



HEIRS OF SIMEON MOXIE

172 IBLA 280

Decided September 14, 2007



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 N. Quincy St., Suite 300  
Arlington, VA 22203

HEIRS OF SIMEON MOXIE

IBLA 2006-212

Decided September 14, 2007

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying Native allotment application A-055996, Parcels B and C.

Affirmed.

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

The regulations have always required a written and signed application, which must be filed with the Bureau of Land Management office having jurisdiction over the land sought. More than a written declaration of the desire to apply for additional lands is necessary. Without a duly filed, written application in a form that identifies the entry and lands sought, there is no proper basis for identifying and segregating lands and potentially defeating subsequent applications and entries. Where the applicant did not file a new or amended application for additional lands identified as Parcels B and C prior to Dec. 18, 1971, an application after that time constitutes a new application under the Native Allotment Act which must be denied as a matter of law.

APPEARANCES: Carol Yeatman, Esq., Alaska Legal Services Corp., Anchorage, Alaska, for appellants; Regina L. Sleater, 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

The heirs of Simeon Moxie (Heirs) have appealed the May 23, 2006, decision of the Alaska State Office, Bureau of Land Management (BLM), denying Native allotment application for Parcels B and C, A-055996. Parcels B and C together embrace

approximately 155 acres of land.<sup>1</sup> Simeon Moxie's use and occupancy of the land was initiated in 1940.

### *Background*

On December 1, 1961, Moxie filed an amended Native allotment application for 3.80 acres asserting use and occupancy commencing in 1958.<sup>2</sup> BLM began processing the application.

On September 3, 1965, making his mark thereon, Moxie executed a form witnessed by representatives of BLM and the Bureau of Indian Affairs (BIA), which recited that he had been told that day about "the new Native allotment regulations (43 CFR 2212.9)." The form further recited: "I understand that I may now change my present application (shown above) to include several separate tracts if I actually use more than the one tract described in my present application." The indicated application was A-055996, with the application date of October 13, 1961, for 3.80 acres. An individual was expected to check one of three boxes "indicating my wishes on my allotment case." Part A would be checked if an applicant did not wish to change his or her application, Part B would be checked if an applicant wanted to amend his or her present application, and Part C would be checked if the applicant would be willing to accept a deed from the State of Alaska if the lands claimed in an amended application had been surveyed for state selection. Although Part B was not checked, it is clear that Moxie intended to select that option, because Box 2 of the two boxes presented under Part B was checked. Box 2 states: "I will submit an amended application as soon as I can properly stake the lands and describe them." An unidentified handwritten notation beneath Box 2 states: "will not change tract as shown Mosquito Point Plat."

In a letter dated September 22 and received on September 26, 1966, Moxie (apparently through a proxy) wrote BLM and stated:

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<sup>1</sup> Parcel B is approximately 135 acres located in sec. 30, T. 11 S., R. 57 W., Seward Meridan (S.M.); Parcel C is approximately 20 acres located in sec. 15, T. 12 S., R. 57 W., S.M. Both parcels are at Lake Nunavaugaluk in or near Aleknagik, Alaska.

<sup>2</sup> Moxie's initial application was filed in October 1961. It stated that use and occupancy had commenced in 1961. However, his use and occupancy began in 1958, when he purchased a cabin on the land. The amended application corrected that error. Moxie's original and amended applications were also signed with his mark, which was duly witnessed.

Since a Native of Alaska is entitled to so many acres, I would like to put a claim on the Snake River area.

I own 3.8 acres here at Aleknagit. Since I do not have a map I can not show the exact places but here's a rough sketch of where I want it. (Hand-drawn sketch showing two places in addition to the home site.)

If you will send me a map I can mark the places I want claimed. I have lived at the home site since I was very young and my four older children were born there. I have lived beside the river below our home site and also the place above our home site.

....

I shall be waiting to here from you as soon as possible.

Ex. C to Heirs' Statement of Reasons (SOR).

On October 23, 1967, BLM wrote to BIA and advised that Moxie was requesting an amendment of his application, and asked BIA to assist. By letter dated November 16, 1967, BIA responded by writing to Moxie and inquiring whether he intended to "file for additional lands." In addition, BIA acknowledged that Moxie had "previously informed this office of [his] desire to file on land on the Snake River at Lake Nunavaugaluk," and had informed him that "the land is under application by Mr. Peter H. Nelson of Dillingham," who had filed evidence of occupancy. BIA suggested that the apparent conflict between Moxie's and Nelson's claims to the land might be resolved if Nelson could be persuaded to relinquish part of the land included in his application. In addition, the letter informed BIA that competing claims had been filed by the Bristol Bay Native Association (BBNA), Kodiak Area, and the Alaska Peninsula Native Association. Ex. E to SOR. The record shows that, while BLM continued to process Moxie's application for the 3.80 acres, nothing happened with respect to his declared intention to apply for additional lands.

By letter dated October 7, 1969, Moxie again wrote BLM. That letter disputed Nelson's claim to the land, alleged that Nelson was responsible for the fire that burned his improvements, and reiterated: "I want more land staked out in Snake River . . . . I am wondering if someone can come over so I can show them just where I want it & surveyed. . . . I will also show the land man where my cabins were and the remains and also the place where my uncle's cabin was down the river always. Will be expecting a letter from you very soon." Ex. F to SOR. "So that they will be aware of your interest in obtaining additional lands," by letter dated October 29, 1969, BLM informed Moxie that his second letter had been forwarded to BIA, indicating that Moxie would receive "additional information" from BIA. Ex. G to SOR. A BLM note to the file shows that BIA had taken no action by July 8, 1970.

By letter dated January 10, 1973, BLM wrote Moxie to inform him of options afforded by ANCSA. On January 16, 1973, Moxie and his wife, Anna, responded by filing an election to proceed with Native allotment application A-055996. No action had been taken regarding Moxie's letters requesting additional lands. A daughter, Sassa Moxie, apparently inquired about the amendment, because the record includes a copy of a letter dated June 21, 1973, in which the Bristol Bay Resource Area<sup>3</sup> acknowledged receipt of her March 28 letter and indicated that a field examination would be conducted. The letter also commented on the conflicting claims of Moxie and Nelson, suggested that the Moxies file a protest against Nelson's claim, but cautioned "before you do anything along those lines, you should seek legal advice," and referred her to the BIA.

Moxie died on July 6, 1973. On September 29, 1978, BLM transmitted Patent No. 50-78-0112, issued to Moxie for 3.61 acres, to BIA.

On May 21, 1979, the BIA responded to an inquiry from Catherine Adams, another of Moxie's daughters. BIA referred to the June 21, 1973, letter that explained what was required to file a protest against Nelson's claim (by then Nelson was also deceased), and noting that no certificate (deed) had been issued to Nelson, again stated that the Heirs could file a protest.

Moving ahead in the record, the next relevant document is a February 10, 1995, memorandum to file noting that BLM had asked the BBNA to look through its file on Moxie "to see if there are any handwritten Native allotment applications or any other documents pertaining to land, other than the three certificated acres on Lake Aleknagik, that Mr. Moxie applied for." A note on the same page dated February 15, 1995, states that the BBNA responded by stating that "there was no additional application for land in his file other than the 9/22/66 letter with the sketch for the three parcels of land in the vicinity of Lake Nunavaugaluk." BBNA was to contact the Heirs and "find out the exact location and legal description of the land Mr. Moxie actually intended to apply for."

In a letter to BBNA dated January 7, 1997, BLM advised that it had designated the 3.61-acre "certificated" parcel as Parcel A, designated the 135-acre tract Parcel B and the 20-acre tract Parcel C and serialized them under Moxie's Native allotment application A-055996, and noted both tracts on the land records. BLM further advised that "in order to issue a decision which deems the applications for the two parcels as having been timely filed," it would be necessary to "file departmental Native allotment application and evidence of occupancy forms for the two parcels." A notice to that effect was issued on April 1, 1997, under which the Heirs were given an additional 30 days to submit the

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<sup>3</sup> We assume that Bristol Bay Resource Area is part of the BBNA.

required documentation “to facilitate adjudication of the two new parcels.” On April 25, 1997, BIA received reconstructed application A-055996 for Parcels B and C. The reconstructed application was forwarded to BLM on April 30, 1997, with the statement that BIA “can not offer any additional proof of timely submission other than what is offered by [BBNA].”

A field examination followed, in which the location of the land and Moxie’s use and occupancy of the tracts were confirmed.<sup>4</sup> Mineral reports were prepared in 2003. In May 2004, BLM concluded that the lands identified as Parcels B and C included lands that had been conveyed out of Federal ownership, thus invoking the procedures stipulated to implement the order in *Aguilar v. United States*, 474 F. Supp. 840 (D. Alaska 1979).

By decision dated May 7, 2004, citing Moxie’s letters of 1966 and 1969 and alluding to repeated expressions of an intent to claim more than the patented acreage, BLM deemed the reconstructed application timely filed. On May 27, 2004, BLM received a protest filed by Choggiung Limited Village Corporation against application A-055996, which challenged the conclusion that Moxie had filed a claim for the two parcels. On May 28, 2004, the State of Alaska likewise challenged the sufficiency of the application for Parcels B and C. At BLM’s request, this Board vacated the May 7, 2004, decision and remanded the case to BLM.

On remand, on May 23, 2006, BLM issued the decision denying the application, and this appeal followed.

#### *The Issue Presented*

A single issue is presented and argued: whether Moxie’s formal requests for additional lands effectively serve to amend the application filed in 1961, so that an application was pending before the Department on December 18, 1971. Appellants contend that Moxie’s formal requests for the additional lands should be deemed a timely application, so that application A-055996 as thus amended was pending before the Department on December 18, 1971. BLM contends that Moxie did no more than express an intention that he never fulfilled by filing an application on an approved form, so that the application for Parcels B and C was a new application filed after December 18, 1971, which must be denied as a matter of law.

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<sup>4</sup> During the field examination, one of the heirs, Jeff Moxie, indicated that the acreage for Parcel C was only 5 acres rather than 20, and that he intended to file an amended application for a fourth tract.

*Analysis*

We begin by expressing dismay at the Department's failure to meaningfully respond to Moxie's timely and unambiguous written requests to apply for additional lands. The Department not only failed to take decisive action on his requests in the years before the enactment of ANCSA, it doggedly continued processing application A-055996 as if it did not have actual knowledge of Moxie's written requests to claim additional lands. Some 40 years later, after taking and abandoning the opposite view, BLM has finally decided that Moxie failed to act on those intentions and thus failed to file an application. As compelling as we find the circumstances of this appeal, however, we can do no more than follow the regulations and the logic of well-settled Board precedent and affirm BLM's decision.

[1] The regulations have always required a written and signed application, which must be filed with to the office having jurisdiction over the land sought. Such applications must contain a description of the land conforming to the plat of survey if surveyed, or a description in metes and bounds, accompanied by a map or protracted survey, if the land had not been surveyed. Additionally, the authorized BIA officer must attest that the applicant is a Native who is qualified to apply for an allotment, that the applicant has occupied and posted the lands sought, and that the claim does not conflict with other claims to the lands. *Compare, e.g.,* 43 C.F.R. §§ 67.2-67.5 (1954), 43 C.F.R. § 67.5 (1960), 43 C.F.R. § 2212.9-3 (1966) *with* 43 C.F.R. § 2561.1 (2005). The filing of an acceptable application segregates the lands identified in the application, causing subsequent conflicting applications to be rejected unless the first applicant has permanently abandoned use and occupancy of the land. *Compare* 43 C.F.R. § 67.9 (1954); 43 C.F.R. § 67.6 (1960); 43 C.F.R. § 2212.9-3(e) (1966) *with* 43 C.F.R. § 2561.1(e) (2005). In 1966 and 1969 when he wrote BLM requesting additional lands, the regulations required BLM to refer an application to BIA for its certification of Moxie's eligibility as a Native, and his continuous use and occupancy of the lands claimed for the requisite 5 years. 43 C.F.R. § 2212.9-4 (1966).<sup>5</sup>

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<sup>5</sup> In 1961 when Moxie filed his application for the 3.80-acre parcel, the regulations did not clearly assign BIA any responsibility for certifying that an applicant had occupied and posted the lands sought for 5 years. That burden apparently rested with the applicant primarily. *See* 43 C.F.R. §§ 67.5(e) and 67.7 (1961). The 1966 version of the regulations acknowledged that BIA could submit the proof, or the applicant could submit it with the application if he or she had satisfied the 5-year continuous occupancy requirement at the time the application was filed. 43 C.F.R. § 2212.9-4 (1966). The 1969 regulations were the same as those in effect in 1966.

Here, on a form provided by the Department, Moxie indicated early on that he intended to request additional lands, followed by two unambiguous written requests for additional acreage. BLM referred his requests to BIA, where they languished with BLM's knowledge, but, unfortunately, no one ever initiated timely action to help him perfect his request by identifying the land and preparing and submitting a new or amended application.<sup>6</sup> However, more than a written declaration of the desire to apply for additional lands is necessary.

Without a duly filed, written application in a form that identifies the entry and lands sought, there is no proper basis for identifying and segregating lands and potentially defeating subsequent applications and entries, or for resolving conflicting claims. Indeed, until a proper application cognizable as such is actually submitted to the Department, a declaration remains only an unfulfilled expression of intent. Most regrettably, that is the case here. Moxie did not, prior to December 18, 1971, file a new or amended application for the lands ultimately identified as Parcels B and C, because the Government did not timely act on his requests; therefore an application after that time would constitute a new application under the Native Allotment Act. As that Act has been repealed, we have no choice but to deny such an application as a matter of law. 43 U.S.C. § 1617(a) (2000);<sup>7</sup> *see Andrew Petla*, 43 IBLA 186, 193 (1979); *George Ondola*,

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<sup>6</sup> In its Answer, BLM notes that Moxie had successfully filed an application for the 3.80-acre parcel and later arranged to clearly communicate his desire for additional lands, arguing that Moxie understood what was required to apply for an allotment. Answer at 2 n.5, 3. BLM obviously intends to suggest that Moxie thus knew that his requests could not possibly constitute an application or an amendment of his pending application, so that the blow dealt by BLM's later decision could not be unexpected. That may be so, but it would be better to question why, in the 6 years that preceded the repeal of the Native Allotment Act and despite actual knowledge of Moxie's declared intentions, BLM never found it necessary or appropriate to respond, if not by action, then by simply informing him whether the pending application could or could not be amended and providing specific information or instructions regarding what was required to do so. Apparently a direct, informative response to Moxie was not warranted even when BLM confirmed in July 1970 that BIA had yet to take any action, though ANCSA's Dec. 18, 1971, deadline loomed ahead.

<sup>7</sup> This is not an instance of a mistake in describing the parcel for which Moxie intended to apply in 1961, for which we might afford some relief. To the contrary, he clearly intended to apply for the 3.80-acre parcel containing his homestead, and accurately described it by metes and bounds in the application. As the sketch in his 1966 letter  
(continued...)

17 IBLA 363, 365 (1974). In the absence of an application, there is no basis for relief under Board precedent.<sup>8</sup> If relief can be granted, it must be obtained from the courts or from Congress.<sup>9</sup>

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

\_\_\_\_\_/s/  
T. Britt Price  
Administrative Judge

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<sup>7</sup> (...continued)

shows, he sought two additional parcels located just above and below the 3.80-acre home site parcel.

<sup>8</sup> Equitable adjudication cannot be invoked because in the absence of a cognizable application filed in a proper bureau or office of the Department (or a bona fide attempt to file such an application), an assertion of substantial compliance with the regulations prescribing the manner in which one applies for a Native allotment is not supportable. 43 C.F.R. § 1871.1-1; *see, e.g., Herbert Herrmann*, 45 IBLA 43, 49 (1980) (“This Board found that the error or deficiency was satisfactorily explained as being the result of some obstacle over which the parties had no control, and held that the applications be reinstated and the case remanded for further consideration in accordance with equitable adjudication. We find the same reasoning applicable here.”); *DeRalph S. Bunting*, 41 IBLA 13, 19 (1979) (“Here there is no entry or claim where there has been substantial compliance with the law and a patent could issue except for some slight mistake, error, or technicality which can be overlooked.”); *Julius F. Pleasant*, 5 IBLA 171, 177 (1972) (“[H]aving recognized that the documents were held by the BIA past their respective due dates, the several appellants are equally absolved of blame, regardless of how long their individual submissions were delayed in the Anchorage agency.”).

<sup>9</sup> Congress may find the facts of this case compelling enough to enact private relief legislation.

I concur:

\_\_\_\_\_/s/  
James F. Roberts  
Administrative Judge