

**Editor's note: Reconsideration granted; decision set aside by Order dated Jan. 31, 1990; original decision affirmed -- 114 IBLA 373 (May 24, 1990)**

JUNE I. DEGNAN (ON RECONSIDERATION)

IBLA 86-1396

Decided November 3, 1989

Petition for reconsideration of June I. Degnan, 108 IBLA 282 (1989), which set aside a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA-54599 and referred for hearing the issue whether such application was timely filed.

Petition granted; prior Board decision reversed; State Office decision affirmed.

1. Administrative Procedure: Hearings--Alaska: Native Allotments--  
Evidence: Presumptions--Hearings--Rules of Practice: Hearings

No hearing is required to determine whether an application for a Native allotment was timely filed with the Department when the record contains affidavits stating only that the application was mailed prior to the Dec. 18, 1971, deadline. The presumption of regularity, which supports the official acts of public officers in the discharge of their duties, must for reasons of public policy and under burden of proof analysis be accorded priority over the presumption that documents properly mailed are duly delivered.

APPEARANCES: Dennis J. Hopewell, Esq., Anchorage, Alaska, for the Bureau of Land Management; Kimberly Heuter, Esq., Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

The Alaska State Office, Bureau of Land Management (BLM), has filed a timely petition for reconsideration of this Board's decision in June I. Degnan, 108 IBLA 282 (1989). In Degnan, the Board set aside a decision of the Alaska State Office rejecting Native allotment application AA-54599 as untimely filed, and referred for a hearing the question whether Degnan's application was, in fact, timely.

In its decision of May 22, 1986, BLM found that Degnan's application for a Native allotment had been filed on August 27, 1984, 1/ well beyond the December 18, 1971, filing deadline imposed by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1982). Appellant explained that this tardy application was a reconstruction of her original allotment application, which had been timely filed and thereafter lost.

Acknowledging that an application could be reconstructed when neither the original nor a copy was available, BLM rejected Degnan's reconstructed application because there was insufficient documentation to support Degnan's claim that her original application was pending before the Department prior to December 18, 1971. Such documentation must include a Federal agency document showing timely receipt, BLM's decision stated; allegations of timely filing without "sufficient objective, documentary proof" are insufficient. Id.

The Board set aside BLM's May 22 decision because it found that appellant's affidavits raised a factual question as to whether Degnan's application was timely filed. Citing Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), and Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978), the Board held that due process considerations required an oral hearing prior to rejection of Degnan's application. The affidavits relied upon by the Board had been submitted by Degnan and by Degnan's mother and brother. The affidavits recited that Degnan and her father staked out the lands sought; that Degnan filled out and signed a Native allotment application; and that Degnan's father, now deceased, mailed the application to BIA or BLM in Anchorage. 2/ These events occurred in late 1969, 3/ or as early as 1967. 4/ Everyone in the Degnan family filled out a Native allotment application, and all except June received an allotment. 5/

Accepting these statements as true, the Board found that the affidavits affirmatively stated that Degnan's application had been mailed to the Department by Degnan's father prior to December 18, 1971. Mail properly addressed and deposited with adequate postage in the appropriate receptacle is presumed to be duly delivered, the Board recognized. 108 IBLA at 287 n.1. Offsetting this presumption of delivery, however, was the presumption of regularity which attends the official acts of public officers. Id. Under this rule of law, it is presumed that administrative officials have properly discharged their duties and not lost or

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1/ BLM's decision states that Degnan's application was before the Department on Dec. 29, 1983. The application bears a date-stamp of the Bureau of Indian Affairs (BIA) showing receipt on Mar. 7, 1984.

2/ Affidavits of June and Ada Degnan, Exhibit 1 to Supplemental Statement of Reasons, Oct. 10, 1986, at 5, 8.

3/ Id.

4/ Affidavit of Charles Orville Degnan, Exhibit 2 to Supplemental Statement of Reasons, Oct. 10, 1986, at 1.

5/ Affidavit of Ada Degnan, Exhibit 1 to Supplemental Statement of Reasons, Oct. 10, 1986, at 8.

misplaced legally significant documents submitted for filing. David A. Gitlitz, 95 IBLA 221, 224 (1987). Given these two presumptions, the Board found that a clear factual question arose as to whether Degnan's application was timely filed.

In so holding, the Board cited as controlling Heirs of Linda Anelon, 101 IBLA 333 (1988), a case involving, as here, reconstruction of a Native allotment file. In Anelon, the Board ordered a hearing to determine whether Anelon had a Native allotment application pending on December 18, 1971. Affidavits filed on Anelon's behalf recited that Anelon and her brother had been driven to BIA, Anchorage, in 1970 or 1971, and the purpose of this trip, the affidavits suggest, was to fill out allotment applications. 101 IBLA at 334. The record also contained a statement by counsel for Anelon that the brother's application had been lost and later found by BIA.

In its petition for reconsideration, BLM states that Anelon is distinguishable from the instant case because Anelon involves specific allegations of an actual filing of a Native allotment application. The most Degnan alleges, counsel states, is that an application was mailed. Filing is accomplished when a document is delivered to and received by the proper office; depositing a document in the mails does not constitute filing. 43 CFR 1821.2-2(f). To treat allegations of mailing as a sufficient basis for a hearing on the issue of timely filing is inconsistent with the regulation and longstanding precedent, counsel argues. Such precedent includes Amanda Mining & Manufacturing Association, 42 IBLA 144, 146 (1979), wherein the Board stated, "Although appellant has offered to produce witnesses to attest to the mailing of the documents, such witness could not provide evidence of their timely receipt, and appellant, having chosen the means of delivery, must accept responsibility for nondelivery."

[1] We have examined our decision in Degnan in light of the arguments advanced by BLM in its petition and are persuaded that it is appropriate to grant the petition. On reconsideration, we conclude that affidavits of mailing are not a sufficient basis for granting a hearing on the issue of filing and, accordingly, reverse our decision in Degnan.

Prior Board decisions make clear that when the record contains facts supporting both the presumption of regularity and the presumption that documents properly mailed are duly delivered, public policy requires that greater weight be accorded to the former. This conclusion is also supported by a burden of proof analysis. Bernard S. Storper, 60 IBLA 67, 70 (1981), aff'd, Storper v. Watt, Civ. No. 82-0449 (D.D.C. Jan. 20, 1983). Although priority is afforded to the presumption of regularity, this presumption may be overcome by evidence presented by appellant. 60 IBLA at 71. See, e.g., L.E. Garrison, 52 IBLA 131 (1981).

As in Storper, Degnan's evidence consists primarily of affidavits stating that her application was mailed. It is receipt of the document, however, which is critical. Though we accept as true Degnan's affidavits

of mailing, such affidavits do not overcome the presumption of regularity. 6/ William R. Gaechter, 66 IBLA 230, 232 (1982). See also Wilson v. Hodel, 758 F.2d 1369, 1374 (10th Cir. 1985).

Nor do Degnan's affidavits support the grant of a hearing. These affidavits are not evidence of receipt by the Department of Degnan's application. 7/ There is, accordingly, no material issue of fact. A hearing is not necessary in the absence of a material issue of fact which, if proven, would alter the disposition of the appeal. Woods Petroleum Co., 86 IBLA 46, 55 (1985). No evidentiary hearing is required where there is no issue of material fact and the validity of a claim hinges on the legal effect of facts of record. John Murphy, 58 IBLA 75, 83 (1981). BLM may reject a claim without a hearing if it determines that rejection is required as a matter of law. Pence v. Andrus, supra. 8/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is granted; June I. Degnan, 108 IBLA 282 (1989), is reversed; and BLM's decision of May 22, 1986, is affirmed.

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Gail M. Frazier  
Administrative Judge

I concur:

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Will A. Irwin  
Administrative Judge

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6/ A similar result obtains if we construe appellant's affidavits to mean that the applications of all Degnan family members were mailed simultaneously. See S.H. Partners, 80 IBLA 153, 155 (1984).

7/ A return receipt card issued by the Postal Service may be probative evidence of receipt. But see John Walter Starks, 55 IBLA 266 (1981), appeal dismissed, Starks v. Watt, Civ. No. 81-0711 (C.D. Utah Mar. 2, 1982). None appears in the record.

8/ We find it noteworthy that appellant filed no response to BLM's petition for reconsideration. If appellant were capable of alleging facts evidencing BLM's timely receipt of her Native allotment application, the response would have been an appropriate vehicle for expressing such.