

Editor's note: Reconsideration denied by Order dated Jan. 4, 1994

STATE OF ALASKA
(HEIRS OF LUCY CHARLIE)

IBLA 89-463

Decided May 20, 1993

Appeal from a decision of the Alaska State Office, Bureau of Land Management, dismissing State of Alaska's protest and confirming approval of Native allotment application. F-13863.

Affirmed as modified.

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

The timely filing of a valid protest against a Native allotment under 43 U.S.C. § 1634(a)(5)(B) (1988), is sufficient to prevent legislative approval, even where that protest is subsequently withdrawn. A BLM decision denying the State's protest on the grounds that no trail exists that conflicts with the Native allotment will not be affirmed where the record reveals that an easement has been granted for a trail and that the easement probably crosses the allotment.

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

Where a Native allotment applicant never objected during her life to BLM's placement of her allotment parcel on the ground, and where her heirs have not subsequently objected, BLM's placement of the parcel will be affirmed on appeal in the absence of irrefragable showing beyond question that the parcel that BLM approved is not the land the applicant intended to claim.

APPEARANCES: James N. Wanamaker, Esq., Office of the Attorney General, Anchorage, Alaska, for appellant; Kathy J. Keck, Esq., Fairbanks, Alaska, for the Heirs of Lucy Charlie; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The State of Alaska (the State) has appealed from the April 14, 1989, decision of the Alaska State Office, Bureau of Land Management (BLM), dismissing its protest against the Native allotment application of Lucy Charlie

(F-13863) and confirming approval of that application on behalf of the heirs of Lucy Charlie.

On May 3, 1971, Charlie filed an application, which was apparently prepared on her behalf by Alaska RULCAP. ^{1/} That application described approximately 160 acres of unsurveyed land to the northwest of Grayling, Alaska. The application indicated that, starting in 1950, Charlie had seasonally used and occupied the lands applied for each year between June 1 and August 30, for her "fish camp" and "hunting camp." The application also indicated that she had made an improvement, a cabin valued at \$350, on the land in 1950.

The 160-acre parcel originally applied for was unsurveyed at the time of the application. Accordingly, although it was configured in the shape of a quarter section, it was described in the application by metes and bounds relying on longitude and latitude. Also, a copy of the "Holy Cross (D-3) Quadrangle" map (quadrangle map) showing the boundaries of the parcel was attached to the application.

In early June 1974, BLM conducted its field examination of those lands. Charlie signed a statement dated June 7, 1974, indicating in part as follows: "I want to change my Native Allotment application as described above into two 80 acre parcels. RULCAP (Clyde Diemtief) erred [sic] in plotting my application." The following was provided as a description of F 13863 B (subsequently referred to as "Parcel B"): "80 acres on Grayling Cr. is located within the 160 acres originally applied for as F13863 as shown on BLM field map [sic] Holy Cross D-3." ^{2/} Although Charlie signed this statement, it is likely that she did not write it, as her name is misspelled on it as "Lucy Charley."

Jon Dolak, the BLM field examiner, was evidently working with various applicants in the Grayling area at that time. His field reports for Parcels A and B are both in the record.

The first of these parcels (Parcel A) is not directly at issue in this appeal. It is located on the shores of the Yukon River a substantial distance from the land described in Charlie's application. The record indicates that Parcel A was a fish camp that showed signs of substantial use, including a cabin and smokehouse (Parcel A Field Report). The fact that Charlie's improvements were located in Parcel A, rather than in the 160 acres described in the application, strongly suggests that RULCAP's original application was erroneous.

^{1/} Charlie's application was filed pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed effective Dec. 18, 1971, subject to pending applications, by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1988)). RULCAP was a community action program designed to help Natives receive entitlements under that Act.

^{2/} The quadrangle map is not a BLM map, but is prepared by the Geological Survey.

Parcel B was evidently a hunting camp. The location of Parcel B is at the center of this controversy.

On June 11, 1974, Dolak conducted a field examination of Parcel B. In his January 22, 1975, "Field Report" he stated that he examined that parcel after talking to Charlie, who was "knowledgeable of the area" (Parcel B Field Report at 2). He also stated therein that Charlie desired to have 80 acres at her fish camp and "80 acres on Grayling Creek." Id. Charlie evidently did not accompany Dolak on his examination, but one Mountain Deacon, described by Dolak as "allotment guide for Grayling," went with him. Id. Dolak did not report that he located any mark or post left by Charlie, or any other evidence of use other than a blazed trail running in a northwest direction along the creek and several adjacent wood piles. He was able to confirm that the land was suited to hunting and berrypicking, which were her reported uses at the time. Id.

In order to identify Parcel B, Dolak took three steps. First, during the field examination, he nailed a BLM marker to "a spruce tree located in a small opening of the timber" (Field Report at 2). Using that marker, he provided an "[a]pproximate metes and bounds description" of the parcel. That description expressly refers to the sketch map next considered. 3/

Second, Dolak attached to the Field Report a hand-drawn sketch map (sketch map) attempting to picture Parcel B in relation to physical features of the surrounding lands. The sketch map shows a trail running through the parcel from southeast to northwest, as well as two branches of Grayling Creek. The northern branch lies just outside the parcel as depicted, and the parcel is shown as including the southern branch.

Third, Dolak attached to the Field Report a copy of the same quadrangle map that was included in the application, with new handwritten notations outlining Parcel B. He depicted Parcel B on that map as lying for the most part inside the borders of the 160-acre parcel described in the application. 4/ He placed Parcel B close to and directly south of the 40-acre Parcel A of the Native allotment claim of Dolly Deacon (F-14996-A), which he tied to the same BLM marker. 5/ He depicted the marker as lying on the southern boundary of Deacon's claim. The quadrangle map also depicts Parcel B with relation to physical features shown on that map. It now appears

3/ "Starting at the BLM marker go west 6 1/2 chains to corner No. 1; thence go on a bearing of S. 52 degrees W. for 20 chains to corner No. 2; thence go on a bearing of S. 39 degrees E. for 40 chains to corner No. 3; thence go on a bearing of N. 52 degrees E. for 20 chains to corner No. 4; thence go on a bearing of N. 39 degrees W. for 40 chains to corner No. 1; approximately 80 acres; also see sketch map."

4/ A rectangular 80-acre parcel will not fit inside the borders of a square 160-acre parcel, unless the former is situated at right angles to the latter or is equilateral. Parcel B, as depicted by Dolak, was neither and, as a result, extended slightly below the southern boundary of the 160-acre parcel as shown on the quadrangle map.

5/ Deacon's Parcel A is misidentified on the map as "14996B."

that Dolak incorrectly marked the location of the marker tag on that map, depicting the tag approximately three eighths of a mile to the north of where it was placed on the ground (Statement of Reasons at 2).

BLM subsequently processed Charlie's application. By letter dated April 21, 1975, BLM notified Charlie that it had determined that she had used the lands she had applied for. BLM stated: "No further action is needed from you at this time. However, before we can issue the certificate of allotment for your land, we must survey its boundaries."

BLM did not survey Parcel B until 1983, when it conducted U.S. Survey No. 5385, Alaska (USS 5385). Although it does not appear on the plat of survey for USS 5385, it is clear from other information in the record that corner No. 1 of USS 5385 was situated 6-1/2 chains west of a "BLM ALUM. TAG" (R-105). ^{6/} It is accepted that that "tag" is the aluminum BLM marker that Dolak nailed to a spruce tree when he examined the site in June 1974. ^{7/}

The survey plat and field notes for USS 5385 were filed on July 31, 1985. By letter dated August 27, 1986, BLM notified Charlie that the survey had been filed and that "[i]n 30 days we will proceed toward final certificate and issuance of the Certificate of Allotment." That notice of survey was received at Charlie's last address of record, but she did not sign the return receipt. Charlie died on November 4, 1986. At no time subsequently has any of Charlie's heirs (who are parties to this appeal) objected that USS 5385 does not accurately portray the lands applied for by Charlie.

The State's involvement in this matter dates to June 1, 1981, when it filed a protest against the allotment pursuant to section 905(a)(5)(B) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(5)(B) (1988). The State asserted that, owing to an "existing trail," Parcel B was "necessary for access to lands owned by the United States, the State of Alaska, or a political subdivision of the State of Alaska, to resources located thereon, or to a public body of water regularly employed for transportation purposes." The State also stated that reasonable alternatives for access were not available.

^{6/} The request for survey of Parcel B, prepared by BLM on Apr. 21, 1975, places Corner 1 of the parcel 6-1/2 chains to the west of the BLM marker. Further, the original 1983 plat of survey for Parcel A of Deacon's allotment, F-14996-A USS 7307), depicts corner 1 of USS 5385 situated approximately 6-1/2 chains to the west of a "BLM ALUM. TAG" (R-105). As discussed below, Deacon's Parcel A was surveyed again in 1985, placing the parcel approximately 15 chains to the north of its original location. The fact that USS 5385 is tied to the aluminum marker is also apparent from the plat of amended survey USS 7307 (Exh. B attached to June 1, 1991, affidavit of Jennings).

^{7/} We note that USS 5385 varies from the metes and bounds description contained in Dolak's Field Report in that it uses angles of S. 45 degrees W. instead of S. 52 degrees W., S. 45 degrees E. instead of S. 39 degrees E., N. 45 degrees E. instead of N. 52 degrees E., and N. 45 degrees W. instead of N. 39 degrees W.

In its April 14, 1989, decision approving Charlie's application, BLM addressed the State's protest. BLM stated that it could not verify the existence of any existing trail. ^{8/} Accordingly, BLM dismissed the protest. BLM also confirmed the approval of Charlie's application for Parcel B, noting that "Parcel B * * * was approved pursuant to the Act of May 17, 1906 on April 21, 1975, and also was legislatively approved pursuant to Sec. 905 of [ANILCA] effective June 1, 1981."

[1] We cannot affirm BLM's determination that Parcel B was legislatively approved. That question turns on whether a valid protest was in place on June 1, 1981. See 43 U.S.C. § 1634(a)(5)(B) (1988). A valid protest was filed by the State, but was subsequently withdrawn in October 1981. ^{9/} We have held that the timely filing of a valid protest under 43 U.S.C. § 1634(a)(5)(B) (1988), is sufficient to prevent legislative approval, even where that protest is subsequently withdrawn. Stephen Northway, 96 IBLA 301, 306 (1987). So it is here. ^{10/}

Further, we cannot affirm BLM's conclusions concerning the lack of a trail on Parcel B. Appended to the State's protest in June 1981 was a description of a number of easements, among them "34 C5." That easement was described as "[a]n easement for a proposed access trail fifty (50) feet in width from Grayling northwesterly along the existing route following Grayling Creek and then westerly along an unnamed creek to public land." According to the description, the easement was "necessary to facilitate travel from the airport and village area west to a large block of isolated public land."

The State has shown that the easement referred to is a public easement (EIN 34 C5) originally proposed by BLM in August 1978 (R-17 and R-20) and then recommended in October 1978 by the Joint Federal-State Land Use Planning Commission pursuant to section 17(b) of ANCSA, 43 U.S.C. § 1616(b) (1988) (R-30 and R-32). It was eventually reserved, in a modified form, to the United States in Interim Conveyance Nos. 582 and 583, as EIN 34a C5 (R-51).

^{8/} BLM held, "Based on a review of the case file, topographic maps, field reports, the Alaska Existing Trail System (1973) maps, the survey plat, and easements reserved pursuant to Sec. 17(b) of ANCSA, it has been determined that there is no trail entering or exit[ing] Parcel B."

^{9/} On Oct. 19, 1981, the State withdrew its protest against Charlie's application for Parcel B, stating that that application is "now noted by the BLM as previously approved pursuant to the Native Allotment Act of 1906." The State, however, expressly conditioned its withdrawal, stating that "if the BLM information upon which this withdrawal decision is based proves to be wrong, the state reserves the right to reactivate affected protests." BLM acknowledged the withdrawal and summarily dismissed the State's protest by decision dated Nov. 27, 1981.

^{10/} Thus, it is unnecessary to consider whether the State's withdrawal of its protest at a time when BLM's case record and title plats showed Parcel B to be situated in an entirely different place than eventually placed by survey, could be considered binding.

Parcel B, as situated by USS 5385, appears to be crossed by public easement EIN 34a C5. 11/ Even if there is presently no trail, an easement exists for one. Although the location of this easement has evidently not been finally identified, we have no reason to doubt that it will be. 12/ Based on the present record, it appears that it will probably cross Parcel B as presently surveyed, and the public's access to the trail might be impinged by the allotment. The fact that it was deemed appropriate to reserve an easement itself confirms that an access route is needed and will eventually be put in place. See State of Alaska (Molly Tocktoo), 118 IBLA 1, 6 (1991).

It is evident from BLM's decision that it regards Charlie's application for Parcel B as valid and that, if the matter were returned to it, it would hold the application for approval. Thus, we perceive no need to remand the matter to BLM for further action. 13/ Instead, we shall examine whether BLM's decision placing Parcel B as surveyed by USS 5385 can be affirmed. 14/

11/ The location of the easement in relation to the various branches of Grayling Creek is shown on the map of the easement provided by the State (R-114). As shown on the master title plats prepared after the lands were surveyed, Parcel B straddles the creek where it branches off to the west-southwest in sec. 28. The easement is situated just to the north of that stretch of the creek and follows the western branch, thus apparently crossing Parcel B as surveyed.

12/ Both Parcel B and EIN 34a C5 were reserved to the United States when the surrounding lands were conveyed to Hee-ya-lingde Corp. on Sept. 27, 1982. The purpose behind reserving Parcel B was plainly to be able to patent it to Charlie. Similarly, the lands in the easement were retained so that a 25-foot path could be maintained without threat of interruption by a private landowner. To the extent that the easement crosses Parcel B, it remains to determine whether Charlie's claim is superior to the easement.

13/ Unlike in previous cases concerning conflicts between Native allotments and State selections, the State has no "direct interest grounded on a specific statutory grant" in Parcel B, and therefore lacks standing to file a private contest. See United States v. United States Pumice Co., 37 IBLA 153, 159 n.4 (1978); compare State of Alaska, 42 IBLA 94 (1979). Accordingly, the election of remedies set out in State of Alaska, supra (filing either a private contest or an appeal) is not available to it. BLM's determination that the claim is valid can be fully reviewed in the context of this appeal, however.

14/ Certain facts are not presently subject to challenge. For example, BLM has found that the lands subsequently described in USS 5385 had been used and occupied in a qualifying manner. Based on that determination, it favorably adjudicated Charlie's application in 1975. Thus, there is no question that Charlie is entitled to an allotment of the lands in USS 5385, as that matter is now finally resolved and immune from further review.

It is thus apparent that resolution of the appeal turns on whether Parcel B, as surveyed in USS 5385, represents the lands she intended to apply for.

[2] The State contends that the 80-acre parcel that BLM approved is not the land Charlie originally intended to claim as Parcel B. Rather, the State argues, Dolak, in marking the location of the parcel on the ground at the time of his June 1974 examination, erroneously shifted the parcel to the south such that, as now surveyed and approved, it does not conform with her intent.

The State's argument is not without support in the record. Someone certainly envisioned that Charlie would receive lands substantially to the north of those that were later surveyed as Parcel B in USS 5385. Charlie's application contained a quadrangle map depicting lands to the north of where Parcel B was later surveyed, as does the copy of the quadrangle map included in Dolak's Field Report for Parcel B. That latter map shows all but a fraction of Parcel B lying "within the 160 acres originally applied for * * * as shown on the * * * Holy Cross D-3" map attached to application F-13863. That placement thus closely corresponds to Charlie's putative June 7, 1974, request as to the location of the lands in Parcel B. In contrast, only approximately half of the lands in Parcel B as later surveyed are within the 160 acres originally applied for as shown on the Holy Cross D-3 quadrangle map that accompanied her application (See Statement of Reasons at 2).

The State further argues that BLM's handling of Parcel A of Deacon shows that Dolak mislocated the marker to which Charlie's claim was tied when it was surveyed. Deacon applied for Parcel A, consisting of 40 acres, on January 6, 1972 (F-14996-A). Her application contains a metes and bounds description commencing at latitude 63 degrees 04'11" N. That starting point is more than 9 minutes north of the point (lat. 62 degrees 55'0" N.) used to commence the metes and bounds description of Charlie's Parcel B. Despite that difference, separate topographical maps accompanying both Deacon's and Charlie's applications depicted their parcels as situated closely together, with Deacon's just to the north of Charlie's.

In June 1974, at roughly the same time he examined Charlie's Parcel B, Dolak conducted a field examination of Deacon's Parcel A. Deacon did not accompany Dolak on his examination; only Mountain Deacon went with him (Deacon Field Report at 2). At that time, Dolak tied both Deacon's Parcel A and Charlie's Parcel B to the same BLM marker (R-97). Dolak misplaced Deacon's Parcel A on the map attached to his field report for that parcel, as he had done on Charlie's (R-99). 15/

In the summer of 1983, BLM completed USS 7307 of Deacon's Parcel A. That survey, following Dolak's description from the field examination, located that parcel using the same aluminum tag earlier used in USS 5385. USS 7307 placed the southern border of Deacon's Parcel A directly through the point marked by the aluminum tag (R-105 - R-107). However, in October 1983 and again in July 1984, Deacon (acting through the Tanana Chiefs Conference, Inc.) notified BLM that USS 7307 incorrectly described her

15/ In fact, Dolak used the same quadrangle map for both claims.

Parcel A (R-93 - R-96). Her complaint resulted in the lands being surveyed again in the summer of 1984 and relocated approximately 17 chains N. 15 degrees E. (R-90, R-110, and R-111). Thus, her Parcel A was moved approximately 16 chains farther north than originally located by USS 7307.

The State's argument rests on the fact that the quadrangle maps attached to Deacon's application, to the Field Report for Deacon's Parcel A, to Charlie's application, and to the Field report for Charlie's Parcel B all depicted Deacon's Parcel A as being situated directly to the north of Charlie's Parcel B. The State presumes that the applications and field reports demonstrate that Deacon and Charlie intended to apply for adjacent parcels. It argues that the fact that BLM later moved Deacon's claim considerably north of the BLM marker to a position close to that depicted on those maps means that Dolak positioned the marker to the south of the location desired by Deacon and Charlie. The State contends that BLM has subsequently corrected the error as to Deacon's claim, but not as to Charlie's.

Against the State's argument, we note the absence of any proffer of evidence establishing that Charlie and Deacon ever intended their claims to be in close proximity. In the absence of such evidence, it is equally possible that someone other than Charlie, most probably the RULCAP representative, initially placed their claims together on the quadrangle maps attached to Charlie's and Deacon's applications. It is clear from the June 7, 1974, statement attributed to Charlie that her application had inaccurately plotted her parcel. ^{16/} Dolak may simply have continued an unwarranted presumption that the two parcels belonged together.

More generally, we do not find it controlling that the survey placed Parcel B partially outside "the 160 acres originally applied for * * * as shown on the * * * Holy Cross D-3" map attached to application F-13863, even though that was how Parcel B was described in the June 7, 1974, statement included in the field report. It appears that Charlie did not author that description, but merely signed her name to it. We deem it unlikely that Charlie would have intended to locate Parcel B with reference to a map she did not prepare, especially as, at the same time, she was expressing dissatisfaction with the accuracy of the application that included that map. It is more likely, as Dolak also stated in his field report, that Charlie had expressed her wishes in June 1974 with considerably less precision, simply requesting that she be granted "80 acres on Grayling Creek" (Field Report for Parcel B at 2). Those wishes were honored by the award of the lands surveyed in USS 5385.

We may also safely presume from Dolak's Field Report that, in order to determine the location of Parcel B on the ground and to assess Charlie's

^{16/} Although (as discussed immediately below) we do not accept that statement as specifying what lands Charlie wished to apply for, we do accept it as showing that her application was inaccurate. Otherwise, no statement would have been prepared at all.

compliance with the use and occupancy requirements of the Native Allotment Act, he located Parcel B on the ground within a short period after consulting with Charlie in reliance on information supplied by her. Further, the sketch map (which is referred to in the metes and bounds description and was thus likely contemporary) depicts Parcel B in relation to the branches of Grayling Creek very close to where it was surveyed. On the other hand, the depiction of Parcel B on the quadrangle map attached to Charlie's application and the field report for Parcel B does not correspond to the sketch map. 17/ That fact strongly suggests that Dolak realized where he had placed the marker on the ground and that he did not make an error in so doing. 18/

We are also influenced by the fact that Charlie never objected to the location of Parcel B on the ground during the period from June 1974 (when the tag was placed on the tree) to her death in November 1986. This was so even though Charlie apparently lived in Grayling, Alaska, which was only slightly over a mile from Parcel B and, on any visit to the site, would likely have seen the BLM marker fixing the location of the parcel. Further, although the record does not show that Charlie signed for BLM's determination as to the location of Parcel B, it was delivered to her last address of record, a circumstance allowing the presumption that she did receive notice of that fact before her death. See 43 CFR 1810.2(b). 19/ Nor have Charlie's heirs corroborated the State's assertions that the lands as surveyed were not those she desired or objected to the location of the parcel, as was their right. See Olympic v. United States, 615 F. Supp. 990, 995 (D. Alaska 1985). In other situations in the past, we have ruled that, to the extent that a recorded description of a parcel differs from its actual situs on the ground the on-the-ground location of the claim is controlling. Compare Patsy A. Brings, 119 IBLA 319, 327 (1991), and cases cited (mining claim); Robert R. Perry, 87 IBLA 380, 384 (1985) (survey).

17/ The sketch map shows one branch of Grayling Creek in the lower one-third of Parcel B, virtually exactly where a branch of Grayling Creek occurs in the parcel as surveyed. A second branch is shown just outside the boundary between corners 1 and 2. There is a second branch of Grayling Creek just inside the parcel as surveyed. That discrepancy is easily explained by the fact that Dolak only approximated distances in preparing the sketch map. Only one branch of Grayling Creek is evident in the parcel as depicted on the quadrangle map. It thus appears that the location of the tag on the quadrangle map was incorrect.

Contrary to the assertion of the dissent, the features as depicted on the sketch map correspond more closely to the on-the-ground location than to the location depicted on the quadrangle map.

18/ Whether the placement of the marker corresponded either to Deacon's or Charlie's intentions is, of course, another matter.

19/ The dissent's attempt to establish a competing assumption, viz., that Charlie was informed in an Apr. 21, 1975, letter from BLM that the lands were located as indicated on the quadrangle map and never objected, fails. That letter does not contain any detailed description of the parcel or anything indicating that it was located as indicated on the quadrangle map.

A long time passed between the filing of the amendment and concurrent location of the parcel on the ground in 1974 and the assertion by the State that the parcel had been misdescribed. Charlie's death has greatly reduced or foreclosed any inquiry into her actual state of mind in 1974. Her signed statement in 1974 is not, by itself controlling, as it was not prepared by her, and, in view of her subsequent death, it may not now be corroborated satisfactorily to be read literally. The absence of statements from other sources, such as Deacon, establishing a link between her allotment and Charlie's, strongly suggests that such evidence is not now available.

We are faced with a situation where a third party (the State) is attempting to establish another's state of mind. Further, the State is attempting to impose a result different than that long accepted by that other party and her heirs. In these circumstances, it is appropriate to impose a strict burden on the State to establish its case. There is insufficient evidence in the record to establish beyond question that Dolak's location on the ground did not correspond to Charlie's wishes. Accordingly, in the absence of irrefragable evidence showing that Charlie's intentions have not been served, we find that the location of Parcel B on the ground conformed to her intent.

We therefore also reject the State's contention that BLM effectively amended Charlie's allotment application as to Parcel B by virtue of Dolak's location of the parcel on the ground in June 1974. No amendment then occurred because Dolak simply located the parcel in conformance with Charlie's stated intention. See Olympic v. United States, supra at 994. The State has not maintained that Charlie did not use Parcel B as required by law to secure her entitlement to receive an allotment, and, in any event, her entitlement to Parcel B as surveyed has long been accepted. As BLM's decision thus properly granted the allotment for Parcel B for the correct lands, its decision must be affirmed as modified to reflect our holding above that there was no legislative approval.

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.

David L. Hughes
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

ADMINISTRATIVE JUDGE MULLEN CONCURRING IN PART AND DISSENTING IN PART:

The State of Alaska (State) has appealed from an April 14, 1989, Bureau of Land Management (BLM) decision dismissing its protest of Native allotment application F-13863, filed by Lucy Charlie (Charlie), and confirming approval of her application.

This appeal does not involve a single application. To garner a true understanding of the conflict between the State and Charlie, one must also know the history of Native Allotment Application F-14996, filed by Dolly Deacon (Deacon).

In a Native allotment application filed with BLM on May 3, 1971, Charlie sought approximately 160 acres of unsurveyed land lying along Grayling Creek, a short distance from where that creek enters the Yukon River near Grayling, Alaska. ^{1/} The land she sought was described in the application by metes and bounds as:

Corner No. 1, located on Grayling Creek 85 chains West of the West Bank of the Yukon River at 62 degrees 55'0" North Latitude, 160 degrees 5'42" West Longitude; thence West 40 chains to Corner No. 2; thence North 40 chains to Corner No. 3; thence East 40 chains to Corner No. 4; thence South 40 chains to Corner No. 1, the point of beginning, no protractors available, (Holy Cross Quadrangle D-3), containing 160 acres, more or less.

The boundaries of Charlie's selection were drawn on a copy of a topographic map ("Holy Cross (D-3) Quadrangle") which was attached to her application. This map also depicted various topographic features, the most prominent being Grayling Creek and its tributaries. ^{2/} Charlie stated that the corners of her selection had been marked and posted.

Deacon applied for three tracts. She executed her Native allotment application on January 1, 1970, which was the same day that Charlie signed hers. The exact date that Deacon's application was filed with the Bureau of Indian Affairs is not apparent from the documents in the file, but it was filed with BLM on January 6, 1972, over 7 months after Charlie's application was filed. Parcel A was described as: "Parcel A; 40 acres Beginning at latitude 63 degrees 04' 11" N., longitude 160 degrees 05' 32" W., thence south

^{1/} It is important to note that her application was actually dated Jan. 1, 1970, and was initially filed with the Bureau of Indian Affairs.

^{2/} The latitude and longitude of her allotment selection were obviously determined from the map after identifying the land she sought on the map. The alternative would have been to survey to her claimed land from a point of known latitude and longitude, with the monument at the starting point being described in the legal description. A short time after Charlie filed her application, BLM identified the land she had applied for as being in the northern half of unsurveyed sec. 28, T. 33 N., R. 57 W., Seward Meridian, Alaska.

20 chains to corner 1, thence west 20 chains to corner 2, thence north 20 chains to corner 3, thence east 20 chains to the point of beginning." A copy of a topographic map with a drawing of the boundaries of Deacon's allotments was attached to Deacon's application. It was the same map Charlie had used to depict her choice. By comparing the position of Charlie's selection and Deacon's Parcel A, as drawn, it is obvious that Charlie and Deacon intended to have those tracts in very close proximity to one another. 3/

On June 7, 1974, Charlie informed BLM that she wanted to amend her application by splitting it into two 80-acre parcels. The second (Parcel B) was described as being "80 acres on Grayling Cr[ee]k * * * within the 160 acres originally applied for, as shown on the BLM field map Holy Cross D-3" (Statement dated June 7, 1974 (emphasis added)).

On Monday, June 10, 1974, BLM realty specialist Jon Dolak conducted a field survey of Deacon's Parcel A. In his February 3, 1975, Field Report Dolak stated that Deacon had informed him that she did not want to accompany him to the site of her selection, but that he was accompanied by "Mountain Deacon, allotment guide for Grayling." 4/ The area had not been officially subdivided by the Cadastral Survey, and there were no monuments in the immediate vicinity. Therefore, Dolak nailed a BLM marker to a spruce tree at a point he described as being on the southerly boundary of Deacon's allotment to establish a starting point for the legal description of her Parcel A. On a "Sketch Map" attached to Dolak's field report for the Deacon allotment, Deacon's tract was depicted as being located along a stretch of Grayling Creek, which skirted the western edge of her tract so closely that it was shown as crossing the western boundary of the allotment three times in fairly close proximity, and crossing the southern boundary near the southwestern corner. See R-99, 100. 5/

Dolak conducted a field examination of Charlie's Parcel B the next day, which was Tuesday, June 11, 1974. In his January 22, 1975, Field Report Dolak again noted that, like Deacon, Charlie did not desire to accompany him to the allotment site, and that he was again accompanied by Mountain Deacon. Dolak did not note finding any marker or post left

3/ I find it unnecessary to speculate about why this is the case or whether they somehow intended to do so. It matters not whether one even knew of the others filing. The drawings and projections speak to this fact.

4/ There is no indication of how Deacon might be related to Mountain Deacon, if at all.

5/ A document entitled "Case Record" was submitted with the State's statement of reasons for appeal. The State's case record is a compilation of what the State considers pertinent portions of the public record with the pages consecutively numbered. This document is cited by all parties as "R" followed by the page number. When citing the State's case record for documents not found in BLM's case file, I will use the same designation.

by Charlie or any other evidence of use, other than a blazed trail running through the selected land in a northwest direction along the creek. Dolak placed Charlie's allotment immediately to the south of Deacon's. ^{6/} He used the marker he had nailed on the tree the previous day for use as the starting point for Deacon's legal description as the starting point for Charlie's Parcel B. See R-97, 99-100. The following is his metes and bounds description of Charlie's Parcel B:

Starting at the BLM marker go west 6 1/2 chains to corner No. 1; thence go on a bearing of S. 52 degrees W. for 20 chains to corner No. 2; thence go on a bearing of S. 39 degrees E. for 40 chains to corner No. 3; thence go on a bearing of N. 52 degrees E. for 20 chains to corner No. 4; thence go on a bearing of N. 39 degrees W. for 40 chains to corner No. 1 * * *.

BLM formally requested a survey of the Deacon and Charlie parcels and the Cadastral Survey undertook the surveys in 1983. Dolak's marker was tied to corner No. 1 of Deacon's Parcel A in the 1983 survey, and the plat of that survey depicts the BLM marker as being on the southerly boundary of her Parcel A. Corner No. 1 of Charlie's Parcel B was shown to be almost due west of and approximately 6-1/2 chains from the BLM marker, with very little difference in the north-south direction between the relative location of Charlie's corner No. 1, as described by Dolak and the location described on the survey plat.

The next event that transpired regarding Deacon's Parcel A is significant. Deacon's Parcel A was surveyed again in 1984. When her selection was being surveyed in 1983, Deacon objected to the placement of her parcel, but no action was taken to change the survey. When the 1983 survey was completed she challenged the survey, arguing that she never intended to select the land identified in the survey (R-95). Following her protest, her Parcel A was re-examined and resurveyed in September 1984 to include the land she had actually applied for. See Exh. B attached to May 31, 1990, Affidavit of Gerald D. Jennings. As a result of the resurvey (U.S. Survey (USS) No. 7307, Alaska) corner No. 1 of Deacon's Parcel A was moved 17 chains (1,122 feet) N. 17 degrees E. of the marker Dolak described as being on the southerly boundary of Deacon's claim. ^{7/} Needless to say, this is considerably to the north of the southern boundary of the Parcel A described

^{6/} It is not difficult to accept the probability that Dolak was aware that the Charlie and Deacon intended to have their tracts in close proximity from the legal descriptions, maps, and conversations with both Charlie and Deacon very shortly before he conducted his field examinations. This premise is a lot easier to accept than one advanced by the lead opinion that he had no idea whatsoever about the relative location of the two parcels.

^{7/} As a result, the southerly boundary of the Deacon tract was properly located 16.26 chains (1,073 feet) north of where it was depicted on the 1983 survey plat.

in the field report, and the result is in direct contradiction of Dolak's statement that the marker was on the boundary of the Deacon claim.

As resurveyed by BLM in 1984, Deacon's allotment "returned" to its original position relative to the distinctive topographic features shown on the map she and Charlie had used to depict their selection sites when they filed their applications. The survey plat of the 1984 survey shows the creek crossing the western boundary and the southern boundary, near the southwestern corner, of the claim. See Exh. B attached to May 31, 1990, Affidavit of Gerald D. Jennings. If the land claimed by Deacon was slightly to the west (not south) of the position depicted on the quadrangle and sketch maps attached to the field report, the survey plat of her claim would be in complete agreement with those maps. The problem of the improper location of Deacon's Parcel A was averted when BLM chose to ignore the tie to Dolak's field marker and accept Deacon's original description of where she intended the southern boundary of her allotment to be. ^{8/}

There is other good evidence that Dolak placed the marker 17 chains south of its intended location.

Dolak's January 1975 Field Report was written after Charlie had amended her application stating that she was seeking 80 acres within the land she had originally applied for. As marked on the ground it was not. See May 31, 1990, Affidavit of Gerald D. Jennings, at 2. The State relies on the relative north-south positions of corner No. 1 of her Parcel B as depicted on USS No. 5385, Alaska, and corner No. 1 of the land described in Charlie's application. ^{9/} See Exh. F attached to May 31, 1990, Affidavit of Gerald D. Jennings, at 1, 3. As graphically illustrated by the State, this shift places Parcel B in large part outside the land described in Charlie's application. See id. at 1.

As noted above, Deacon's claim conforms to the topographic features identified on the map originally filed by her, and Charlie's claim does not. The land features found on Charlie's Parcel B do not correspond to the land features shown on the quadrangle map or the sketch map attached to Dolak's January 1975 Field Report. Beginning with the October 15, 1985, Master Title Plat (MTP), which was drawn a short time after acceptance of the survey, Parcel B was shown on MTP's as straddling the portion of Grayling Creek branching to the west-southwest. The final survey plat shows a branch of the creek exiting Parcel B in a southwest direction. As shown on these documents, Parcel B is clearly to the south of the position depicted on the maps attached to the January 1975 Field Report and to Charlie's allotment application, which show the parcel some distance north of the point the creek branches to the west-southwest.

^{8/} The MTP's drafted after Oct. 15, 1985, show Deacon's tract along the same portion of the creek that was depicted on the quadrangle map.

^{9/} Using the relative north-south positions, I estimate Parcel B, as surveyed, to be approximately 1,000 feet south of the position described in Charlie's application.

In affidavits submitted by James E. Culbertson, manager of "State Interest Determinations for the Department of Natural Resources," State of Alaska, and Gerald D. Jennings, a surveyor employed by the State, they state that the measured distance between Dolak's marker and the townsite of Grayling on the topographic map attached to the January 1975 Field Report was 1.75 miles. The actual measured distance between the two points was 1.38 miles. Thus, Dolak actually set the marker 1,140 feet south of where he had represented it to be. 10/ It is doubtful that Dolak actually measured the distance between his marker and Grayling on the ground, as he made no tie to a specific object in town. It is much more likely that Dolak arrived at the distance by measuring from town to the point on the map where he believed he had placed the marker. Nonetheless a 0.37-mile discrepancy in a 1.75-mile measurement is sizable (over 20 percent), regardless of the scale of the map used. This discrepancy suggests that when Dolak set the marker in the field he had not properly oriented himself on the map, and was south of the point on the map where he believed himself to be when he placed the marker, resulting in a southerly shift of Deacon's Parcel A. 11/ The next day he used the marker as the starting point for his examination of Charlie's Parcel B.

Prior to acceptance of the 1983 survey of Charlie's tract, her tract had always been shown to be in very close proximity to and just to the south of the Deacon tract. They are now over 1,000 feet apart.

In an April 1975 letter to Charlie, BLM stated that it had determined that she had used the land applied for and that BLM would proceed to issue a certificate of allotment following survey. The approval encompassed Parcel B within Charlie's original 160-acre tract and as plotted by Dolak in his January 1975 Field Report, and not as represented in the 1983 survey, which was not to take place for another 8 years. Although this letter does not contain all of the formal language that might be expected of a decision approving a Native allotment application, BLM states that decisions containing language similar to that in the 1975 decision have been regarded as approving an allotment application. There is no evidence that Charlie ever objected to the description of the location of her tract found in this letter, which is not the surveyed location.

10/ Culbertson erroneously stated that the "field examiner posted the location tag [for Parcel B] * * * in a location different from that which was described in [Charlie's] application" (May 31, 1990, Affidavit of James E. Culbertson, at 1). The tag was not posted until June 1974 and could not have been described in the 1971 application.

11/ BLM discounts the discrepancy "considering that the land involved * * * is in an unsurveyed area" (BLM Answer at 13). I disagree. The 1.75-mile reading was taken from the topographic map. Although this map depicts unsurveyed land, it was to scale and, should accurately reflect distances between topographic features. The 1.38-mile reading was based on the State's calculation of the relative positions of the BLM marker and the center of the Grayling townsite. See Exh. F to the May 31, 1990, Affidavit of Gerald D. Jennings, at 2.

No resurvey was ever undertaken to correct the Charlie survey. BLM continued to rely upon Dolak's marker as the starting point for Charlie's Parcel B and the field notes and survey plat of her Parcel B were deemed officially filed on July 31, 1985. ^{12/} By letter dated August 27, 1986, BLM notified Charlie that the survey of her Parcel B had been officially filed and provided her with a copy of the survey plat. This letter also stated that "[i]n 30 days we will proceed toward final certificate and issuance of the Certificate of Allotment." There is no evidence that Charlie received the letter, and there was no suggestion in the letter that Charlie had an opportunity to challenge the survey. I am unable to attribute any significance to the fact that Charlie failed to object to the survey or otherwise respond to the letter. Similarly, I find no basis for saying that Charlie acknowledged that the survey encompassed the land she had originally intended to claim. Charlie died on November 4, 1986, a little over 2 months after the letter was written. ^{13/}

Public easement EIN 34a C5 crosses Parcel B, as surveyed. As depicted on the topographic map attached to Dolak's January 1975 Field Report, Charlie's Parcel B lies slightly north of public easement EIN 34a C5.

In its April 14, 1989, decision BLM confirmed the approval of Charlie's Native allotment application as to Parcel B, specifically noting that: "Parcel B * * * was approved pursuant to the Act of May 17, 1906 on April 21, 1975, and also was legislatively approved pursuant to Sec. 905 of [Alaska National Interest Lands Conservation Act] effective June 1, 1981." BLM then stated that Parcel B of the allotment had been conformed to USS No. 5385, Alaska, and was properly described by reference to that survey. The State filed an appeal.

I find the lead opinion satisfactory in many respects, but in error on a crucial point. I do not agree with the lead opinion finding that BLM's decision placing Parcel B as represented in USS No. 5385 was correct.

The lead opinion acknowledges the State's contention that the 80-acre parcel approved by BLM is not the land Charlie intended to claim because Dolak erroneously shifted the parcel on the ground in 1974, and finds that contention "not without support in the record." After setting out a limited

^{12/} The survey placed most of Charlie's 80-acre Parcel B in sec. 28, T. 33 N., R. 57 W., Seward Meridian, Alaska. A small portion of the tract was in sec. 33 of that township.

^{13/} Although the majority asserts that Charlie lived in Grayling during the entire time in question, there is no evidence that she was actually in Grayling the crucial year before her death. Their conclusion regarding her failure to object is based on the unsupported assumptions that she was in Grayling and that her health was such that she would or could take the same action taken by Deacon. Considering the obvious fact that they stand to gain if the State loses this appeal, it is hardly surprising that Charlie's heirs have not come forward and supported the State's assertion.

synopsis of the State's factual assertions, it states that "[a]gainst the State's arguments, [they] note the absence of any proffer of evidence showing that Charlie and Deacon intended their claims to be in close proximity." (Emphasis supplied.)

Let us look at the facts. There is no argument from anyone -- Deacon, BLM, the State, Cadastral Survey, the lead opinion, or me -- that BLM's decision to move Deacon's Parcel A from the position shown in the 1983 survey to the position shown in the 1984 survey was correct. That decision could not have been made without a concomitant finding that Dolak's marker was not on the southerly boundary of Deacon's Parcel A. The file contains evidence that Dolak met with Charlie and Deacon to discuss the allotments shortly before the field examination in the form of photographs he took at the time. He also noted that he had talked with both Deacon and Charlie and they advised him before going to the field, but they could not accompany him. He then went into the field and located the Deacon and Charlie tracts in close proximity to one another. To identify the starting point for Deacon's Parcel A, Dolak nailed a marker to a tree on Monday, June 10, 1974. On Tuesday he used the same marker as the starting point for the Charlie Parcel B. I am befuddled. How can the marker be 1100 feet from the right place on Monday and in the right place on Tuesday? To reach the conclusion reached in the lead opinion one must assume that Dolak was lost on Monday, realized where he really was on Tuesday, and did not bother to correct (or even note) the error he made on the previous day. ^{14/} In the face of these facts the majority is able to find an absence of evidence establishing that Charlie and Deacon ever intended to have their allotments in close proximity, and (in the same paragraph) state that Dolak had simply continued an unwarranted presumption that the two parcels belonged together. Dolak had talked to both. Did Mountain Deacon also labor under the same unwarranted assumption?

Again reading the lead opinion, the fact that Parcel B, as surveyed, was not within the 160-acre tract originally applied for is deemed "not controlling," on the assumption that Charlie did nothing more than sign her name to the application. Did Dolak become lost when looking for Deacon's tract but correctly followed Charlie's directions the next day? If so, it was fortunate that he stumbled across a marker someone had nailed on a tree.

What I am most impressed by is the fact that the final location of the Deacon tract fits the evidence so well. It is very close to the position drawn on the topographic map (Charlie's is not). It fits the physical features shown on the topographic map and on Dolak's sketch (Charlie's does not). It is the proper distance from Grayling (Charlie's is not). There are only two discrepancies: it is not in close proximity to Charlie's Parcel B; and it is not tied to Dolak's board nailed on a tree.

^{14/} Much is made of Charlie's alleged statement that RULCAP erred when plotting her application. Comparing the handwriting in the file, there is very little doubt that the document was actually prepared by Dolak.

If we were to move Charlie's tract to a position in close proximity to the location of Deacon's Parcel A, some interesting things would happen. Charlie's Parcel B falls within the originally selected 160-acre tract described on the original application. It is in the same area as that depicted on the map submitted with her application. The physical features on Dolak's map and sketch fit. Both tracts are the reported distance from Grayling. The only thing that no longer corresponds is, of all things, the tie to the marker nailed on the tree, which was in the wrong place on Monday and magically transported to the right place on Tuesday (without moving an inch).

The State initiated this action to protect an existing trail across Parcel B it deemed necessary for access to lands owned by the United States and the State, specifically to facilitate travel from the airport and village area west to a large block of isolated public land. The State was given this responsibility by section 17 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1616(b) (1976). The majority is willing to find against the State because the evidence presented by the State was not irrefragable, that is, impossible to break or indestructible. This is their choice of words and their choice of a burden to impose upon the State. It is not mine. I believe that, when unsupported assumptions are given the proper weight, the preponderance of the evidence supports a finding that Charlie's Parcel B is not where BLM has deemed it to be.

At the very least, we should apply the standard of proof found at 43 CFR 4.415. "[T]he Board may, on its own motion refer any case to an administrative law judge for a hearing on an issue of fact." There is a material issue of fact regarding the propriety of using Dolak's marker as the starting point for Charlie's Parcel B, which is ample basis for referring this matter to an Administrative law Judge for a hearing and findings of fact. 15/

R.W. Mullen
Administrative Judge

15/ The strength of the factual evidence supporting the majority decision becomes painfully apparent when reviewing that opinion and noting the use of words and phrases such as "appears," "it is equally as possible," "may simply have," "it is more likely," "we may safely presume," "strongly suggests," "apparently," and, lastly, when addressing the State's evidence, "lack of irrefragable proof." I choose not to lend support to my position by indulging in the supposition that it is "equally as possible," that it "may simply have" been foggy when Dolak placed his marker. That assumption would strongly support the conclusion that he was not where he thought he was when he nailed it to the tree.

