

Appeal from a decision of the Fairbanks District Office, Bureau of Land Management, denying a request to amend Native allotment application F-13737.

Set aside and referred for hearing.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

Under sec. 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. | 1634(c) (1982), an amendment to a Native allotment application may be filed only where the applicant is seeking land different from the land described in the original application. No amendment may be allowed under that section where the applicant is seeking land in addition to that described in the original application.

2. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

Where a Native allotment applicant alleges that he timely made an application for an allotment of a specific parcel of land with officials of the Bureau of Indian Affairs but, through no fault of his own, this parcel was not included within the application which the Bureau of Indian Affairs filed with the Bureau of Land Management, the applicant will be afforded a fact-finding hearing in which he may attempt to show that he did, in fact, make timely application for the parcel in question.

APPEARANCES: David C. Fleurant, Esq., Anchorage, Alaska, for appellant; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Donald Peter has appealed from that portion of a decision of the Fairbanks District Office, Bureau of Land Management (BLM), dated September 5, 1986, which denied an amendment to his Native allotment application F-13737.

On March 29, 1971, the Bureau of Indian Affairs (BIA) filed appellant's Native allotment application F-13737 with BLM. While the application indicates that it was signed by appellant on December 3, 1970, there is no indication when BIA received it. The mostly handwritten application stated that appellant's subsistence use of the area began on December 12, 1963, and that a cabin was constructed thereon in 1966. A typed land description on the application describes approximately 80 unsurveyed acres in sec. 9, T. 21 N., R. 14 E., Fairbanks Meridian. A map attached to the application shows a roughly rectangular tract in a bend of the Black River Slough. The application does not mention any other parcel.

On December 4, 1972, BLM rejected appellant's application because the land had been withdrawn for a powersite in connection with the Ramparts Power Project prior to appellant's commencement of occupancy. This decision expressly noted that "[t]he claim contains 80 acres and is located in protracted Section 9, Township 21 North, Range 14 East, Fairbanks Meridian, Alaska." No appeal was taken from this determination.

However, pursuant to section 905(d) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. | 1634(d) (1982), BLM reinstated the allotment application in the summer of 1981. On October 1, 1981, BLM notified appellant that his application had been reinstated, stating: "Your Native Allotment application, F-13737 has been reinstated pending further determination. This application was filed in this office on March 29, 1971 for approximately 80 acres located in Sec. 9, T. 21 N., R. 14 E., Fairbanks Meridian."

On April 5, 1983, BLM conducted a field examination and verified appellant's use and occupancy of the 80-acre parcel listed in his application. Appellant accompanied the field examiner and informed the field examiner that he had intended to apply for two 80-acre parcels, not one. The field report concluded:

Based on examination of the parcel, suitability of the land for the uses claimed, testimony of the applicant and his personal knowledge of the land, and absence of any evidence to the con-trary, it is concluded that the applicant has met the requirements of the Native Allotment Act of 1906, as amended. Certificate would be subject to Sec. 905(d) of ANILCA. [1] It is believed

1/ While the receipt by BIA of an application prior to the repeal of the Native Allotment Act by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. | 1617(a) (1982), will satisfy the statutory requirement that the application be pending before the Department on Dec. 18, 1971, merely establishing that the application was timely mailed does not establish that it was, in fact, received. Since the Postal Service is properly considered to be the agent of the sender, appellant must show not only that he mailed the application but that the application was actually delivered to BIA.

that the applicant intended to apply for 160 acres at this location. BIA should be contacted for substantiation.

(Field Report at 5).

Based on appellant's information, the field examiner assembled two sets of corrected metes and bounds land descriptions. Both described his original 80-acre parcel, apparently adjusted by shifting the location slightly in order to eliminate a conflict with his father's Native allotment which was adjacent on the west. One alternative description also included a second 80-acre parcel which appellant told the field examiner he intended to claim. The field examiner's map shows the second parcel adjacent to the first parcel along its southern boundary, forming an L configuration when joined with the original 80-acre parcel.

On May 2, 1983, appellant filed an affidavit asserting his intent to apply for 160 acres, rather than 80:

1) I applied for a native allotment on December 3, 1970, my application was issued the number F-13737.

2) I applied for 160 acres located in protracted Sec. 9, T. 21 N., R. 14 E., Fairbanks Meridian.

3) The Bureau of Land Management came to Fort Yukon on April 5, 1983 to field exam my allotment, at that time the examiner told me my application was for 80 acres.

4) I do not know how this mistake was made, I have used 160 acres, I intended to apply for all of this land. I wish to have the full 160 acres that I believe I applied for.

On September 5, 1986, BLM issued the subject decision. In it, BLM held that the original 80-acre parcel had been legislatively approved subject to a reservation of oil and gas to the United States. BLM also treated appellant's affidavit as a request to amend his application to include an additional 80 acres and denied that request as untimely. Appellant thereupon pursued an appeal to this Board, limited to that part of the BLM decision which denied the additional 80 acres.

In his statement of reasons for appeal, appellant asserts that his application should have been amended as of December 18, 1971, to include a second 80-acre tract on the Black River Slough. He contends that it was a longtime practice of Native allotment applicants to leave the land description blank on their applications, as he did, so that BIA could insert the correct land description. He asserts that he attached two maps to his application when he first mailed it to BIA. One map, which is still attached to the original application in the case file, showed his original parcel on the Black River Slough. He asserts that he attached to his application another map, which appears nowhere in the case record, showing a second 80-acre parcel on the Sheengik River. He states that his family discovered a conflict with the Sheengik River parcel between appellant and his

brothers. As a result, 2 months after mailing the original application to BIA, appellant asserts that he wrote BIA again, this time asking to substitute a second 80-acre parcel on the Black River Slough for the Sheengik River parcel. He speculates that BIA did only part of what he requested; it eliminated the parcel on the Sheengik River but failed to substitute the second 80-acre parcel on the Black River Slough.

Appellant argues that section 905(c) of ANILCA, 43 U.S.C. | 1634(c) (1982), allows him to amend his application to describe land he originally intended to claim. He acknowledges that BIA has not certified his amendment but insists that such certification is not a statutory prerequisite to the filing of a request for amendment under section 905(c). He maintains that he should have an opportunity to prove his intent to claim 160 acres at an oral hearing before an Administrative Law Judge, pursuant to Pence v. Kleppe, 529 F.2d 135, 143 (9th Cir. 1976). He argues that he deserves notification of the specific reasons for the proposed rejection and the opportunity to submit supporting evidence, prior to the rejection of his claim to the additional 80 acres.

BLM responds that the facts of record do not support appellant's claim and that appellant has not met the criteria for an amendment. BLM concedes that BIA certification is not a prerequisite for an amendment under section 905(c), but argues that what is missing is proof that the second application, which appellant asserts was submitted 2 months after the December 3, 1970, application, was ever filed with BIA. BLM contends that, until it can be established that such a second application was filed on or before December 18, 1971, appellant's attempt to amend that application must be rejected. Finally, BLM suggests that appellant has not raised an issue of material fact which would warrant a hearing.

[1] Section 905(a)(1) of ANILCA, 43 U.S.C. | 1634(a)(1)(1982), legislatively approved Native allotment applications, subject to valid existing rights and certain exceptions. Section 905(c) of ANILCA further authorized allotment applicants to amend land descriptions in Native allotment applications where the description in the application "designates land other than that which the applicant intended to claim at the time of application." 43 U.S.C. | 1634 (c)(1982); see Angeline Galbraith, 97 IBLA 132, 146, 94 I.D. 151, 158 (1987); Pedro Bay Corp., 78 IBLA 196, 201 (1984). See also Joash Tukle, 86 IBLA 26 (1985), aff'd, Tukle v. Hodel, No. A85-373 (D. Alaska Apr. 7, 1987).

Both appellant and BLM have focused on the applicability of section 905(c) of ANILCA to appellant's claim for an additional 80-acre parcel. In fact, however, section 905(c) is clearly inapplicable. Appellant does not assert that the description of the land in his application as filed is erroneous. Indeed, BLM has held that the land described therein was subject to legislative approval under ANILCA and appellant does not challenge that part of its decision. What appellant alleges is that he applied for an additional parcel which, through no fault of his own, was omitted from the application filed with BLM.

As we recently noted in William Carlo, Jr., 104 IBLA 277 (1988):

By its clear language, [section 905(c)] is only applicable where the original description designates lands other than the land originally sought. As we have noted, "it does not permit the applicant to include other land in addition to that originally described." Charlie R. Biederman, 61 IBLA 189, 192 n.1 (1982) (emphasis in original). Indeed, section 905(c) expressly provides that "[i]f the allotment application is amended, this section shall operate to approve the application or to require its adjudication, as the case may be, with reference to the amended description only." (Emphasis added.)

Id. at 283. Because appellant is not contending that a description which appears on his application depicts the wrong land but rather is arguing that other land should have been included in his application in addition to the land actually described, section 905(c) of ANILCA does not apply.

[2] This does not end the matter, however. Appellant, in effect, is arguing that, as submitted to BIA, there was a second parcel in his application. The Board has dealt with similar assertions in numerous appeals. See, e.g., William Carlo, Jr., *supra*; Nora L. Sanford (On Reconsideration), 63 IBLA 335, 337 (1982); Eleanor H. Wood, 46 IBLA 373 (1980). While most of our earlier cases dealt with situations in which corroborative statements from BIA employees were submitted to establish that a parcel had been inadvertently omitted from the application which BIA had transmitted to BLM, which corroboration is lacking in the instant appeal, the Carlo case dealt with a situation on all fours with the present appeal. Therein, we concluded:

[W]hile the absence of any independent corroboration clearly weakens the evidentiary weight which may be accorded appellant's assertions, this does not work to alter the essential fact that appellant has, indeed, challenged factual predicates essential to the determination of BLM * * *. We believe that it is precisely this type of question which, under the dictates of Pence v. Kleppe, *supra*, requires a fact-finding hearing in which appellant may be afforded an opportunity to establish that he did, indeed, timely make application for [the omitted parcel] with officials of BIA.

Id. at 282.

Similarly, we believe that appellant herein should be afforded an opportunity to show that he did timely file with officials of BIA a request for the 80-acre parcel which is the subject of the instant appeal. Admittedly, this may be a difficult matter since appellant must not only show that he mailed a second description to BIA depicting the 80-acre parcel, he must establish, by a preponderance of the evidence, that BIA actually received it and subsequently mislaid it. But, under Pence v. Kleppe, *supra*, appellant deserves the opportunity to show that these two events did occur.

Accordingly, we have determined that it is appropriate to refer this case to the Hearings Division for the assignment of an Administrative Law Judge. The decision of the Administrative Law Judge shall, absent timely appeal to this Board, be final for the Department.

Therefore, 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 Fairbanks District Office is set aside and the case is referred to the Hearings Division for further action consistent with this decision.

James L. Burski
Administrative Judge

I concur:

Anita Vogt
Administrative Judge
Alternate Member