

IRENE K. JIMMY

IBLA 89-23

Decided May 14, 1991

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying a request for reinstatement of Native allotment application A-060941.

Affirmed as modified.

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

BLM properly denies reinstatement of a Native allotment application for land within the Tongass National Forest filed by a Native who did not personally use and occupy the land before it was included in the forest.

APPEARANCES: Irene K. Jimmy, Sitka, Alaska, pro se; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Irene K. Jimmy has appealed the September 7, 1988, decision of the Alaska State Office, Bureau of Land Management (BLM), that denied a request for reinstatement of part of Native allotment application A-060941. The application for this Native allotment was originally filed by appellant's father, Charles G. Benson, in June 1959, with the Juneau Land Office, BLM, and was given serial number JUN-011549. ^{1/} The application described approximately 160 acres of land on Chichagof Island within the Tongass National Forest. Benson claimed annual use from September 1 - October 31 and in January for the years 1924-1957 for hunting, fishing, and trapping. The application also stated: "This land has been used by me and my ancestors for fishing, hunting and trapping since time immemorial. This period of use and occupancy dates back before the establishment of the Tongass National Forest."

^{1/} By letter to Benson dated Mar. 2, 1964, the Anchorage District Office, Bureau of Land Management, informed him that it had assigned Anchorage serial number A-060941 to his claim.

By decision dated August 24, 1961, BLM accepted Benson's application with respect to described lands containing approximately 3.9 acres, and rejected the application as to the remaining lands because "[i]nvestigation by the U.S. Forest [S]ervice has shown that only a small portion of the land is or was used for hunting, fishing and trapping." 2/ Benson received a copy of the decision on August 30, 1961. An appeal of this decision was not filed.

In 1965, 43 CFR 2212.9-3(b) (1964) was amended to allow Native allotment claims for lands that were not contiguous. 43 CFR 2212.9-2(a), 30 FR 3710 (Mar. 20, 1965); see United States v. Flynn, 53 IBLA 208, 227, 88 I.D. 373, 383 n.4 (1981). As a result, the BLM Area Manager and the Area Realty Officer of the Bureau of Indian Affairs (BIA) visited Benson and appellant on September 13, 1966, and explained the new regulations to them. According to the Area Manager's field report of September 14, during an interview on that day "Benson * * * signed the agreement (AS02-2212-1) requesting the Indian allotment area of 3.9 acres accepted by the Bureau of Land Management in their decision of August 24, 1961." 3/

2/ The Mar. 22, 1961, report of the Forest Service Sitka District Ranger states in part:

"Results of Inspection - 1. Area Actually Used by Claimant - As determined from the examination on the ground, approximately 3.9 acres have been used by the claimant and his ancestors as shown on the attached map. The rest of the area claimed is a steep hill side with rock outcrops covered with a poor quality of hemlock and cedar and showing no evidence of any use.

* * * * * "Interview with Claimant - An interview was held with Charles Benson in Sitka by Wallace Watts. The results of the interview are as follows:

"1. Claimant - Mr. Charles G. Benson; Age 61; date of birth Nov. 25, 1899; birthplace Sitka * * * .

"2. Head of Family - Yes

"3. Statement as to residence on Tract - Mr. Benson claimed that the area was used by his parents during the summers that they worked in the mines at Rodman Bay. After the mines closed, he continued to use the area off and on during the summers. The last time Mr. Benson used the area was two years ago. (In checking with the commissioner's office, the Rodman Bay mines were operated during the period from 1905 - 1910)."

3/ The form reads:

"Today I was told about the new Native allotment regulations (43 CFR 2212.9). I understand that I may now change my present application [A-060941] to include several separate tracts if I actually use more than the one tract described in my present application. I know that I cannot receive allotment for more than 160 acres in total. I have checked the blocks below indicating my wishes on my allotment case: Unsurveyed area in Poison Cove - Approx 3.9 acres described in BLM Decision dated Aug. 24, 1961, in JUN-011549 [Indian] A[llotment]."

Benson checked the box for statement A, which reads: "I do not want to change the description of my lands in my current application."

The Area Manager's field report recommended "that the application for the Indian allotment be processed for the purpose of issuance of the Indian Allotment Certificate." After completion of U.S. Survey No. 4986 in August 1967, Allotment Certificate Patent No. 50-70-0043 was issued to Benson for 4.35 acres on September 12, 1969.

In April 1983 the Central Council of Tlingit and Haida Indian Tribes of Alaska (Tribes) requested BLM to review Benson's allotment file "for the purpose of reinstating his application for the entire 160 acres. * * * It appears that [the BIA Area Realty Officer] persuaded [sic] Mr. Benson to sign form #A50-2212-1 * * *. He was probably told that was the only way he could get anything." BLM replied on June 13, 1983, that

[s]ince a representative from BIA agreed to the acreage reduction, we consider this a voluntary relinquishment and not reinstatable under the provisions of the Alaska National Interest Lands Conservation Act [ANILCA] of December 2, 1980. Mr. Benson stated he wanted the approximate 3.9 acres and did not want to change the description in his current application. By current application, we consider he is talking about only the 3.9 acres.

On March 6, 1987, appellant wrote BLM concerning her father's allotment and stated "I have recalled that my father expressing [sic] that he applied for 160 acres. I certainly don't recall him requesting less in writing or verbally." BLM responded by letter dated April 1, 1987, that Benson had "knowingly and voluntarily relinquished his Native allotment claim from 160 down to 3.9 acres" and repeated that the claim could not be reinstated under section 905(a)(6) of ANILCA because a representative of BIA had witnessed his signing of the September 14, 1966, relinquishment.

On August 23, 1988, the Tribes requested reinstatement of Benson's claim so that it could be "processed under existing procedures * * * providing due process protection" that were established as a result of the decision in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). Accompanying the request were affidavits by appellant, Thomas Young, and Ray Perkins, Benson's grandson, that the Tribes argued attested "Mr. Benson's intent was for 160 acres." On September 7, 1988, BLM denied the request on the same grounds stated in its April 1, 1987, letter to appellant. Appellant filed a timely notice of appeal. ^{4/}

In her SOR appellant argues that the form Benson signed on September 14, 1966, should not be regarded as a relinquishment because

^{4/} Attached to appellant's statement of reasons (SOR) as Exhibit 9 is a copy of a Feb. 29, 1972, order of the Office of Hearings and Appeals Hearings Examiner approving Benson's will. According to this document, appellant is the sole heir of Benson's Indian trust estate, which consisted of the land granted to him by Patent No. 50-70-0043.

there was nothing to relinquish as a result of BLM's August 24, 1961, decision rejecting his claim for all but 3.9 acres. She argues Benson did not voluntarily and knowingly relinquish his rights to the rest of the land he claimed. She states that "many people * * * have contended that Mr. Benson did not know what he was signing on September 14, 1966 [and] that Mr. Benson was coerced into signing this document * * * because he was led to believe it was the only way he would receive any of his land" (SOR at 4-5). Appellant also argues that BLM's August 24, 1961, decision was improperly influenced by the Forest Service 5/ and wrongly reduced the acreage claimed to the most intensively used land and that Benson's attempt to appeal that decision may have been timely (SOR at 5-6). 6/ Appellant concludes that "[u]nder the Pence guidelines, BLM should reopen the claim and remand the matter for a hearing." In its Answer, BLM argues that the doctrine of administrative finality precludes reconsidering BLM's August 24, 1961, decision because the appeal period has long since expired.

[1] Assuming, without deciding, that appellant is a party to this case who has a right of appeal from BLM's September 7, 1988, decision that was issued in response to the Tribes' request for reinstatement, the decision must be affirmed. Benson's application states he began to use the land in 1924, although it had been used by his ancestors before it was included in the Tongass National Forest; see note 2, infra. In Shields v. United States, 698 F.2d 987 (9th Cir. 1983), cert. denied, 464 U.S. 816 (1983), the U.S. Court of Appeals for the Ninth Circuit concluded that "Congress intended to limit allotments on national forest lands to those individuals whose personal occupancy antedated the withdrawal of the land

5/ We note that a report by the Forest Service has long been part of the processing of Native allotment applications located within national forests. 43 CFR 2561.0-8(c); 43 CFR 176.15 (1954). The fact that the Forest Service conducted an investigation upon which BLM relied does not establish improper influence by the Forest Service or bias on the part of BLM.

6/ Appellant bases the last argument on an Oct. 10, 1961, letter to her father from BIA (SOR, Exh. 6). The letter indicates Benson sent a \$5 money order to BIA; there was no letter of explanation accompanying the money order.

This money order did not constitute a notice of appeal of the BLM decision. Pursuant to 43 CFR 221.2(a) (1963), notices of appeal to the Director, BLM, were to include the serial number or other number identify-ing the case and were to be filed with the officer who made the decision. The latter requirement has been strictly enforced. See United States v. Louis Camerlo, 17 IBLA 303 (1974); San Juan Coal Co., 83 IBLA 379 (1984); Eklutna, Inc., 90 IBLA 196 (1986). The \$5 money order was apparently unaccompanied by a serial or case number, or by any document which could serve as a notice of appeal. See 43 CFR 221.2(b) (1963). Although we have held it is not a requirement that a document be labelled a notice of appeal, a document must at least challenge the BLM decision. See Thana Conk, 114 IBLA 263 (1990); Buck Wilson, 89 IBLA 143 (1985). A filing fee alone will not suffice as a notice of appeal.

for the national forest." 698 F.2d at 991. Indeed, the court mentioned the August 24, 1961, BLM decision partially accepting Benson's application as one this Board has "dismissed * * * as possibly erroneous and nonprecedential." Id. at 990. 7/ Because Benson did not personally use and occupy the land he claimed before it was included in the Tongass National Forest in 1902, 32 Stat. 2025, there could be no additional grant of that land even if the claim were reinstated. 8/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's September 7, 1988, decision denying reinstatement is affirmed as modified.

Will A. Irwin
Administrative Judge

I concur:

James L. Byrnes
Administrative Judge

7/ In our 1975 order denying a petition for reconsideration of Louis P. Simpson, 20 IBLA 387 (1975), we stated:

"[A]ppellants assert that a Departmental decision, Charles G. Benson of August 24, 1961, and the John Littlefield decision of April 28, 1961, are precedent [that the Department previously recognized 'tacking' of ancestral use to establish allotment rights]. Appellants err. Those decisions were rendered by the Juneau Land Office Manager. In any event, the decisions fail to show whether the applicants based their claims of use and occupancy commencing prior to the inclusion of the land within the forest or whether the lands were classified by the Forest Service as suitable for entry. Those decisions were not reviewed by the Director, Bureau of Land Management. The possible erroneous adjudication of individual cases by Land Office personnel cannot bind the Department to perpetuate error."

Arthur R. Martin, 41 IBLA 224 at 229 (1979).

8/ Since there is no dispute involving this material fact and no chance of development of further material facts which would require a different decision, the appellant's request for a hearing is denied. A hearing under the rule announced in Pence v. Kleppe, supra, is required only when there is a factual dispute. Arthur R. Martin, supra at 226. Since appellant's father was not yet three years old when the land claimed was reserved, she could not show the requisite minimum five years use and occupancy.