

FRED T. ANGASAN
CLARENCE KRAUN

IBLA 2003-28 and 2003-29

Decided August 3, 2005

Consolidated appeals from decisions of the Alaska State Office, Bureau of Land Management, rejecting Native allotment applications for lack of timely filing. AA-77251 (Parcels A and B) and AA-77252 (Parcels A and B).

Set aside and referred for hearing.

1. Alaska: Native Allotments--Applications and Entries: Filing

A BLM decision rejecting Alaska Native allotment applications because of lack of evidence showing that they were pending before the Department on or before December 18, 1971, will be set aside and the matter referred to the Hearings Division for a hearing under 43 CFR 4.415 where an affidavit is submitted on appeal stating that the applications were filed with the Bureau of Indian Affairs in November 1970, and where the record contains evidence lending credence to that assertion.

APPEARANCES: Cathy Aukongak, Esq., and Carol Yeatman, Esq., Alaska Legal Services Corp., Anchorage, Alaska, for appellants; Kenneth M. Lord, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Fred T. Angasan and Clarence Kraun have appealed from the September 17, 2002, decisions of the Alaska State Office, Bureau of Land Management (BLM), rejecting their Native allotment applications.^{1/} Angasan and Kraun filed their

^{1/} Angasan's appeal was docketed as IBLA 2003-28 and Kraun's was docketed as IBLA 2003-29. On appeal, Angasan and Kraun have raised the same arguments,

(continued...)

applications pursuant to the Act of May 17, 1906, as amended (the Act), 43 U.S.C. §§ 270-1 to 270-3 (1970). The Act authorized the Secretary of the Interior to allot up to 160 acres of vacant, unappropriated, and unreserved non-mineral land in Alaska to any Native Alaskan Indian, Aleut, or Eskimo, 21 years old or the head of a family, upon satisfactory proof of substantially continuous use and occupancy of the land for a 5-year period. The Act was repealed by section 18 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (2000), with a savings provision for applications pending before the Department on December 18, 1971. Thus, absent an application pending before the Department on that date, BLM is without authority to grant the Native allotment application. Arthur John, 160 IBLA 211, 217 (2003); Boy Dexter Ogle, 140 IBLA 362, 369 (1997). The central issue presented by these appeals is whether appellants' applications were pending before the Department on or before December 18, 1971.

On September 1, 1992, Angasan signed a reconstructed application for a Native Allotment seeking 160 acres.^{2/} The reconstructed application claimed hunting, trapping, fishing, and berry picking on the lands since 1948. On September 1, 1992, Kraun also signed a reconstructed Native allotment application seeking 160 acres of lands in two parcels.^{3/} His application is virtually identical to Angasan's; it also claimed hunting, trapping, fishing, and berry picking on the lands since 1948.

It appears that Angasan and Kraun first tendered their reconstructed applications to the Bristol Bay Native Association (BBNA), which received it on September 16, 1993, more than a year after it was signed. Both reconstructed applications were accompanied by an affidavit by Carvel Zimin, dated October 28, 1992, stating as follows:

^{1/} (...continued)

which arise out of common facts and circumstances. Accordingly, the two appeals have been consolidated for decision.

^{2/} The lands Angasan sought consisted of Parcel A, containing approximately 40 acres in secs. 8 and 9, T. 21 S., R. 44 W., Seward Meridian, and Parcel B, containing approximately 120 acres in secs. 5 and 8, T. 18 S., R. 44 W., Seward Meridian. (Angasan Decision at 2.)

^{3/} The lands Kraun sought consisted of Parcel A, containing approximately 40 acres in sec. 9, T. 21 S., R. 44 W., Seward Meridian, and Parcel B, containing approximately 120 acres in sec. 6 and 8, T. 18 S., R. 44 W., Seward Meridian, Alaska. (Kraun Decision at 2.)

1. Fred T. Angasan, known as Ted Angasan, was a Ruralcap employee in 1969-71, who assisted individual Natives in filing for their Native allotments.
2. Three of us, Clarence Kraun, Ted Angasan, myself, Carvel Zimin, filed 40 acre parcels, approximately 20 miles upstream of Big Creek. My sister, Muriel Reeves, later filed in Anchorage in the same area, next to my allotment.
3. Clarence Kraun's allotment bordered my allotment and Ted Angasan's allotment bordered Clarence Kraun's.
4. BIA lost all our applications but I pursued my application and was awarded USS 8977, 39.97 acres in the Big Creek area as one of my parcels. ^[4/]

BBNA subsequently forwarded the two reconstructed applications to the Anchorage Office of the Bureau of Indian Affairs (BIA) for certification on December 14, 1993, which marked them as received on December 27, 1993. BIA certified both applications as follows on January 24, 1994:

I Certify Hereby That the above-named applicant is a native entitled to an allotment under the appropriate regulations in 43 CFR 2212. I further certify that the applicant has occupied, marked, and posted the lands as stated in this application and that this claim does not infringe on other Native claims or area of Native Community use.

BIA forwarded the applications to the Anchorage District Office, BLM on January 21, 1994, which serialized Angasan's application as AA-77251 and Kraun's as AA-77252 on January 25, 1994.

On July 9, 1997, BLM wrote to BIA, noting that the applications of Angasan and Kraun (among others) were not timely filed with BLM and included no evidence that they were timely filed with BIA, that is, filed on or before December 18, 1971. BLM invited BIA to show "through sufficient objective documentary proof that [the applications] were received by the BIA on or before" that date, or, if "records relating to receipt of these applications are unavailable from the BIA," to "review the documentation you provided to the BLM from your records." BLM advised BIA that an "affidavit signed by the [BIA] Area director, stating that the applications were

^{4/} The record also contains a second copy of that affidavit, identical in all respects to the one quoted above, except that it does not contain the words "in the Big Creek area as one of my parcels."

received by the BIA on or before December 18, 1971, would provide sufficient proof of timely filing.” BLM even provided a copy of an acceptable sample memorandum from BIA certifying that an application was timely before the Department. Nothing in the record shows that BIA ever provided either any additional evidence or an affidavit. By memorandum dated January 26, 1998, BLM reiterated to BIA that the applications of Angasan and Kraun would be returned to BBNA if BIA did not certify them as timely filed within 30 days of the date of that memo. Again, no response was filed.

On September 18, 1998, BBNA filed a letter with BLM relating to Angasan’s restructured application, including an affidavit by Angasan dated September 16, 1998, which states:

I was a Rural Cap employee from 1969 – 1972 as a Program Development Specialist for one year, then became Executive Director for the first BBNA Group, which was called the Bristol Bay Area Development Corporation. At the time, all State Rural Cap Agencies were assisting Alaska Natives apply [sic] for a Native allotment. That was how there were over 10,000 applications turned into the [BIA] Office, from all over Alaska. Linda Blackford, William Johnson and myself helped the Bristol Bay residents fill out over 3,500 Native allotment applications. I filled out my Native allotment application about the same time as Clarence Kraun and Carvel Zimin[;] I think Muriel Reeves filled out the application for her Native allotment a little later. In my application I described two parcels of land, upstream from Clarence Kraun Parcel A[;] our parcels are both on the same side of Big Creek. My Parcel A is located approximately twelve miles south up the Big Creek, which is approximately twelve miles southerly of the Village of King Salmon, Alaska. My Parcel B is approximately two miles up the Naknek River from the Village of King Salmon, on the south shore of the Naknek River. My Parcel B contains 120 acres[;] Clarence Kraun Parcel B is about a mile and a half to two miles upriver from my Parcel B. I have been using both parcels since January 1, 1954[;] I use Parcel A for hunting for caribou and moose in the fall. I had a couple of posts for marking the land, and I have an old campsite on this Parcel, which I used throughout the year. I also caught white fish, trout, grayling and char which most prevalent there with a rod and reel for subsistence. It would be no fun catching the fish with a net, it was more fun using a rod and reel. I still go up to this land each year, I went up to this parcel earlier this year with a four wheeler. Back then I used to use a skiff in the summer and a snowmachine in the winter to get to both parcels. I used Parcel B for picking blackberries, cranberries and salmon berries during the fall. I also got wood from this parcel to

heat my house for the last thirty years. I have assisted other Alaska Natives [to] file for a Native allotment from 1969-1972[;] during this time I also filed for a Native allotment. I was surprised when some of the allotment applications for our area were lost or misplaced, including mine. I believe my employment with Rural Cap should warrant sufficient evidence of timely filing of my Native allotment application. I would like to receive title to both of my parcels.

Notably, Angasan's affidavit fails to state when he filed his original application or with what office. ^{5/}

On October 8, 1998, BBNA filed documents with BLM supporting Angasan's reconstructed application, in an effort to establish that Angasan was an employee for Ruralcap "working on some of these allotment applications just prior to December 18, 1971 in submitting several Native Allotment applications, including his." ^{6/} BBNA asserted that Angasan's "allotment application is among those that didn't get date stamped by BIA as 'timely filed.'" BBNA wished to show that Angasan "was there prior to the deadline with his allotment application." BNAA also enclosed a letter from Fefa Setuk dated April 7, 1973, confirming that he had filed "for 160 acres when it was opened with Ted Angasan," explaining that Angasan "had me contact [illegible] land Department to fill out an application and they were to mail it to the land Bureau of Management." Setuk further stated that "Ted Angasan was at Lovelace to help the people here." No timeframe is specified in the letter. However, BBNA also enclosed a letter from Ted Angasan confirming that Setuk had "filed a Native Allotment in November of 1970," presumably by giving it to Angasan (as a Ruralcap employee) in Lovelace. As discussed below, this is relevant, if Setuk's

^{5/} BBNA also filed a copy of a declaration dated Sept. 28, 1971, and filed with BIA's Anchorage Office on Oct. 1, 1971, concerning the Native allotment application of Harold R. Samuelson, Jr. That document, certifying that Samuelson occupied, marked, and posted the land he applied for as a Native allotment, is signed by Angasan and is relevant only because it shows that he participated in the preparation of Native allotment applications, presumably pursuant to his employment in Ruralcap.

^{6/} BBNA showed that Ted Angasan was a Ruralcap employee working with Bristol Bay Natives to file Native allotment applications. Thus, a letter dated Mar. 21, 1973, from BIA to Fefa Setuk indicating that BIA's "records failed to reveal an application for Native allotment by" Setuk referred to Ted Angasan. BBNA also showed that BIA also wrote to Angasan directly on Mar. 21, 1973, doubtlessly because he was a former Ruralcap employee who had been shown to be involved in the possible preparation of an application by Setuk, requesting "any help [he] may be able to offer in locating [Setuk's] Native allotment application."

statement that he filed “with Ted Angasan” means that he filed at the same time as Ted Angasan, since it would confirm that Ted Angasan filed in November of 1970, as he alleges on appeal.

On March 11, 1999, BBNA filed documents in support of Kraun’s reconstructed application. These are four witness statements attesting to Kraun’s use of lands in Alaska, including one by Angasan, dated January 26, 1999. Only Angasan’s statement addresses the question of when Kraun applied for his parcel, stating: “I assisted Clarence [Kraun] in 1970 in applying for these parcels of land both on the Naknek River and the big Creek parcels. The original applications became lost.”

On September 17, 2002, BLM issued the decision at issue in Angasan’s appeal, ruling that neither Angasan nor BBNA had provided any independent corroborating evidence that would allow his allotment application to be deemed timely filed with the Department, as required by Heirs of Linda Anelon (Anelon), 101 IBLA 333, 337 (1988). BLM ruled that the witness statements submitted by Angasan on September 21, 1998, and the statement by Zimin attesting that BIA lost Angasan’s original application were not sufficient by themselves to establish that Angasan’s application was “pending” before the Department on December 18, 1971. (Angasan Decision at 2.)

BLM also ruled that, as a party who submitted an original application to Ruralcap rather than an agency of the Department, Angasan had to use the procedures set out by stipulations in the Fanny Barr case. (Angasan Decision at 2.) BLM refers to the Stipulation of Settlement resolving the litigation in Fanny Barr v. United States, Civ. No. A76-160 (D. Alaska Aug. 3, 1982), which acknowledged that certain Alaska Natives had timely submitted allotment applications to the Rural Alaska Community Action Program (Ruralcap) that 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. Members of the Barr class also agreed that they “would waive any right [they had] to require the United States to recover title to land [they] claim, if the United States has already conveyed that title to someone else,” meaning “previously conveyed by the United States to any other person, entity, or the State of Alaska.” See Florence La Rose (On Reconsideration), 136 IBLA 373, 375 (1996).

BLM ruled that since Ruralcap is a non-Federal entity, evidence that Angasan filed his application with it is not sufficient to show that his application was pending before the Department on December 18, 1971. BLM thus also ruled that the relief afforded to applicants who filed with Ruralcap by virtue of the Barr stipulations (whereby timely filing with Ruralcap was accepted as timely filing with an agency of the Department) was available only to members of the Barr class, that is, to

participants in the Barr litigation. BLM held that, since it does not appear that either appellant is a member of the so-called Barr class, they had to prove that their applications were timely filed with an agency of the Department. Since that had not been shown, BLM rejected their applications as untimely. (Angasan Decision at 2.) ^{7/}

Also on September 17, 2002, BLM issued its decision rejecting Kraun's application, "since there [is] no evidence to indicate that a Native allotment application for Clarence Kraun was filed with the Department of the Interior prior to December 18, 1971." (Decision dated Sept. 17, 2002 (Kraun Decision), at 4.) BLM's decision, which is virtually identical to the Angasan decision and includes the discussion of the applicability of the Barr stipulations, expressly ruled that the witness statement by Angasan indicating "that he assisted Mr. Kraun in 1970 in applying for these parcels and that the original application became lost" was insufficient, without "any corroborating evidence" to "allow [Kraun's] allotment application to be deemed timely filed with the Department." (Kraun Decision at 3.)

On appeal, Angasan affirmatively asserted for the first time that he submitted applications to BIA both on his own behalf and on behalf of Kraun before the December 18, 1971, filing deadline. In his reply brief filed at the end of the appeal process, Angasan belatedly presented an additional affidavit alleging more details about his filing of the original applications. He specifically alleged therein that he "applied for [his] land in November, 1970 by filling out a native allotment application * * * by hand and attached a map which designated the areas [he] wanted." He specified that he then "hand-carried approximately 30 completed native allotment applications which included Clarence Kraun's and Carvel Zimin's applications, and [his] application to the BIA office in Anchorage at the end of November 1970." He indicated that he actually "set these applications on a desk in the BIA office," which was "in disarray because it was in the middle of a move to another office" and that BIA employees expressed dismay that more applications were being filed. ^{8/} Angasan's statement thus indicates that he timely submitted both his

^{7/} BLM also noted that the lands covered by both Angasan's and Kraun's Parcel B had been conveyed to the Alaska Peninsula Corp by Patents Nos. 50-91-0598 and -0599. Since it ruled that it had not been shown that Angasan and Kraun filed Native allotment applications, BLM noted that neither application would be processed in accordance with the Stipulated Procedures for Implementation of Order in Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979). We note that, if it is ultimately determined that Angasan and Kraun did file timely applications, it will be appropriate to convene an Aguilar hearing to determine whether to seek reconveyance of the lands covered by their Parcels B. See Lilian Pitka, 164 IBLA 50 (2004).

^{8/} Appellant also submitted the affidavit of a BIA employee working in the Anchorage (continued...)

own and Kraun's applications to BIA, an agency of the Department, in November 1970, prior to the December 18, 1971, deadline.

[1] BLM cited the Anelon case for the proposition that there must be corroborating evidence in addition to affidavits asserting timely filing. The import of the facts of that case are actually that evidence of record (including the affidavits) may present questions of material fact justifying the referral of the case for a hearing. We recently addressed the Anelon case:

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 [99th Cir. 19760], 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[, Department of Transportation and Public Facilities, 131 IBLA 121 (1994)], 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

^{8/} (...continued)

office explaining that "there were too many applications for the Anchorage [BIA] Agency to process" and that boxes of applications were sent to a BIA office in Sacramento, California. Although that affidavit in no way acknowledges the possibility, the existence of such a process increased the likelihood that applications timely filed with BIA were lost in the shuffle between Alaska and California.

timely filed or that the appellant had raised a material question of fact concerning a timely delivery.

Timothy Afcan, 157 IBLA 210, 220-22 (2002). The Board echoed this ruling more recently in Arthur John, 160 IBLA 211, 218 (2003), holding that, where “disputed issues of material fact exist regarding whether a Native allotment application was timely filed, a fact-finding hearing is appropriate “regardless of whether the applicant has submitted corroborative statements.”

We find that the record as a whole contains evidence raising a question of material fact (specifically, the credibility of Angasan’s attestation that appellants’ applications were filed with BIA in November 1970) justifying referring both of these appeals to the Hearings Division for a hearing under 43 CFR 4.415. The affidavit belatedly filed by Angasan along with his reply brief directly states that both his own and Kraun’s applications were filed with BIA prior to the December 18, 1971, deadline. The credibility of that statement will benefit from cross-examination under oath. However, we note that there is some corroboration in the record. Thus, the assertion is lent credence by the undisputed fact that he was a Ruralcap worker who was on the scene at the time Native allotment applications were being prepared and filed in the Bristol Bay area and who, presumably, knew of the deadline. In Angasan’s case, there is also the statement in the record of Fefa Setuk that he (Setuk) “filed for 160 acres when it was opened with Ted Angasan.” If that statement is understood as indicating that Setuk and Angasan filed applications for 160 acres at the same time, it would tend to show that Angasan’s application was timely filed, since Setuk’s apparently was. Likewise, Zimin indicated that both Angasan and Kraun filed at the same time he did, albeit for only 40 acres. If Zimin’s application was timely filed, then appellants’ applications may have been timely filed as well. ^{2/} However, there is other evidence in the record suggesting that neither appellant’s application was timely filed, such as the fact that Angasan did not affirmatively declare when their applications were filed until more than 30 years after the date he ultimately asserted as the date of filing. ^{10/} The Tuck affidavit, submitted by appellants, also raises doubts as to how both of appellants’ applications could have been completely lost by BIA, in view of the recordation procedures described therein that were in place in the Anchorage agency office. Those questions can be addressed at the hearing.

^{2/} We note that Zimin might have been a member of the Barr class, discussed above. If so, his situation would be different as a matter of law from that of appellants.

^{10/} We are unable to find any declaration by Kraun as to exactly when his application was given to Angasan.

Appellants assert that, by failing to conform its decisions to this Board's decision in Afcan, supra, BLM caused appellants' counsel to expend extra time and effort to address this moot issue, and accordingly requests "a sanction of attorney fees" under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504(a)(1) (2000). We reject that request for two reasons. First, although a Native allotment contest is an "adversary adjudication" under the EAJA (Heirs of David F. Berry, 156 IBLA 341, 343 (2002)), an appeal to this Board is not such. Tom Cox, 155 IBLA 273, 274-75; Benton C. Cavin, 93 IBLA 211, 215 (1986). As no hearing or contest has occurred, there is nothing upon which a claim under EAJA could be erected. Second, and in any event, the record before BLM (which included no direct statement by either appellant as to when they had filed their applications) provided no basis whatsoever to conclude that either appellant had submitted a timely application. In that factual context, BLM made the correct decision in denying appellants' applications, such that its decisions were "substantially justified" within the meaning of EAJA. It is only because Angasan made such a statement belatedly on appeal that BLM's decision can be set aside and a hearing on the question justified.

In referring the matter to the Hearings Division for a hearing under 43 CFR 4.415, the Administrative Law Judge to whom the case is assigned is directed to convene a hearing, take necessary testimony and receive other relevant evidence, and issue a decision applying the law to the facts of the case. In the absence of an appeal to this Board, the Administrative Law Judge's decision shall 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 decisions appealed from are set aside and the cases referred to the Hearings Division for a hearing as described above.

T. Britt Price
Administrative Judge

I concur:

David L. Hughes
Administrative Judge