

TIMOTHY AFCAN, SR.

IBLA 99-321

Decided September 25, 2002

Appeal of a decision of the Alaska State Office, Bureau of Land Management, rejecting reconstructed Native allotment application as untimely filed. AA-51872.

Set aside and referred for hearing.

1. Administrative Procedure: Administrative Procedure Act-- Alaska Native Claims Settlement Act: Administrative Procedure: Applications--Alaska: Native Allotments-- Applications and Entries: Filing

The Alaska Native Allotment Act (formerly codified at 43 U.S.C. §§ 270-1 through 270-3 (1970)) was repealed by sec. 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1994), subject to applications pending before the Department of the Interior on Dec. 18, 1971. A Departmental memorandum issued by Assistant Secretary Jack O. Horton on Oct. 18, 1973, which stated that Native allotment applications filed with a bureau, division, or agency of the Department on or before Dec. 18, 1971, would be considered "pending before the Department" on Dec. 18, 1971, was consistent with section 18(a), created no new law, rights, or duties limiting the eligibility of Native allotment applicants, and therefore is an interpretative rule and not subject to the notice and comment provisions of the APA, 5 U.S.C. § 553 (1994).

2. Alaska Native Claims Settlement Act: Administrative Procedure: Applications--Alaska: Native Allotments -- Applications and Entries: Filing--Alaska: Native Allotments--Rules of Practice: Appeals: Generally

Where on appeal from a BLM decision rejecting a Native allotment application because the application was not pending before the Department on Dec. 18, 1971, the Board determines that there is a question of fact whether the application was pending on that date, the Board will set aside the BLM decision and refer the

case for a hearing before an Administrative Law Judge. Evidence that a BIA employee may have accepted an allotment application prior to December 18, 1971, establishes a question of fact as to whether the application was "pending before the Department" on that date.

APPEARANCES: Carol Yeatman, Esq., Anchorage, Alaska, for appellant; Lisa M. Toussaint, Esq., Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Timothy Afcan, Sr., has filed an appeal from a May 5, 1999, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting Afcan's reconstructed Native allotment application, AA-51872, as a matter of law because it was untimely filed. The Bureau of Indian Affairs (BIA) filed Afcan's reconstructed application with BLM under provisions of the Native Allotment Act of May 17, 1906, 43 U.S.C. § 270-1 through 270-3 (1970), which was repealed with a savings provision by sec. 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1994). The savings provision provides that "[n]otwithstanding the foregoing provisions [repealing the Native Allotment Act of 1906] any application for an allotment that is pending before the Department of the Interior on December 18, 1971, may, at the option of the applicant, be approved and a patent issued." BIA filed the reconstructed application with BLM on April 14, 1983. 1/

Background

The reconstructed application and supporting affidavit, signed by Afcan on March 10, 1983, alleged use and occupancy of the land from 1936, when Afcan was born, through 1942, and seasonally during the 1940's, 1952-53, and 1965-68, for hunting and trapping. Afcan identified the approximate location of the lands applied for on an attached map. BLM later pinpointed the land as located in secs. 5 and 6, T. 28 N., R. 82 W., Seward Meridian, near the village of Akulurak, Alaska. 2/ Attached to

1/ In 1982, Afcan petitioned the court in Fanny Barr v. United States, Civ. No. A76-160 (D. Alaska), for inclusion as a class member. The Barr litigation produced a stipulation of settlement that acknowledged that certain Alaska Natives had timely submitted allotment applications to the Rural Alaska Community Action Program (RuralCap), which were not timely submitted to the Department of the Interior. If one could establish inclusion in the class, he or she was afforded certain remedies pursuant to the settlement. On March 10, 1983, Afcan signed an affidavit stipulating that he had not delivered his application to a RuralCap worker, and therefore did not qualify as a member of the Barr class. On the same date, he signed a reconstructed Native allotment application and affidavit averring the facts recounted below. (See BLM record in AA-58260.)

2/ These lands were within village selection application F-14825, and are within Interim Conveyance Nos. 294 and 295, approved February 28, 1980.

the application was an affidavit signed by Afcan on March 10, 1983, stating that he had applied for a Native Allotment sometime in the 1960's, but before his wife died in 1968, while he was living near Sheldon's Point. Afcan's affidavit stated that he gave the completed application to Paul Manumik (now married to Afcan's niece), who was employed at the time by the BIA at the BIA school in Sheldon's Point. "I do not know what happened to my application after I gave it to Paul Manumik," Afcan avers. "I assumed he would take care of it." (Affidavit of Timothy Afcan, Sr., dated Mar. 10, 1983.)

Tred Eyerly, employee of the Alaska Legal Services Corporation (ALSC), also submitted an affidavit with the application. Eyerly's affidavit states that he spoke with Manumik over the telephone on April 5 and 26, 1982. According to Eyerly's affidavit, Manumik "told [him] that he helped some people fill out their Native allotment applications," and that "he remembered taking Tim Afcan's Native Allotment application." The affidavit continues:

Mr. Manumik said he mailed the application to either Bethel or Anchorage. He cannot remember whom he sent it to. Mr. Manumik also told me he was employed by the BIA at this time, and worked at the BIA school in Sheldon's Point when he took Mr. Afcan's application.

(Affidavit of Tred Eyerly dated Mar. 14, 1983.) On April 15, 1983, Tred Eyerly forwarded to BLM a letter from Mary Ayers, a personnel assistant working in the BIA office in Bethel, Alaska, indicating that Manumik was employed by BIA during the years 1966-1969, again in 1971, and from October 26, 1972, through June 3, 1975. (Letter from Mary Ayers, Bethel Agency, BIA, dated Mar. 23, 1983.)

Everett F. Prince, Agency Superintendent for the Bethel Agency, BIA, provided a cover letter with Afcan's reconstructed application. Prince's letter averred:

Afcan submitted his application to a BIA school employee around 1968. The employee remembers accepting the application and then mailing it to an address in Bethel or Anchorage. However, BLM has no record of Mr. Afcan's application.

Mr. Afcan's application was submitted to the Department of Interior before the repeal of the Allotment Act. Enclosed is an affidavit from Tim Afcan which attests to this fact. Also included in this submission is an affidavit from Tred Eyerly of Alaska Legal Services. Mr. Eyerly's affidavit reports the facts of his conversations with Paul Manumik, the BIA employee who took Mr. Afcan's application.

(Letter dated Apr. 11, 1983, from Everett Prince, Superintendent, Bethel Agency, BIA.)

After receipt of the application and supporting documents, BLM processed the application as if it had been timely filed. It requested a mineral examination and field report on February 13, 1986. The field examination took place on July 20, 1987, and the field report was completed on September 22, 1987. ^{3/} BLM issued a report finding the land non-mineral in character on March 30, 1988. BLM requested a survey on January 13, 1988. By letter dated August 3, 1990, BLM notified Afcan of a final date by which he would need to amend the application, if he desired. Afcan confirmed the location on August 14, 1990, and BLM approved special instructions for the field survey on October 2, 1991. The survey was completed on July 26, 1992, and the Director, Cadastral Survey, approved the plat of survey on July 2, 1993. It was officially filed with BLM on July 15, 1993, and noted to "records" (presumably, the Master Title Plat) on December 2, 1993. BLM sent Afcan a letter dated November 15, 1994, notifying him that the allotment application would be conformed to survey unless he objected within 30 days. Afcan filed a written acceptance of the survey on December 27, 1994.

Nothing appears in the record between 1994 and May 5, 1999, when BLM issued its decision rejecting Afcan's application. Relying on an October 18, 1973, policy memorandum issued by the Department's Assistant Secretary for Land and Water Resources, Jack O. Horton (Horton Memorandum), BLM's decision rejected the application because it was not delivered to an appropriate agency office of the Department before December 18, 1971. (Decision at 3.) The decision quoted the Horton Memorandum interpreting the phrase "pending before the Department on December 18, 1971," as follows:

[T]he Department has no authority to consider any application not filed with any bureau, division, or agency of the Department * * * on or before [December 18, 1971.] Evidence of pendency before the Department * * * on or before [that date] shall be satisfied by any bureau, agency, or division time stamp, the affidavit of any bureau, division, or agency officer that he received said application on or before December 18, 1971, and may also include an affidavit executed by the area director of BIA stating that all applications transferred to BLM from BIA were filed with BIA on or before December 18, 1971.

(Decision at 3, quoting the Horton Memorandum at 1-2.)

BLM concluded that Manumik's statement to Eyerly did not meet the criteria set forth in the Horton memorandum, because it did not establish "timely filing in an appropriate office." The decision explained:

^{3/} Field examiner Carl Neufelder reported that Afcan's brother accompanied him on the field examination, and had "excellent" personal knowledge of the allotment. The report noted there were signs of a deteriorated cabin and bathhouse, and no recent signs of occupancy. (Sept. 22, 1987, Field Report at 2-3.)

First, Mr. Manumik is unsure of where he sent the application. Second, assuming Mr. Manumik mailed the application, case law establishes that allegations * * * of mailing are not sufficient to prove actual receipt and filing of a document.

(Decision at 3; citations omitted.) Citing this Board's decision in Heirs of Linda Anelon, 101 IBLA 333, 337 (1988), the decision noted that "affidavits attesting to a timely filing, standing alone, are not sufficient to establish such filing. There must be independent corroborating evidence that the Native allotment application was actually received by a Departmental office on or before December 18, 1971." (Decision at 3.) According to BLM, Manumik's "employment as an employee of the BIA school does not meet" criteria requiring that he be an "authorized employee or representative of the BIA for the purpose of receiving and filing Native allotment applications." Id. at 3. Accordingly, there was insufficient evidence to establish that the application was timely received in a Departmental office. (Decision at 3-4.)

In his Statement of Reasons on appeal (SOR), Afcan alleges that the decision "is wrong and should be vacated." (SOR at 4.) It attacks BLM's reliance on "rules created by the Horton Memorandum" because they are "impermissible shortcuts" of the rule making requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1994). Id. Relying on reasoning set forth in Morton v. Ruiz, 415 U.S. 199 (1974), and similar cases, Afcan argues that the Horton memorandum "creates new procedural and substantive rules for processing allotment applications" (SOR at 6), and, as such, should have been duly promulgated in accordance with the rule making provision of the APA, 5 U.S.C. § 553 (1994). ^{4/} In the alternative, Afcan maintains that Manumik's employment at a BIA school was sufficient to meet the requirements of the Horton memorandum. (SOR at 4-5.) In any event, Afcan contends, he "substantially complied" with the requirements of the Native Allotment Act; therefore, "equitable adjudication provisions" should permit the application to go forward. Id. At the very least, Afcan asserts, the record raises a question of fact concerning whether the application was timely filed that must be resolved at a hearing. Id.

In its Answer, BLM maintains that the Horton memorandum does not violate the APA because it is "interpretive" rather than substantive, and therefore comes within an exception to rule making procedures stated in the APA. (Answer at 6-9.) Citing opinions of the Ninth Circuit and the U.S. District Court for the District of Alaska in Alcaraz v. Block, 746 F.2d 593 (9th Cir. 1984), and Aleknagik Natives, Ltd. v. United States, 635 F.Supp. 1477 (D. Alaska 1985), aff'd, 806 F.2d 924 (9th Cir. 1986), BLM asserts that there was no requirement to subject the memorandum to

^{4/} That provision requires that administrative agencies must afford the public notice by publication in the Federal Register and an opportunity to participate in the rule making process prior to the promulgation of rules and regulations having the force and effect of law. 5 U.S.C. § 553 (1994).

either formal notice and comment procedures or to publish it in the Federal Register. Id. BLM maintains that the Horton memorandum sets out a reasonable Departmental interpretation of the savings provision in section 18(a) of ANCSA, 43 U.S.C. § 1617(a) (1994), which is supported by longstanding legal precedent. (Answer at 13.) BLM contends that it “properly rejected appellant’s reconstructed application because there is insufficient evidence in the record that appellant’s original application was pending before the Department on December 18, 1971” (SOR at 14-17), and, further, that appellant has no right to a hearing on the matter “as no material issue of fact exists.” (SOR at 17.)

[1] We reject Afcan’s argument that the Horton memorandum is an inappropriate exercise of administrative authority because it was not duly promulgated pursuant to rule making procedures set forth in the APA, 5 U.S.C. § 553 (1994). It is a well-recognized principle of administrative law that a governmental agency has inherent authority to, without formal notice and comment procedures, issue interpretative internal memoranda consistent with statutory directives for purposes of ensuring their fair implementation. Metropolitan School District of Wayne Township v. Davila, 969 F.2d 485, 490 (7th Cir. 1992) and cases cited; see also K. Davis and R. Pierce, Administrative Law Treatise, § 6.3 at 233 (3rd ed. 1994). This principle is recognized by the APA, 5 U.S.C. § 553(b) (A) (1994), which exempts “interpretative rules” and “general statements of policy, or rules of agency organization, procedure, or practice” from notice-and-comment rule making procedures.

Various court opinions have established general principles regarding the distinction between “interpretive” and “legislative” rules. “[A] ‘substantive’ or ‘legislative’ rule * * * has the force of law; an ‘interpretative rule’ is merely a clarification or explanation of an existing statute or rule.” Guardian Federal Savings and Loan Association v. Federal Savings and Loan Insurance Corporation, 589 F.2d 658, 664 (D.C. Cir. 1978).

In White v. Shalala, 7 F.3d 296 (2nd Cir. 1993), the United States Court of Appeals for the Second Circuit, quoting the second edition of K. Davis, Administrative Law Treatise, § 7.10 at 54, noted that “rules are legislative when the agency is exercising delegated power to make law through rules, and rules are interpretative when the agency is not exercising such delegated power in issuing them.” The Court continued: “Since legislative rule-making involves the agency’s delegated power to make law through rules, it is subject to the public participation and debate that notice and comment procedures provide.” Id. at 303-304. Citing the Seventh Circuit’s opinion in Metropolitan School District of Wayne Township v. Davila, 969 F.2d at 489-90, the Court in White v. Shalala stated that “[t]he central question [to be determined] is whether an agency is exercising its rule-making power to clarify an existing statute or regulation, or to create new law, rights, or duties in what amounts to a legislative act.” 7 F.3d at 303.

Likewise, the Seventh Circuit, in Metropolitan School District, 969 F.2d at 492, held that a determination of whether a rule is

interpretive and exempt from the APA's notice and comment requirements includes whether the rule merely states what the agency thinks the statute means, rather than creating new law, rights or duties, and whether the rule relies upon the language of the statute and its legislative history. 969 F.2d at 492. In that case, the Seventh Circuit referred to the Ninth Circuit's opinion in Alcaraz v. Block, which held that, where directives merely tracked requirements of a statute, explaining something that the statute already required, they did not create new law and did not require notice-and-comment procedures. 746 F.2d at 613. Likewise, in American Mining Congress v. MSHA, 995 F.2d 1106, 1112 (D.C. Cir. 1993), the D.C. Circuit held that a rule is "legislative" and thus subject to the APA notice-and-comment requirement if, inter alia, in the absence of the rule, there would not be adequate legislative basis for enforcement action or other agency action to confer benefits or ensure performance of duties, or if the rule amends a prior legislative rule.

Relying on Morton v. Ruiz, 415 U.S. 199, Afcan states:

The Horton Memo is not a mere opinion. It is not a guide for BLM personnel. Instead, it establishes a norm or standard for the determination of eligibility of an allotment. * * * The rule is used as a gatekeeper to deny allotment applications, such as Mr. Afcan's, without considering the merits of their claim.

(Reply at 3.) In Morton, BIA denied welfare benefits to Native Americans on the basis of a provision in the BIA Manual limiting general assistance benefits to Natives living "on reservations." The Supreme Court held that, by not publishing its general assistance eligibility requirement in the Federal Register or in the Code of Federal Regulations, the BIA failed to comply with the requirements of the APA as to publication of substantive rules. Morton v. Ruiz, 415 U.S. at 235. The Supreme Court's pivotal concern was that, by a limitation set forth in the BIA Manual, the BIA limited general assistance benefits to Native Americans provided by Congress under the Snyder Act to those living "on reservations," a limitation not found in the Snyder Act. Furthermore, the BLM provision ran counter to BIA's prior practice and interpretation. Morton v. Ruiz, 415 U.S. at 206-07, 214, 236-37.

Afcan maintains that the Horton memorandum is an analog to the BIA Manual provision at issue in Morton v. Ruiz because it establishes a substantive rule for extinguishing Native allotment claims. He construes the Horton memorandum as limiting Afcan's eligibility for a Native allotment in a manner contrary to ANCSA.

This is not the case. ^{5/} The Horton memorandum as written follows the statutory language of ANCSA which extinguishes all claims not pending

^{5/} In addition to Morton v. Ruiz, 415 U.S. at 199, Afcan refers us, inter alia, to Malone v. Bureau of Indian Affairs, 38 F.3d 433 (9th Cir. 1994), and Ruangswang v. Immigration and Naturalization Service, 591 F.2d 39

before the Department on December 18, 1971. Thus, Afcan's eligibility for a Native allotment is limited by section 4 of ANCSA, which extinguished "all aboriginal titles in Alaska, and all claims based thereon" (H.R. Rep. No. 92-523 (1971), reprinted in 1971 U.S.C.C.A.N. 2192, 2196), subject to section 18(a), which provides that only those Alaska natives who had applications pending before the Department of the Interior on December 18, 1971, are eligible for Native allotments pursuant to the Native Allotment Act of 1906. Section 18(a) provides:

Further, the Act of May 17, 1906 (34 Stat. 197), as amended, is hereby repealed. Notwithstanding the foregoing provisions of this section, any application for an allotment that is pending before the Department of the Interior on December 18, 1971, may, at the option of the Native applicant, be approved and a patent issued in accordance with said * * * 1906 Act * * *.

43 U.S.C. § 1617(a) (1994) (emphasis supplied).

The Horton memorandum did not alter the impact of this statutory provision. Indeed, the plain language of the statute would permit rejection of applications which the Horton memorandum allowed to be considered, based on evidence that refuted the plain fact that no timely application could be located. Assistant Secretary Horton's stated purpose in issuing the "Horton memorandum" in 1973 was to implement fairly the savings provision imposed by section 18(a), considering that some applications could not be found that would meet the terms of the statute. (Horton Memorandum at 1.) The memorandum addressed the "many areas of concern in the practical administration of the Native Allotment Act." Id.

A review of prior Board appeals involving the question of whether an application was "pending before the Department on December 18, 1971," reveals some of the practical exigencies that Secretary Horton attempted to address. In some cases, applicants had timely submitted their applications to BIA area offices, but BIA either failed to transmit them to BLM or transmitted them untimely. See, e.g., Pedro Bay Corp., 111 IBLA 271, 272 (1989); Herbert Herrmann, 45 IBLA 43, 45 (1980); Julius F. Pleasant, 5 IBLA 171, 172 (1972). In other instances, applicants alleged they had submitted informal land descriptions to BIA that were omitted from the formal application BIA eventually submitted to BLM. E.g., Nora L. Sanford (On

fn. 5 (continued)

(9th Cir. 1978). In these cases, statutory benefits were denied appellants as the result of memoranda that had not been subjected to formal APA procedures. For the reasons stated here, these cases present variations on themes addressed in Morton v. Ruiz, and are similarly distinguished. Afcan relies on Phillips Petroleum Co. v. Johnson, 22 F.3d 616 (5th Cir. 1994). In that case, the Circuit found that the Minerals Management Service's reliance on an unpublished "Procedure Paper" substantively changed prior royalty valuation and "legislatively" established valuation procedures under a general statutory grant of rulemaking authority which did not cover specific valuation methodology.

Reconsideration), 63 IBLA 335, 337 (1982); William Yurioff, 43 IBLA 14, 15-16 (1979). A third scenario involved applications which were timely received by BIA but not properly date-stamped as timely received. E.g., State of Alaska Department of Transportation and Public Facilities, 131 IBLA 121, 124 (1994), citing Myrtle Jaycox, 64 IBLA 97, 99 n.2 (1982).

The Horton memorandum thus ensured that Departmental officials administered the savings provision fairly with respect to allotment applicants who had complied with section 18(a), but, with respect to which, for one reason or another, the Department had not performed its responsive duties in a timely or proper fashion. Thus, the memorandum took the position that, where a Departmental official could verify that the Native had in fact complied with section 18(a), the Native would not be penalized for the Department's ministerial failures.

In Afcan's parlance, then, it is the statute and not the Horton memorandum that was the "gatekeeper" to prevent acceptance of filings which were tardy because of actions of the applicant. The Horton memorandum permitted exceptions where the Department bore some fault in the perceived delay.

Accordingly, the Horton memorandum did not "create new law, rights, or duties" vis a vis Native allotment applicants. For the foregoing reasons, we hold that the Horton memorandum is an interpretative rule, and not subject to the notice and comment provisions of the APA, 5 U.S.C. § 553 (1994).

[2] Having determined that the Horton memorandum is an interpretative rule, however, does not answer the specific question presented in this case. Afcan's argument that the Horton memorandum is a substantive rule derives not from the memorandum but from the conclusion reached by BLM in this case, purportedly in reliance on the memorandum. BLM concluded in 1999 that the record affidavits from 1983 stating that Afcan had delivered his application to Manumik were not enough to show that an application was pending on December 18, 1971, because Manumik was not an "appropriate office of the Department." (Decision at 3.) BLM reasoned that delivery to a BIA school employee did not comply with the Horton memorandum because this status did not establish that he was "an authorized employee or representative of the BIA for the purpose of receiving and filing Native allotment applications." Id.

This construction of who within BIA would be considered an authorized recipient of an application goes beyond the terms of the Horton memorandum. Indeed, though the Board has addressed the Horton memorandum many times, it has not directly taken on that issue. See, e.g., Boy Dexter Ogle, 140 IBLA 362, 366-67 (1997); State of Alaska (Mabel S. Brown), 123 IBLA 233, 236 (1992), citing Heirs of Linda Anelon, 101 IBLA at 336; June I. Degnan, 108 IBLA 282, 284 (1989); Stephen Northway, 96 IBLA 301, 307 (1987); Ouzinkie Native Corp. v. Opheim, 83 IBLA 225, 228-29 (1984); Katmailand, Inc., 77 IBLA 347, 354 (1983); and Charlie R. Biederman, 61 IBLA 189, 191 (1982) (all construing Horton memorandum for other purposes). In fact, the Horton memorandum on its face does not define what kinds of BIA employees

could have, prior to December 18, 1971, accepted an application from a Native allotment applicant.

BLM's construction also goes beyond the conclusions of this Board regarding evidentiary matters in similar cases. Rather, our decisions reflect the understanding that, prior to December 18, 1971, BIA had held its employees out as willing to accept Native allotment applications. In Boy Dexter Ogle, the Board explained that BIA had published notices indicating that BIA would accept applications. In that decision, we cited these BIA notifications as explanation for the fact that applicants should not have anticipated that submitting applications to Alaska Legal Services Corporation attorneys would be sufficient.

The notice issued by the Juneau Area Office of BIA encouraged Natives to route their applications through BIA in order to file with the BLM, (Attachment 2, Barr Ex. 18). Another cited information bulletin noted that a representative of BIA "will help you in filing an application for an allotment" with BLM, (Attachment 2, Barr Ex. 19). Another BIA notice speaks of sending a representative to Native villages to help Natives with their applications, (Attachment 2, Barr Ex. 20). None of the documents presented indicate[s] that a Native allotment application may be filed with BIA (or BLM) by leaving it in the custody of ALSC attorneys.

140 IBLA at 370. The Board went on in that case to state:

The court in Barr recognized the Department's consistent holding that "pending" applications were limited to those filed with BIA or BLM (agencies of the Department) by the statutory deadline. Fanny Barr v. United States of America, Civ. No. A76-160 (D. Alaska, Jan. 18, 1980, Memorandum Order at 10).

140 IBLA at 371.

The Board has not otherwise discussed the context in which particular BIA employees may have been authorized to accept an application. At most, the Board has noted the possibility that some BIA employees may not have sufficiently placed applications "on file" with the Department and remanded such questions for a hearing. Stephen Northway, 96 IBLA 301, 307-08 (1987) (referred for hearing because evidence that a BIA employee assisted an appellant in preparing an allotment application does not establish that it was filed with the Department of the Interior.)

Thus, we find that BLM's reliance on the fact that Manumik was a "school employee" as justification for rejecting Afcan's application, because such an employee was not an "appropriate office of the Department," or because he was not authorized to accept applications, goes beyond the terms of the Horton memorandum, and suggests a conclusion not rendered in any decision of the Board. The extent to which a BIA school employee was considered by applicants to be a BIA representative in a remote Native village is unclear. Moreover, construing the Horton memorandum to

establish such distinctions would be inconsistent with its apparent purpose of ensuring that applicants are not unduly penalized by the actions of Department employees.

Moreover, a review of our decisions shows that BLM's action of merely rejecting the application without permitting Afcan a hearing goes beyond our precedent. This Board has long held that Native allotment applicants have property interests in their Native claims which entitle them to notice and an opportunity to be heard before their applications can be rejected. State of Alaska, 40 IBLA 79, 84 (1979). The minimum process attendant on denial of such claims was established in 1976 in Pence v. Kleppe:

[A]pplicants whose claims are to be rejected must be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and, if they request, granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment.

529 F.2d 135, 143 (9th Cir. 1976); Erling Skaflestad, 155 IBLA 141, 149 (2001); Heirs of George Brown, 143 IBLA 221, 226-27 (1998).

Based upon Pence, Board precedent has ensured that where there is an evidentiary question as to whether an application was pending on the relevant date, we must permit the applicant a hearing before its claim is rejected. Our cases have ensured further that other types of evidence than those identified in the Horton memorandum would be sufficient to justify at least a hearing on the issue of whether an application was pending. Thus, in State of Alaska, Department of Transportation and Public Facilities, 131 IBLA 121, the Board found that an allotment application was timely filed even though the application did not bear a timely date stamp and no "bureau, division or agency officer" submitted an affidavit verifying timely receipt. There, we relied on an affidavit of a woman, Lillian Boston, who stated that she personally assisted the appellant and others in preparing Native allotment applications, and that she was aware that time was of the essence in delivering allotment applications to BIA in Anchorage, as there was concern that the Native Allotment Act would soon be repealed. She averred that, as a normal practice, she mailed completed applications to BIA Anchorage on a regular basis, and that she would have mailed the appellant's application to the BIA office during the first few weeks in 1971. The record also contained a deposition by a BIA employee that "a datestamp was not consistently used by BIA when an 'avalanche' of applications began arriving in October 1970." 131 IBLA at 124. We held: "[a]lthough the Boston affidavit does not fall within the examples described in the Horton memorandum, this memorandum is not exhaustive and does not preclude reliance on other evidence." 131 IBLA at 124, citing Heirs of Linda Anelon, 101 IBLA at 337. Accordingly, the Board held that "[t]he record supports a finding that Boston mailed [the appellant's] application * * * early in 1971 and that it was timely received, albeit not datestamped, by BIA well prior to the deadline."

In Heirs of Linda Anelon, in support of an assertion that Linda Anelon had an application pending before the Department on December 18, 1971, Anelon's brother Henry submitted his own affidavit and the affidavit of Eleanor Himler, with whom he and Linda lived "while attending school in Anchorage." 101 IBLA at 334. The Himler affidavit stated that Himler drove "Linda and Henry to the BIA office on 'C' Street here in Anchorage" to file allotment applications, although she did not go in with them. Id. The Board held that the affidavits created a question of material fact concerning whether the application was pending before the Department on December 18, 1971, and, accordingly, referred the matter for hearing. While "independent corroborating evidence" was absent from the Anelon record, id. at 337, the Board determined that, under the auspices of Pence v. Kleppe, 529 F.2d at 135, and Pence v. Andrus, 586 F.2d 733, 743 (9th Cir. 1978), the Himler and Anelon affidavits were sufficient to raise a question of fact whether an application was pending before the Department on December 18, 1971, that warranted a fact-finding hearing. Id. at 337-38.

State of Alaska and Heirs of Linda Anelon demonstrate the type of evidence (absent a timely date stamp or agency affidavit) the Board considers to either establish a timely filing or to raise a material question of fact concerning whether the application was timely filed. In both cases, although the application was not date-stamped or approved as filed by agency affidavit, there were sufficient corroborating facts to warrant either a finding that the application was timely filed or that the appellant had raised a material question of fact concerning a timely delivery.

Consistency with those decisions in Afcan's case would require a hearing before his application may be rejected. BLM's 1999 decision appears to accept that Afcan's application was submitted to BIA employee Manumik. Afcan submitted a 1983 affidavit stating that he gave the application to Manumik. Tred Eyerly of ALSA provided a 1983 affidavit stating that he had confirmed this in telephone conversations with Manumik. Manumik allegedly stated that he assisted Native allotment applicants in preparing their applications while employed by BIA. While not an affidavit, the BIA Agency Superintendent's letter forwarding the application stated that Alcan's application was submitted to the Department before repeal of the Allotment Act. While this information is not dispositive of whether his application was "pending" within the meaning of ANCSA, Afcan can hardly be faulted for failing to submit further evidence as nothing between the 1983 submission of the application and the 1999 BLM decision rejecting it plausibly suggested that the date of filing was an issue.

Considering the above precedent, Afcan's request for an evidentiary hearing to provide additional evidence concerning the filing of his application must be granted. (SOR at 14, 15.) An evidentiary hearing is properly ordered when a case on appeal discloses an issue of fact which is material to the case that can be resolved only by introduction of evidence not found in the record before the Board. Commission for the Preservation of Wild Horses, 133 IBLA 97, 100 (1995); see Woods Petroleum Co., 86 IBLA 46, 55 (1985). Due process requires a fact-finding hearing when issues of

material fact are in dispute regarding whether a Native allotment application must be rejected. Pence v. Kleppe, 529 F.2d at 143; Heirs of Linda Anelon, 101 IBLA at 337-38; Eleanor H. Wood, 46 IBLA 373, 377-80 (1980). That process was denied here when BLM rejected Afcan's application without providing him an opportunity to submit evidence to corroborate his affidavits, or to substantiate his view that submitting his application to BIA school employee Manumik would have been tantamount to submittal to BIA, considering contemporaneous public notices to potential applicants.

Therefore, 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 set aside and the case is referred to the Hearings Division, OHA, for further action consistent herewith. Afcan will bear the burden of showing that his application was timely filed with the Department. State of Alaska (Mabel S. Brown) (On Reconsideration), 123 IBLA 233, 239B (1993).

Lisa Hemmer
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge