

**Editor's Note: Affirmed, Civ. No. A95-475 (D. Alaska March 24, 1997).**

UNITED STATES

v.

HEIRS OF AMBROSE KOZEVNIKOFF

IBLA 90-430

Decided December 30, 1993

Appeal from a decision of former Chief Administrative Law Judge Parlen L. McKenna refusing to allow amendment of Native allotment application F-17770 to include an additional 80 acres.

Affirmed as modified.

1. Alaska: Native Allotments--Alaska National Interest Lands  
Conservation Act: Native Allotments--Rules of Practice: Appeals:  
Burden of Proof

In cases where the amount of land originally applied for in a Native allotment application is at issue, the proper standard of proof to be applied is the preponderance of the evidence.

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

Under sec. 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), a Native allotment application may not be amended to describe land in addition to that described in the original application.

APPEARANCES: William E. Caldwell, Esq., Fairbanks, Alaska, for appellants; Dennis J. Hopewell, Esq., Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The heirs of Ambrose Kozevnikoff (heirs/appellants) have appealed from a May 30, 1990, decision by former Chief Administrative Law Judge Parlen L. McKenna, rejecting their request to reinstate Native allotment application F-17770 filed by Ambrose Kozevnikoff (applicant/Kozevnikoff) to include 80 additional acres.

### Background

On October 28, 1970, Ambrose Kozevnikoff signed Native allotment application F-17770 for lands located along the White Alice Site Road, near Tanana, Alaska. The legal description of the land requested was left blank with the understanding that the Bureau of Indian Affairs (BIA) would later supply it. BIA later supplied the description, indicating the land encompassed 80 acres, 1/ and filed the application with the Bureau of Land Management (BLM) on April 4, 1972, pursuant to the provisions of the Alaska Native Allotment Act of 1906. 2/ The applicant died in October 1980. On March 17, 1982, BLM received a letter from Wilfred Kozevnikoff, son of applicant, claiming that the original application should have included 160 acres.

Subsequently, on January 22, 1988, BIA filed with BLM a request on behalf of the heirs for "reinstatement" of an additional 80 acres on the original application. BLM's decision of March 1, 1988, denied BIA's request on the basis that the request constituted a request for an unauthorized amendment:

There is nothing in the records to substantiate that Mr. Kozevnikoff intended to apply for 160 acres or that an amended corrected application and/or description was timely filed. The information received from the BIA did not include a proper and complete application on an approved form for an additional 80-acre parcel and there is nothing to substantiate that the application as pending on or before December 18, 1971 included 160 acres. Therefore, the request for reinstatement is considered a request for amendment.

Section 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. 1634(c) (1988), authorizes a Native allotment applicant to amend the description of the land in his application to accurately describe the parcel for which he applied. It does not authorize an applicant to amend the allotment application to include additional or different land.

The heirs appealed BLM's denial of BIA's request on April 1, 1988. BLM requested that the Board remand the appeal to BLM, and the request

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1/ The following legal description is given: "SE 1/4 NE 1/4, NE 1/4 SE 1/4, sec. 30, T. 5 N., R. 21 W., Tanana A-4, [Fairbanks Meridian]" (Exh. G3). The partial description simply states: "T 4 N, R 21 W[,] A-4." BIA also attached a Geological Survey map to the application indicating a rectangular block of land marked "80." The words "Ambrose Kozevnikoff" are written to the right of the marked rectangle (Exh. G3, Tr. 115).

2/ Alaska Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed effective Dec. 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1988), with a savings provision for applications pending on Dec. 18, 1971).

was granted on July 1, 1988. On December 2, 1988, BLM initiated a contest pursuant to the requirements of Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), <sup>3/</sup> alleging the heirs were not entitled to more than 80 acres. Appellants filed an answer with BLM and requested a hearing, which was held before former Chief Administrative Law Judge Parlen L. McKenna on August 21 and 22, 1989, in Fairbanks, Alaska.

At the hearing, Eileen Kozevnikoff, daughter-in-law of the applicant, testified that in October 1970, subsequent to a village meeting about allotments with BIA representative Kathy Adams, she prepared and filed together three Native allotment applications for herself, her husband, and Kozevnikoff (Tr. 114-15). She stated that she left the legal description blank, and was advised by Adams that the description would be supplied by BIA from the location described by her on the application as "4.4 miles on the site road - right side going up from Post Office, approximately 250 feet off the road" (Tr. 116). She indicated that although they did not have a clear concept of how much area 160 acres would include, all three applicants intended to apply, and assumed they had applied, for the amount allowable by law (Tr. 117-18). She further stated that the amount of acreage was never discussed with Adams, and that she thought Adams was aware that the application was to include 160 acres (Tr. 118).

William Carlo, a neighbor who lived on the White Alice Site Road about 2 miles from the land Kozevnikoff used and occupied, testified that his conversations with Kozevnikoff indicated that he thought he had applied for a 160-acre allotment (Tr. 128).

Judge McKenna's decision found the heirs' testimony concerning Kozevnikoff's intent to file for 160 acres credible (Decision at 7). Judge McKenna held, however, that in order for appellants to prevail, the evidence must show that Kozevnikoff communicated his intent to apply for 160 acres to an officer of the Department of the Interior prior to the December 18, 1971, deadline. The Judge held that appellants did not show that Kozevnikoff communicated his intent to BIA at the time his application was completed. The decision held that although the application was initially silent concerning the amount of acreage to be included in the allotment, and was filled in by BIA at a later time to include 80 acres, the presumption of administrative regularity operated in favor of BLM to require appellants to present clear and convincing evidence that BIA had erred in filling out the application. Testimony by appellants and neighbors that Kozevnikoff intended to apply for 160 acres was held inadequate to overcome that presumption.

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<sup>3/</sup> Pence v. Kleppe, *supra*, held that Alaska Native applicants claiming to be eligible for allotments of public lands under the Alaska Native Allotment Act whose applications the Secretary intends to reject are entitled to notice and hearing prior to rejection of their claims. See Donald Peter, 107 IBLA 272 (1989); see also William Carlo, Jr., 104 IBLA 277 (1988).

### Arguments

In their statement of reasons (SOR) on appeal, appellants argue that Judge McKenna erred in applying the presumption of administrative regularity to the facts of this case, and that the standard of proof should be the preponderance of the evidence (SOR at 11). Appellants argue that application of the presumption required them to meet an erroneously high burden of proof, *i.e.*, a clear and convincing showing of evidence to the contrary. Appellants argue that the Department relies on cases where appellants have alleged that documents have been filed but lost or misplaced by a Government agency. Appellants assert that the question is "whether the applicants intended to apply for land in addition to that which the government described on the application forms out of the presence of the applicants," and that neither the Government nor the Judge cited any Board decision applying the presumption in this context (SOR at 10-11 (emphasis in original)). Appellants argue that even if the Board were to extend its application of the presumption to other types of government actions, the presumption is not properly applied in this case since the myriad of problems BIA and BLM encountered in administering the Alaska Native Allotment Act is a matter of public record (SOR at 6-9).

Secondly, appellants argue that Judge McKenna's decision holding that Kozevnikoff did not communicate his intent to apply for 160 acres is erroneous in light of the surrounding circumstances as described at the hearing by appellants, who were present at meetings between BIA representatives and Kozevnikoff, and who subsequently helped him complete and file his application.

In its answer, BLM argues that the presumption of administrative regularity was properly applied in this case, that the applicants failed to prove that Kozevnikoff applied for 160 acres of land, and that Judge McKenna's decision should therefore be upheld.

### Discussion

[1] We first consider the contention raised by appellants that Judge McKenna misapplied the presumption of administrative regularity to these facts. This presumption has previously been applied by this Board to situations where a document is alleged to have been filed with BLM and subsequently lost or misplaced. David A. Gitlitz, 95 IBLA 221, 224 (1987), and cases cited therein. In Wilson v. Hodel, 758 F.2d 1369, 1374 (10th Cir. 1985), the court indicated that this Board's application of the presumption of regularity in lost document cases is on firm foundation. In that case, however, the court stated that "the presumption of regularity applies only when an agency engages in 'regular' activities \* \* \* [it] does not apply when an agency deviates from its established procedure."

The Board has held that the preponderance of evidence standard should be applied in nearly all Native allotment cases. In United States v. Estabrook, 94 IBLA 38, 51-52 (1986), we stated:

In previous Native allotment cases we have stated that the applicant bears the burden of meeting the use and occupancy requirements by clear and credible evidence. See, e.g., United States v. Flynn, 53 IBLA 208, 244, 88 I.D. 373, 393 (1981); John C. Krutsen, 23 IBLA 296 (1976). However, we believe the Tenth Circuit Court of Appeals decision issued in 1984, Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984), indicates that the proper standard of proof to be applied in Departmental review of virtually all classes of cases is the preponderance of evidence standard. See Woods Petroleum Co., 86 IBLA 46, 50-51 (1985). We find this standard is appropriate in evaluating the evidence presented regarding John Estabrook's allotment. [Emphasis added.]

As noted earlier, the hearing in this case was held in accordance with Pence v. Kleppe, *supra*. The preponderance of evidence is the appropriate standard to be applied in such hearings, as was evident in the Board's decision in Donald Peter, 107 IBLA 272, 276 (1989):

[W]e 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. [Emphasis added.]

The above-cited holdings in Estabrook and Donald Peters clearly support the application of the preponderance of evidence standard in Native allotment cases such as this one. On the other hand, neither the Judge nor BLM have cited any applicable precedent in support of applying the presumption of regularity to the facts of this case. We therefore conclude the preponderance of evidence standard is the proper standard to be applied, and that Judge McKenna's decision should be modified accordingly.

[2] However, applying the preponderance of evidence standard instead of the presumption of regularity standard is of no avail to appellants. In its answer, BLM states, "[t]he key to this case is not the applicability of the presumption of regularity but the absolute lack of evidence showing that Ambrose Kozevnikoff intended to describe 160 acres in his original allotment application." We agree.

Section 905(c) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(c) (1988), provides: "An allotment applicant may amend the land description contained in his or her application if said description designates land other than that which the applicant intended to claim at the time of application and if the description as amended describes the land originally intended to be claimed."

This Board has previously held, however, that section 905(c) prohibits applicants from adding land to the original description. See Mitchell Allen, 117 IBLA 330, 337 (1991); Donald Peter, *supra*; William Carlo, Jr., 104 IBLA 277, 287 (1988); Stephen Northway, 96 IBLA 301, 309 n.8 (1987); Charlie R. Biederman, 61 IBLA 189, 192 n.1 (1982).

Accordingly, Judge McKenna held that section 905(c) of ANILCA could not be applied to permit appellants to amend Kozevnikoff's application to include the additional 80 acres. He also held, however, that "Ambrose Kozevnikoff will be found to have had an application for 160 acres pending before the Department before December 17, 1971 if his heirs can prove that he not only intended to apply for 160 acres, but that he also communicated his intent to Kathy Adams" (Decision at 5 (emphasis added)). Based on his observation of the witnesses and his analysis of the record, Judge McKenna found that appellants "failed \* \* \* to present evidence which showed that he communicated his intent to Kathy Adams or any other employee of the Department" (Decision at 7). Our review indicates the record supports this finding.

Appellants do not contend that Kozevnikoff told BIA employee Kathy Adams that he wished to apply for 160 acres. Rather, they argue that this intent was implicitly understood by Kozevnikoff, Adams, and his son and daughter-in-law, all of whom were present both at the initial BIA meeting in which Adams informed Tanana Alaska Natives about Native allotment applications, and when she picked up their completed applications (Tr. 116). We reject the proposition that appellants do not have the burden of at least showing that the applicant communicated his intent to someone.

The Board has stated that the absence of any independent evidence corroborating an applicant's oral statement of intent after the fact clearly weakens the applicant's assertions. William Carlo, Jr., *supra*. In the case at hand, appellants have not even shown such oral statement was made. There is no credible independent corroborating evidence showing the applicant communicated his intent to apply for 160 acres to any employee of the Department.

#### Conclusion

For the reasons set forth above, we conclude that while Kozevnikoff may have intended to apply for a 160-acre allotment, the record does not support, by a preponderance of the evidence, a finding that he did, in fact, have an application for 160 acres pending before the Department on December 18, 1971. Therefore, we must affirm Judge McKenna's decision holding that the heirs may not amend or reconstruct Kozevnikoff's original Native allotment application to include an additional 80 acres. To the extent appellants have raised arguments which we have not specifically addressed herein, they have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

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John H. Kelly  
Administrative Judge

I concur:

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Bruce R. Harris  
Deputy Chief Administrative Judge

