

KIM M. COOK

v.

MARY FRANCES DeHART BUREN

IBLA 87-384

Decided January 5, 1989

Appeals from decisions of the Alaska State Office, Bureau of Land Management, summarily dismissing a private contest complaint against headquarters site application AA-51841, and rejecting application to purchase homesite AA-52228.

Affirmed in part as modified and reversed in part.

1. Alaska: Headquarters Sites--Rules of Practice: Private Contests

Summary dismissal of a private contest against an Alaska headquarters site cannot be sustained on grounds the contestee was not served with the contest complaint where, on appeal, the contestant produces proof that the complaint was served in conformity to 43 CFR 4.450-5.

2. Alaska: Headquarters Sites--Rules of Practice: Private Contests

Pursuant to 43 CFR 4.450-1, a private contest may not be brought for reasons appearing of record with the Bureau of Land Management. Where all the matters alleged by a contest complaint appear on agency records at the time the complaint is filed, it is subject to summary dismissal.

3. Alaska: Homesites--Evidence: Sufficiency

Where it appears that occupancy of a homesite in Alaska began in September 1983, calculation of years of occupancy must commence with that date. There is no requirement that occupancy for purposes of establishing a homesite claim pursuant to 43 U.S.C. | 687a (1982) be continuous throughout any given calendar year.

APPEARANCES: Kim M. Cook, Gakona, Alaska, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On October 6, 1986, Kim M. Cook filed a private contest with the Bureau of Land Management (BLM) against the headquarters site application of Mary Frances DeHart Buren, BLM case file AA-51841. The complaint was summarily dismissed by BLM's Alaska State Office on February 12, 1987, for two reasons: (1) because, contrary to provision of 43 CFR 4.450-1, the complaint relied entirely on information already contained in BLM records concerning either the Buren headquarters site application or the application for homesite made by Cook, and (2) because the complaint was not served upon Buren as required by provision of 43 CFR 4.450-5. On March 19, 1987, Cook filed timely notice of appeal from the dismissal of his complaint.

Also on February 12, 1987, BLM issued a decision rejecting Cook's application to purchase a homesite, BLM case file AA-52228. The decision recites that Cook's application to purchase was rejected because only 2 of 3 years of required residence had been completed to BLM's satisfaction. The decision stated that application for purchase could be again filed following completion of another year of residence in 1988, pursuant to provision of 43 U.S.C. | 687a (1982) 1/ and Departmental regulations at 43 CFR Subpart 2563. Cook also filed his notice of appeal from this decision on March 19, 1987, and both appeals have been assigned a single docket number. The private contest is considered first.

[1] With his statement of reasons, Cook has submitted a copy of a receipt for certified mail showing that he mailed item P 129 915 648 to Mary Frances Buren on October 9, 1986, and that the item was delivered on October 19, 1986, to Edwin Buren, Jr., who is identified at other places in the case file as Buren's husband. Cook explains that he had not earlier submitted this document to establish service because its return to him was delayed. While the receipt does not establish conclusively that the item sent and delivered was the contest complaint, the dates and the relationship between the parties indicate that it probably was the contest complaint which was delivered to Buren's husband.

We have held that proof of this sort is sufficient to establish that a certain document was probably sent and received, where circumstances indicate that no other explanation of the postal receipt is likely. See Richard A. Willers, 101 IBLA 106 (1988). Applying this same logic to a private contest, we have found that proof of service of the contest complaint may be offered for the first time on appeal, and that, where it is unchallenged on appeal, it may be accepted as proof of service, since there is no apparent prejudice to the opposing party. Winegeart v. Price, 74 IBLA 373, 90 I.D. 338 (1983). Accordingly, BLM's decision is modified to find that the private complaint filed by Cook was served on Buren. We must therefore consider the effect of the complaint filed by Cook.

1/ Repealed subject to valid existing rights by P.L. 94-579, Title VII, | 703(a), Oct. 21, 1976, 90 Stat. 2789, effective Oct. 21, 1986.

Private contest complaints must allege reasons for relief which do not appear of record with BLM. 43 CFR 4.450-1. The development of this rule is explained in Gold Depository & Loan Co. v. Brock, 69 IBLA 194 (1982), where it is observed:

While the requirement limiting private contests to matters not of record was provided mainly to prevent rival homestead entrymen from claiming a preference right based on information already available to the Government, it applies to all contests. This is appropriate because a contest proceeding consists of a formal evidentiary hearing and no such hearing is required where the claim is void as matter of law and its invalidity can be determined on the basis of a record without a hearing. [Footnote omitted.]

Id. at 196.

The application of this provision by BLM has been simple. It merely examines its records to determine whether the information alleged in the complaint appeared in agency records at the time the complaint was filed. Wright v. Guiffre, 68 IBLA 279 (1982). This was the approach taken by BLM in this case. In the decision dismissing Cook's complaint, BLM examines each allegation of Cook's complaint, summarizing eight contentions made by Cook as follows:

(1) That there is an inadequate amount of land in [Cook's] uncontested boundary to allow for a home and proper living facilities. (2) The improvements (an outhouse) on the contested land gives [Cook] priority claim over Mary Frances. (3) The second field examiner failed to recognize this improvement in his supplemental report, therefore, the field exam should be invalidated. (4) [Buren] failed the field report by Steve Durkee dated April 3, 1984. (5) The affidavits and witness statements were fraudulently obtained. (6) Although not illegal, the use of [Buren's] mother, Mrs. Pew, and her current husband, Ed Buren, for the witnesses who signed her application seems not credible. (7) The supplemental field report doesn't mention [Cook's] building. (8) [Buren] filed her claim in trespass because entry and construction on her claim was made before the opening date.

(BLM Decision at 1). The decision then considers each item in relation to documents appearing in the case file and determines that each allegation of the complaint was previously known to BLM through documents previously provided to the agency, and that many of the allegations of the complaint simply describe and seek to find error in BLM documents such as field examiner's reports.

In his statement of reasons, Cook seeks to avoid BLM's analysis of his complaint by explaining that the recorded evidence to which his complaint refers was created by events which were themselves not of record. Examples of this sort of event are uses of his homesite not reported in the field

reports and activity by Buren occurring before the land was opened to locations under 43 U.S.C. | 687a (1982) (Statement of Reasons at 2, 3).

Documents placed in the case file on the Buren headquarters site application in 1984 and 1985 describe fully the situation to which Cook's private contest is addressed. The case file contains a protest by Cook against Buren's application, dated October 2, 1984, which alleges that her headquarters site is not the site of a commercial activity and should be rejected for reasons restated in the 1986 private contest complaint. A field examination report in the case file dated April 3, 1985, and signed by Steven Durkee is apparently one of the reports referred to by Cook's complaint. This report concludes that proof of business activity at the headquarters site was not furnished by Buren. On November 25, 1985, Buren's application to purchase was rejected "without prejudice to file a new application with any appropriate receipts [to show the existence of business activity]" (Decision at 1). A second application to purchase was filed December 26, 1986.

On April 4, 1986, another field examination of the Buren headquarters site is reported. This report by Mike Haskins concludes that the applicant has sufficiently demonstrated the headquarters site is used for "productive industry under the Headquarters Site Act" (Haskins Field Report at 2). Survey of the site was requested by BLM on May 13, 1986. On August 7, 1986, Cook filed a private contest complaint, alleging that the Buren headquarters site was made for substantially the same parcel of land as his homesite claim. The August 7, 1986, complaint was later withdrawn by Cook and refiled in substantially the same form on October 6, 1986.

That there is some conflict between the two field reports concerning the Buren applications to purchase is revealed by BLM's public land records. Similarly, the conflict between the Cook homesite application and the Buren headquarters site has been a matter of public record since 1983. The contention by Cook that his claim is prior to that asserted by Buren is revealed by numerous previously filed documents and maps appearing in the two case files. Buren's contrary position is also revealed by those same case files and by the master title plat. The opposing arguments of the parties are revealed in correspondence with BLM by Cook and Buren following Cook's protest letter filed October 2, 1984. The fact that the two applications overlap one another on the ground is shown by numerous maps and diagrams included in both files, most of which are taken from BLM's title plats.

The private contest complaint adds nothing to the information already available to BLM concerning these two applications. The stated purpose of the complaint is "to prevent Mary Frances from receiving title to her headquarters site claim" (Complaint at 1). It is not intended to be informative, but is designed rather to be a blocking maneuver against the Buren application, which threatens to foreclose any future purchase application by Cook. The complaint explains this relationship between the two conflicting applications when it states that Cook presently is unable to file an application to purchase until "Oct. 15, 1986 at which time all qualifications will be met" (Complaint at 1).

Failure to allege relevant facts not of record in BLM files subjects a contest complaint to dismissal. Christie v. O'Glesbee, 23 IBLA 155 (1975). The Cook and Buren case files contain documents which touch on every relevant fact alleged by Cook's complaint. Because the contest complaint fails to allege any new facts not already of record with BLM, Cook is not entitled to maintain a private contest under 43 CFR 450-5. Gold Depository & Loan Co. v. Brock, *supra*. His contest complaint was properly dismissed. 2/

[3] The question raised by Cook's appeal from the decision rejecting his homesite purchase application remains to be considered. The purchase application was rejected by BLM in part because "[t]he period of September 26, 1983 to December 5, 1983 does not count towards his residency year because it does not consist of 5 consecutive months" (Decision at 2). Because Cook's occupancy was interrupted between December 1983 and May 1984, therefore, the deciding official chose to ignore the time spent at the site by Cook in 1983. Instead of beginning the occupancy calculation in September 26, 1983, she calculated from May 15, 1984, although it was clear that Cook had in fact been at the site beginning in September 1983. 3/

There is no requirement that a year of occupancy begin on January 1, or that it end on December 31. Other cases coming before the Department have recognized that the year begins when occupancy is established, and ends on the anniversary of that event. Thus, for example, in Larry W. Lowenstein, 57 IBLA 95 (1981), the occupancy year was found to end on October 31. Nor does the statute require that residence be "consecutive." The statute provides, pertinently, that a homesite claimant must occupy his site for "not less than five months each year for three years." 43 U.S.C. | 687a (1982). The Departmental regulation implementing section 687a repeats the statutory language concerning occupancy, but requires, additionally, that the homesite application declare "[t]he date when the land was first occupied." 43 CFR 2563.1(a)(3). This requirement only makes sense if the date occupancy commences is operative for purposes of calculating total elapsed time of occupation.

In his statement of reasons Cook admits that his application may have been incorrect about the date when he first established a habitable dwelling on his homesite location. His homesite application declared September 26, 1983, to be the date his occupancy began. He now explains, however, "I should have put down [on the application] Sept. 27th, the day after open-ing, because that's when I began sleeping in the first structure I put up" (Statement of Reasons at 1). Taking either September 26 or 27, 1983, to be

2/ This does not mean that Cook has no remedy, but merely follows the general rule that the Department, in cases where it acts as a stakeholder for claimants having conflicting possessory claims, leaves the adjudication of such conflicts to the courts. *See, e.g., Gold Depository & Loan Co. v. Brock*, 69 IBLA at 196.

3/ Cook argues that his house was habitable on Sept. 27, 1983. The decision under review mentions that Cook had not directly stated the date when his house was habitable, but assumes that it was so on Sept. 26, 1983.

the beginning of Cook's year of residence at the site, therefore, the calculation of his year of residence should consider his occupancy until either September 25 or 26, 1984, for purposes of calculating his first occupancy year. The next occupancy year would begin on the anniversary date of the first year, and future calculations of time would continue in like fashion for the entire allowable period of his application.

The decision to reject Cook's application to purchase must therefore be reversed. On remand, BLM shall calculate Cook's residency year as beginning on the date he first began to occupy his site, within the meaning of the statute and implementing regulations. If his residence from September 26 or 27, 1983, meets the requirements of law, it should be counted, together with any additional time spent in residence prior to the anniversary date of his occupancy in 1984. Succeeding years shall be calculated from the date in September found by BLM to be the correct anniversary day.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are modified in part and affirmed in part and reversed as described in this opinion, and both case files are remanded to BLM for action consistent herewith.

Franklin D. Arness
Administrative Judge

I concur:

John H. Kelly
Administrative Judge