriate instructions for the survey of the claim, such survey to be made not later than the next surveying season. The sum so deposited by the applicant for survey will be deemed an appropriation thereof and will be held to be held to be expended in the payment of the cost of the survey, including field and office work, and upon the acceptance of the survey any excess over the cost shall be repaid to the depositor or his legal representative. [Emphasis added.]

Although section 1328 of ANILCA approved the T&M site application which had been filed by Waitdlow, that section does not eliminate the provisions of 43 U.S.C. § 687a-6 (1982) and 43 CFR 2562.4(a) that a deposit for survey be made nor the requirement that payment be made for the land upon patent. 43 U.S.C. § 687a (1982); 43 CFR 2562.7.

Accordingly, BLM properly issued a decision requiring that Waitdlow deposit a sum equal to the estimated cost of the necessary survey with BLM.

[2, 3, 4] Appellant asserts she mailed a notice of appeal of the February 15, 1983, BLM decision, and provides a draft of its contents and affidavits of friends supporting her assertion. She argues the Board should invoke equitable principles to deem the appeal was timely filed, citing Donald Peters (On Reconsideration), 28 IBLA 153, 164 n.4, 83 I.D. 564, 569 n.4 (1976), and 43 CFR 1871.1-1(a), thus tolling the 180 days provided in the decision for remitting the deposit for survey.

We do not doubt that appellant mailed the notice of appeal. The regulation requires, however, that it be filed. 43 CFR 4.411. Filing means receipt in the proper BLM office, not mailing. 43 CFR 1821.2-2(f); Amanda Mining & Manufacturing Association, 42 IBLA 144 (1979). The cases referred to in Peters, supra, were not instances of the Board exercising discretion to regard as filed something that was never received. Rather, they were cases in which the timeliness of the filing of a notice of appeal was based on the date of receipt of the decision appealed from by counsel, rather than appellant, or on timely entry of appearance by counsel, thus reviving notices of appeal filed by improper representatives. Although the Board may exercise its discretion to accept a late-filed statement of reasons, it has consistently regarded the timely filing of a notice of appeal with the proper office of BLM as jurisdictional. Cf. Pressentin v. Seaton, 284 F.2d 195, 198-99 (D.C. Cir. 1960); Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969).

Equitable adjudication is not available to correct procedural defects concerning the Board's jurisdiction. Cf. Browder v. Director, Illinois Department of Corrections, 434 U.S. 257, 264 (1978). Failure to file a notice of appeal within the time allowed mandates dismissal of the appeal. Jerald F. Russell, 72 IBLA 28 (1983).

The conclusion that, under the circumstances, principles of equitable adjudication cannot authorize an appeal from BLM's February 1983 decision requiring a deposit for a survey, however, does not foreclose an appeal from its November 1983 decision cancelling the claim. Such an appeal was timely filed.

Appellant states she is willing to pay the amount for the survey originally assessed and argues that 43 CFR 1821.2-2(g) and 1871.1-1 authorize BLM to accept payment at this stage. BLM argues that the Board should not remand the case for equitable adjudication because her failure to remit payment within 180 days was not "satisfactorily explained as being the result of * * * some obstacle over which the party had no control." 43 CFR 1871.1-1.

We see no reason under the facts of this case why BLM should not consider accepting appellant's payment of the survey costs. Neither bad faith on the part of appellant nor any intervening interest in the land nor any inconvenience to BLM from doing so is apparent from the record before us.

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the November 15, 1983, decision of the Alaska State Office, Bureau of Land Management, is vacated and the case is remanded for further action consistent with this opinion.

Will A. Irwin
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Franklin D. Arness
Administrative Judge.

