

MACK WIEHL (HEIR OF ALFRED M. WIEHL)

IBLA 2003-175

Decided May 3, 2006

Appeal from decision of the Alaska State Office, Bureau of Land Management, denying protest against survey of Parcel C of Native allotment application F-13363.

Affirmed.

1. Administrative Procedure: Administrative Review--Res Judicata--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Effect of

The doctrine of administrative finality, the administrative counterpart of the doctrine of res judicata, dictates that once a party has availed himself of the opportunity to obtain administrative review of a decision within the Department, that party is precluded from litigating the matter in subsequent proceedings except upon a showing of compelling legal or equitable reasons.

2. Alaska: Generally--Alaska: Native Allotments

Where an applicant for a Native allotment voluntarily and knowingly relinquishes his application as to a portion of the lands applied for, he loses a portion of his entitlement corresponding to the portion that he relinquishes.

APPEARANCES: Carol Yeatman, Esq., Alaska Legal Services Corp., for appellant; Office of the Attorney General, State of Alaska, Anchorage, Alaska, for appellant; 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 HUGHES

Mack Wiehl, an heir of Alfred M. Wiehl, has appealed the February 20, 2003, decision of the Alaska State Office, Bureau of Land Management (BLM), denying a protest filed on behalf of all of the Heirs of Alfred Wiehl (Heirs) against BLM's notice of conformance to plat of survey of Parcel C of Alfred's Native allotment application F-13363.

Alfred M. Wiehl filed his Alaska Native allotment application and evidence of occupancy form with BLM on January 15, 1971, seeking 120 acres of land near Rampart, Alaska, under the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (the Native Allotment Act). ^{1/} As filed, the application contained legal description of two parcels, Parcel A encompassing 40 acres and Parcel B encompassing 80 acres. In addition, in the form's "description of improvements" there was a reference to the existence of a "cabin" on Parcel C, although no legal description for any Parcel C was provided and no additional acreage for a "Parcel C" was sought.

Following filing of the application, BLM determined that the lands described as Parcel A were situated in protracted sec. 13, T. 8 N., R. 13 W., Fairbanks Meridian, and those described as Parcel B were situated in sec. 21, T. 10 N., R. 10 W., Fairbanks Meridian. BLM proceeded to consider whether the lands in those two parcels were prospectively valuable for minerals, notifying Wiehl in April 1971 that Parcel A was considered prospectively valuable for coal and giving him the opportunity to petition to reclassify the lands as nonmineral in character. No response was filed. ^{2/}

In June 1976, BLM notified Wiehl that its field examiners would be in the Rampart area in September to examine Native allotments. A note in the record from one Howard Golden dated September 6, 1976, states as follows: "The applicant, Alfred Weihl [sic], stated he did not want the parcel and would not be using the land, so he decided to relinquish parcel A (40 acres)." The record also contains a BLM form entitled Relinquishment of Application, Entry, or Grant, signed and dated by

^{1/} The Native Allotment Act was repealed, effective Dec. 18, 1971, by sec. 18(a) of the Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (Dec. 18, 1971), codified in relevant part at 43 U.S.C. § 1617(a) (2000).

^{2/} In January 1973, BLM offered Wiehl the opportunity to give up his allotment application in favor of applying for a primary place of residence under section 14(h)(5) of the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1613(h)(5) (2000). The record contains no response, and BLM proceeded to process his application under the Native Allotment Act.

Wiehl on September 6, 1976, relinquishing to the United States any and all right, title, and interest that he may have obtained by reason of the acceptance of application number F-13363A for filing, concerning lands in sec. 13, T. 8 N., R. 13 W., Fairbanks Meridian, totaling 40 acres. On March 15, 1977, the BLM State Office queried the Fairbanks District Office as to whether that document was “a good & proper relinquishment,” directing the District Office, if it was, to remove the parcel from the land plat. On March 16, 1977, the District Office replied that Parcel A was being removed from the plat, thus tacitly confirming its belief that the relinquishment was good and proper. Parcel A was removed from the public lands records on March 18, 1977.

A BLM field examiner again visited the Rampart area in August of 1979 to examine Native allotments. Wiehl evidently informed the BLM field examiner in August 1979 that Parcel B of his allotment application had not been described properly, as shown by a statement to that effect in the record dated August 21, 1979. The field report for Parcel B describes a field examination conducted on August 20, 1979, of 80 acres in secs. 3, 9, and 10, T. 9 N., R. 11 W., Fairbanks Meridian. It states that, based on evidence found during the field examination and on verbal testimony provided by Alfred Wiehl, Jr., and Charles Evans, the examiner had concluded that Alfred M. Wiehl had met the requirements for use and occupancy of 80 acres at that location under the Native Allotment Act of 1906. The field report for Parcel B was accepted as submitted on November 18, 1980. Parcel B was noted on the public lands records in the amended position in April 1981.

On December 30, 1983, BLM issued interim conveyances (IC's) Nos. 778 and 779 concerning lands in the area in which Wiehl's allotment was situated. In IC 778, BLM granted under ANCSA the surface estate in lands throughout the area to Baan o yeel kon Village Corporation and, in IC 779, the subsurface estate in those lands to Doyon, Limited. Significantly to the present matter, BLM excluded from the two IC's 80 acres in secs. 3 and 4, T. 9 N., R. 11 W., Fairbanks Meridian, representing Wiehl's then-pending application for Parcel B. However, BLM did not exclude any lands in T. 8 N., R. 13 W., Fairbanks Meridian, for Parcel A, plainly because BLM considered Wiehl's application for Parcel A as no longer pending, having been formally relinquished by him in 1976 as described above.

In June 1984, BLM approved Wiehl's application for Parcel B (subject to a reservation of coal) and requested that Wiehl's Parcel B be surveyed. BLM completed U.S. Survey No. 8372 (USS 8372) in September 1989, conformed those lands to the survey by notice dated May 24, 1990, and transmitted a certificate of allotment (COA 50-90-0435) to Wiehl for the lands described therein (Parcel B, 79.98 acres) in August 1990. In September 1990, BLM placed a case file closure sheet in the case record for Native allotment application F-13363.

On January 28, 1997, a BLM employee placed a memorandum in the case file concerning a call from an employee of Tanana Chiefs Council (TCC) regarding Native allotment application F-13363. The memorandum indicates that TCC's employee had spoken to Wiehl and he had inquired as to "Parcel C." She said that Wiehl had informed her "that when the applications were being filed, he was in the hospital and asked a friend to file his application (containing 3 Parcels) for him." She stated that Wiehl said that he "had not heard anything about this parcel and found out that it had never been considered." She stated that "Mr. Wiehl wants to know if it was still possible to get this parcel." This inquiry was supplemented on March 17, 1997, with an affidavit from Wiehl concerning the circumstances surrounding the filing of this application in 1970. Attached to the affidavit was a sketch showing a second parcel, described as "Reinstated Parcel C 80 acres" abutting Parcel B to the west.^{3/}

On November 16, 1998, TCC advised BLM that Wiehl had died on November 5, 1998.

BLM proceeded to review a Parcel C in sec. 9, T. 9 N., R. 11 W, Fairbanks Meridian. In November 1998, it requested a report of leasable minerals in the entire section and was informed that the land is prospectively valuable for coal. A mineral report was prepared in February 1999 stating that there is no potential for economic quantities of locatable minerals on the lands. A request for notation of the public land records was approved in December 1998. That request is significant in that BLM requested that only 40 acres be plotted, signaling its belief that it could grant no more than that to Wiehl. Later in December 1998, a 40-acre parcel was plotted abutting conveyed Parcel B to the west.

On March 8, 1999, under the provisions of sec. 905(c) of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), 43 U.S.C. § 1634(c) (2000), BLM notified the State of Alaska and all interested parties that an amended land description for Native allotment F-13363, Parcel C, of Alfred Wiehl, Sr., had been proposed for 40 acres in sec. 9, T. 9 N., R. 11 W., Fairbanks Meridian. BLM afforded those parties 60 days to file a protest or to submit comments.^{4/} A copy of BLM's

^{3/} The sketch was the sketch map prepared for the August 1979 field examination report for Parcel B, with an additional area marked out to represent "Reinstated Parcel C 80 acres."

^{4/} BLM noted that the lands within Parcel C had previously been conveyed out of Federal jurisdiction by IC's 778 and 779. BLM also noted that, when an Alaska Native seeks land under the Native Allotment Act, and such land has been conveyed out of Federal ownership, the matter will be reviewed using the Stipulated Procedures for Implementation of Order dated Feb. 9, 1993, in Aguilar v. United States, 474 F.Supp. 840 (D. Alaska 1979).

decision addressed to the Heirs of Alfred Wiehl, Sr., in care of TCC was received on March 10, 1999.

No protest to the correction of Parcel C as 40 acres in sec. 9, T. 9 N., R. 11 W., Fairbanks Meridian, was received. Accordingly, on May 24, 1999, BLM issued a decision formally accepting the correction.^{5/} A copy of BLM's decision addressed to the Heirs of Alfred Wiehl, Sr., in care of TCC was received on May 26, 1999.

On September 30, 1999, a probate decision was issued by Administrative Law Judge Harvey C. Sweitzer determining the identity of Wiehl's Heirs to his interest in Native Allotment F-13363: Alfred M. Wiehl, Jr., Clifton R. Wiehl, Mack B. Wiehl, and Michael J. Wiehl, each taking one fourth. In the Matter of the Estate of Alfred M. Wiehl, Sr., Probate No. IP SL 052H 99 (Decision, Sept. 30, 1999). A copy of the decision was recorded in BIA's Alaska Title Services Center in the Juneau Area Office on October 7, 1999. On May 30, 2001, TCC notified BLM of the probate decision.

On January 10, 2002, TCC filed a memorandum with BLM indicating that Mack Wiehl, one of the heirs to Alfred Wiehl's estate, was "questioning what the status was with his Dad's Parcel C and having it be 80 acres." TCC acknowledged that BLM had ruled on May 24, 1999, that Parcel C was 40 acres, and that "none of the heirs responded to this decision." TCC questioned whether the heir "ever received this decision, since it was addressed to 'Heirs of Alfred Wiehl, Sr., c/o TCC Realty'" and since a decision officially identifying the Heirs "was not issued until September 1999." TCC asserted that Alfred Wiehl's "original intent was to apply for 160 acres in one spot" and requested to know what could be done "to help the heirs get all of the 160 acres that Alfred wanted." On January 14, 2002, BLM memorialized a conversation with an employee of TCC where the employee said "that the heirs want [Alfred Wiehl's relinquishment of Parcel A of his Native allotment application] rescinded and the 40 acres reinstated." BLM advised the employee to have the Heirs send BLM a formal written request.

On July 1, 2002, BLM officially filed plat of survey USS 12796 describing 39.97 acres to the west of USS 8372, representing a 40-acre Parcel C. On September 13, 2002, BLM issued a decision entitled "Conformance to Plat of Survey" noting that the lands in Wiehl's Native allotment application, F-13363, Parcel C, had been surveyed and were being described as USS 12796, containing 39.97 acres. BLM advised the Heirs that "[a]ny claim that the surveyed location is different than the intended location must be clearly supported by evidence of the error," and that, "[p]ursuant to Sec. 905(c) of [ANILCA], you cannot change the location of the

^{5/} BLM's decision concluded noting that the 40-acre Parcel C would be reviewed in accordance with the Aguilar stipulated procedures.

allotment after the expiration of the 60 days allowed in this notice.” (September 13, 2002, Decision at 2.)

On October 10, 2002, the Heirs, represented by legal counsel, filed a document styled “Petition to Replace Forty Acres and Investigate Whether Mr. Wiehl’s Relinquishment Was Voluntary and Knowing and Notice of Objection to Notice of Conformance of Plat of Survey” (Petition). The Heirs argued therein that the record showed that Wiehl wanted all of his 160-acre allotment in one place and that Parcel B and Parcel C were accordingly meant to be 80 acres each, for a total allotment of 160 acres. (Petition at 2-3.) They also argued that the record showed that Wiehl did not voluntarily and knowingly relinquish any portion of his 160-acre allotment and asserted that BLM had an obligation to make a determination on that question.

On December 9, 2002, BLM issued a decision entitled “Petition for Reinstatement of Parcel A Denied.” BLM ruled as follows concerning Wiehl’s relinquishment of Parcel A:

There is evidence in the case file that Alfred M. Wiehl, Sr., voluntarily and knowingly relinquished Parcel A. The memo from TCC, the BIA service provider, dated March 4, 1997, states that Mr. Wiehl informed their office that he did not wish Parcel A reinstated. His affidavit received with the TCC memo in Mr. Wiehl’s own handwriting stated that he relinquished Parcel A because that area was Walter Woods['] fish camp and did not belong to him. The handwritten affidavit is signed by Mr. Wiehl and notarized by the Allotment Specialist that wrote the memo * * * .

The petition requesting reinstatement of Parcel A infers that Mr. Wiehl was not counseled and therefore, did not know the consequence of relinquishing Parcel A. Mr. Wiehl clearly stated why he relinquished Parcel A in his affidavit and he had no intention of requesting Parcel A be reinstated. Absent any indication of the misrepresentation of a material fact, there is no basis for concluding there is a possibility that the relinquishment was obtained by fraud or deceit.

There is a lack of evidence to support a claim that the relinquishment was not the intent of Alfred M. Wiehl, Sr. [BLM] has no authority to reinstate a relinquished application unless the application was not “knowingly and voluntarily relinquished.” The record does not provide any evidence to dispute that Mr. Wiehl did not knowingly and

voluntarily relinquish Parcel A. The petition requesting that Parcel A be reinstated, on behalf of Mr. Wiehl's heirs, provides no evidence to the contrary. The petition only provides the opinion of the author and without evidence to support its opinion the petition for reinstatement is not persuasive. Therefore, the petition for reinstatement of Parcel A is denied.

(Decision dated Dec. 9, 2002, at 3.) BLM's decision did not address Parcel C, indicating that it would be addressed in a subsequent decision. The decision noted that it could be appealed to this Board under 43 CFR Part 4, and copies were sent to TCC and all four Heirs and their legal counsel, with service being completed on all four Heirs no later than January 13, 2003. ^{6/} No appeal was filed from that decision.

On February 20, 2003, BLM issued the decision under appeal, entitled "Protest of Parcel C Dismissed." In rejecting Wiehl's Heirs' claim for a Parcel C encompassing 80 acres (rather than 40 acres), BLM held:

Alfred M. Wiehl, Sr. can not add additional lands to his application after December 18, 1971 and can only apply for a maximum of 160 acres. Since Alfred M. Wiehl, Sr.'s Native allotment application F-13363 totaled 120 acres for Parcels A and B on December 17, 1971, Parcel C could not exceed 40 acres. Parcel A was not relinquished until 1976; therefore, Alfred M. Wiehl, Sr., could not add additional lands to Parcel C to replace the 40 acres he had relinquished in Parcel A. Therefore, the protest filed against the survey of Parcel C is dismissed.

(Decision dated Feb. 20, 2003, at 3.)

[1] BLM's December 9, 2002, decision became administratively final upon the failure of any of the Heirs to file a timely notice of appeal of that decision. See Marietta Corporation, 164 IBLA 360, 369 (2005); Seldovia Native Association, 161 IBLA 279, 285 (2004); Gifford H. Allen, 131 IBLA 195, 202 (1994); Helit v. Goldfields Mining Corp., 113 IBLA 299, 308, 97 I.D. 109, 114 (1990); Joe N. Johnson, 103 IBLA 5, 8 (1988). Although we have acknowledged a limitation on the

^{6/} The copy of the decision sent by BLM to Clifton R. Webb at his last address of record was returned to BLM on Jan. 13, 2003, by the Postal Service marked "unclaimed." In these circumstances, the decision is considered served, notwithstanding the failure of the recipient to actually receive the document, on the date it is returned to BLM as undeliverable. 43 CFR 4.401(c); Reg Whitson, 55 IBLA 5, 6 (1981).

applicability of this rule “upon a showing of compelling legal or equitable reasons,” we find none here. BLM fully and fairly notified the Heirs, both individually and through counsel of its December 9, 2002, decision expressly ruling on the point in question. Accordingly, BLM’s holding therein that Alfred M. Wiehl, Sr., voluntarily and knowingly relinquished Parcel A is not subject to challenge in the context of the present appeal.

[2] We agree with BLM’s conclusion in the decision under appeal that, where an applicant for a Native allotment voluntarily and knowingly relinquishes his application as to a portion of the lands applied for, he loses a portion of his entitlement corresponding to the portion that he relinquishes. As Parcel A was 40 acres, Wiehl, by voluntarily and knowingly relinquishing his application as to that parcel, limited his entitlement by that amount. At most, Wiehl can receive 120 acres (presuming that his Heirs establish entitlement). We also agree with BLM that Wiehl could not add lands to Parcel C to replace the 40 acres that he had relinquished in Parcel A.

Reviewing Board precedent on the effect of relinquishments reveals that there has rarely, if ever, been a case where it is established that the relinquishment is knowing and voluntary. ^{7/} It is apparent, however, from reviewing the cases concerning whether a relinquishment is valid that the Native allottee will lose entitlement to the relinquished acres if the relinquishment is found to be valid. The BLM decision under appeal correctly states the consequences of a valid relinquishment, and it is properly affirmed.

Since Wiehl’s maximum entitlement was, following his relinquishment of Parcel A, no more than 120 acres, and since Wiehl had already been conveyed approximately 80 acres as Parcel B, ^{8/} he was entitled to no more than an additional 40 acres as omitted Parcel C. Accordingly, BLM properly denied the Heirs’ protest against BLM’s survey establishing Parcel C on the ground as approximately 40 acres. ^{9/}

^{7/} In most cases, it has been deemed necessary to refer the question of the validity of a relinquishment for a hearing. See, e.g., Heirs of Alexander Williams, 121 IBLA 224 (1991); Theodore Suckling, 121 IBLA 52 (1991); Heir of Frank Hobson (On Reconsideration), 121 IBLA 66 (1991). It is not necessary to do so here, in view of the administrative finality of BLM’s determination on that question.

^{8/} The actual acreage of Parcel B was set at 79.98 acres.

^{9/} The actual acreage of Parcel C was set at 39.97 acres.

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

David L. Hughes
Administrative Judge

We concur:

Bruce R. Harris
Deputy Chief Administrative Judge

H. Barry Holt
Chief Administrative Judge

T. Britt Price
Administrative Judge

ADMINISTRATIVE JUDGE HEMMER CONCURRING SPECIALLY:

I agree with the majority opinion but wish to register, in addition to what is stated there, two concerns. First, the dissent's statement of events appears on its face to undermine the statement of facts presented in the majority opinion. The lack of persuasiveness of the dissent's version, to me, derives from its evidentiary source. The facts quoted by the dissent, but not the majority, appear in the characterizations of the heirs or Mack Wiehl, in pleadings which describe the record to support his case. See Dissent at 169 IBLA 41-42 (quoting extensively from SOR at 2-8 to describe "facts" regarding intentions of Golden and Wiehl in 1976). I fully agree with the dissent's analysis of our precedent. I am aware of no case, however, where the Board elevated to the level of evidence self-serving inferences of an heir asserted in pleadings filed years after the relevant record documents were created regarding the alleged but unverified intentions, thoughts, and silent expectations of principals in a case. To decide what happened in a case, I look only to the contemporaneous record of events, and the affidavits of the applicant, to construe the record. See, e.g., Heirs of Edward Peter, 122 IBLA 109, 115 (1992) (focus on legal conclusion resulting from absence of proof in the record). Thus, my disagreement with the dissent comes from the fact that it relies on characterizations in the SOR, and most particularly alleged beliefs attributed to Golden and Wiehl, which I do not find in the contemporaneous record or Wiehl's affidavit. I would not allow the SOR's arguments to serve as facts regarding purported expectations of BLM employees or applicants who are now unavailable.

Second, on May 24, 1990, BLM sent Wiehl a notice describing the survey of the lands he applied for, as amended by Wiehl during the field examination, entitled "Conformance to Plat of Survey." BLM stated that if Wiehl did not complain within 60 days, "the allotment application will be considered correctly described by this survey." (Emphasis added.) Section 905(c) of ANILCA, 43 U.S.C. § 1634(c) (2000), establishes the terms under which an applicant may amend a Native allotment application. It contains the following proviso: "Provided further, That no allotment application may be amended for location following adoption of a final plan of survey which includes the location of the allotment as described in the application or its location as desired by amendment." (Emphasis added). In deciding to affirm BLM's decision to deny the protest, the majority did not expressly address this provision of ANILCA which I think seriously undermines BLM's efforts even to allow the application to be amended to add a 40-acre Parcel C. Presumably, this issue can be addressed at the necessary Aguilar hearing.

Lisa Hemmer
Administrative Judge

ADMINISTRATIVE JUDGE ROBERTS DISSENTING:

For the following reasons, I respectfully dissent from the majority's opinion in this case.

The majority correctly observes that "BLM's December 9, 2002, decision became administratively final upon the failure of any of the heirs [of Alfred Wiehl, Sr. (Alfred Wiehl),] to file a timely notice of appeal of that decision." However, the majority misapprehends the effect of that decision. A finality ruling that Alfred Wiehl's signing the BLM form pertaining to Parcel A entitled "Relinquishment of Application, Entry, or Grant" was knowing and voluntary does not resolve the question addressed in BLM's February 20, 2003, decision, and which is properly before the Board by virtue of the timely appeal taken therefrom by Mack Wiehl (appellant herein), one of Alfred Wiehl's heirs, i.e., whether the subsequent survey limiting Parcel C to only approximately 40 acres was correct. BLM disposed of Mack Wiehl's argument regarding the survey of Parcel C in the following terms:

Alfred M. Wiehl, Sr., can not add additional lands to his application after December 18, 1971 and can only apply for a maximum of 160 acres. Since Alfred M. Wiehl, Sr.'s Native allotment application F-13363 totaled 120 acres for Parcels A and B on December 18, 1971, Parcel C could not exceed 40 acres. Parcel A was not relinquished until 1976; therefore, Alfred M. Wiehl, Sr. could not add additional lands to Parcel C to replace the 40 acres he had relinquished in Parcel A. Therefore, the protest filed against the survey of Parcel C is dismissed.

(Feb. 20, 2003, Decision at 3.)

The majority subscribes to this reasoning, stating: "As Parcel A was 40 acres, Wiehl, by voluntarily and knowingly relinquishing his application as to that parcel lost 40 acres of his entitlement. At most, Wiehl can receive 120 acres (presuming that he establishes entitlement)." The majority propounds the following legal theory: "[W]here an applicant for a Native allotment voluntarily and knowingly relinquishes his application to a portion of the lands applied for, he loses a portion of his entitlement corresponding to the portion that he relinquishes." Not only is this ruling without precedent, it overlooks long-standing Board precedent that acknowledges the need for amendments in such cases, regards attempts to find a waiver by Native applicants of allotment rights with great skepticism, and upholds the validity of attempts to effect amendments when, as here, they are intended to correct the description of land for which the Native originally intended to apply. E.g., Matilda S. Johnson, 129 IBLA 82, 89 (1994); Heirs of William Lisbourne, 96 IBLA 342, 343-44 (1987).

This ruling fails to take into account the following critical facts: (1) Alfred Wiehl intended to apply for 160 contiguous acres; (2) BIA supplied an erroneous legal description for land, identified as “Parcel A,” which was not contiguous to Parcel B and which Wiehl knew his friend, rather than he, was eligible to claim; (3) BIA never identified the land in Parcel C, but noted that Wiehl had a cabin there; (4) Wiehl understood that relinquishment of Parcel A was the first step in amending his application to correct the location misidentified by BIA as the land in Parcel A; (5) Wiehl did not seek to have 40 new acres added to his allotment, but rather to have the location of the 40 acres misidentified in the application as Parcel A correctly identified as located contiguous to Parcel B.

It is clear that Wiehl’s application is appropriate for amendment under section 905(c) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(c) (2000), so that the description of Parcel C reflects the location and amount of acreage for which Wiehl consistently intended to apply. I will place this case into context with a brief discussion of State of Alaska (Johnson), 133 IBLA 281 (1995), which was also authored by my colleague, Judge Hughes. In State of Alaska (Johnson), Judge Hughes referred a matter to the Hearings Division concerning whether two Native allotment applications should be patented, even though “[a]dmittedly, BLM’s records contain no signed allotment application specifically describing the land sought by Johnson which is date-stamped by BLM or another bureau, division, or agency of the Department on or before December 18, 1971.” 133 IBLA at 285. What, one might ask, did the Board consider in concluding that such applications were indeed pending on December 18, 1971? The Board relied exclusively upon Johnson’s handwritten application, which she “evidently” signed in October 1971. That handwritten application referred to Parcels A and B, but did not contain any description whatsoever of the two parcels, stating only, in the case of Parcel A, that it has an “M-B Descri,” presumably, a metes and bounds description. The Board described the milieu during this time:

The fact that the handwritten application has no BIA [Bureau of Indian Affairs] certification indicates that it was reduced to typewritten form (incorporating a proper land description) and then certified by BIA and submitted to BLM. This was often the procedure, and it was not unusual for the process to extend past the December 18, 1971, deadline, especially given the “flurry” of applications submitted immediately prior to the December 18, 1971, repeal of the Act of May 17, 1906. See United States v. Melgenak, 127 IBLA 224, 227-28 (1993) [aff’d in part, rev’d in part, Heirs of Melgenak v. United States, No. A95-0439 CV (JKS) (D. Alaska May 6, 1997)]; Nora E. Konukpeck

(On Reconsideration), 60 IBLA 394, 396 n.2 (1981); see also Aug. 5, 1992, affidavit of Audrey L. Tuck, BIA Realty Specialist.

133 IBLA at 286.

The record shows that Alfred Wiehl signed his Native allotment application (F-13363) on December 9, 1970, and that the BIA filed it on his behalf on January 15, 1971.^{10/} In completing his application, BIA typed in the legal descriptions for only two of three referenced parcels.^{11/} His predicament was far from unusual. As Linda Demientieff of Tenana Chiefs Council (TCC) stated, regarding Alfred Wiehl's application: "[A] lot of information was lost from the field to that office. It was just the nature of the business in those days." Judge Hughes and the majority now hold Wiehl to a standard far more exacting than applied in previous Board decisions.

Like the application in State of Alaska (Johnson), the application filed by BIA on Alfred Wiehl's behalf was deficient on its face. The discrepancies as to the correct location and amount of acreage of each of the three parcels are at the heart of this matter, as shown in a May 24, 1999, decision issued by BLM entitled "Correction of Parcel C Accepted:"

On October 14, 1976, the applicant relinquished Parcel A (40 acres) because it was the camp area for Walter Woods. The applicant had permission to use the ca

On the field examination for Parcel B completed on August 20, 1979, the applicant's son accompanied the examiner as the applicant had a broken leg. The son took the examiner to the location of his father's camp, which is now located in Secs. 9 and 10, T. 9 N., R. 11 W., Fairbanks Meridian, containing 80 acres. The field examiner spoke with the applicant by phone to verify the location. During the conversation, the applicant stated that he had three parcels and wanted

^{10/} The application was filed under the provisions of the Act of May 17, 1906, 43 U.S.C. §§ 270-1 to 270-3 (1970), which was repealed with a savings provision by section 18(a) of the Alaska Native Claims Settlement Act of Dec. 18, 1971 (ANCSA), 43 U.S.C. § 1617(a) (2000).

^{11/} BIA provided the legal descriptions for Parcel A (sec. 13, T. 8 N., R. 13 W., Fairbanks Meridian, containing 40 acres, more or less) and Parcel B (sec. 21, T. 10 N., R. 10 W., Fairbanks Meridian, containing 80 acres, more or less). Under "Description of Improvements," the application listed a cabin for Parcel A and a cabin for Parcel B, as well as a cabin for Parcel C, for which no legal description had been given.

all the parcels to be contiguous. Subsequently, Parcel B was conveyed to the applicant on August 3, 1990.

An affidavit submitted March 17, 1997, by Tanana Chiefs Conference from the applicant, again states that the applicant applied for three parcels and wanted all the parcels to be at Pitka Meadows (location of Parcel B). Submitted with the affidavit was a sketch map indicating where the applicant wanted Parcel C to be located. It is contiguous with Parcel B and contains 80 acres.

It is very clear on the application (in the applicant's own handwriting), that he intended to apply for three parcels. Because the application indicates 120 acres and the applicant relinquished Parcel A (verified again in affidavit submitted), Parcel C will contain 40 acres. Therefore, notice is hereby given that Parcel C was timely filed and is now described as Sec. 9, T. 9 N., R. 11 W., Fairbanks Meridian as shown on the enclosed master title plat.

(May 24, 1999, Decision at 2.) It is important to note that BLM, recognizing the typical process and milieu described in State of Alaska (Johnson), ultimately assigned 40 acres to Parcel C, the parcel for which no legal description was given on Alfred Wiehl's Native allotment application.^{12/}

By Notice entitled "Conformance to Plat of Survey," dated September 13, 2002, BLM informed Alfred Wiehl's heirs (the Heirs), including appellant, that Parcel C had been surveyed and contained 39.97 acres as shown on the plat of survey officially filed on July 1, 2002.^{13/} BLM informed them that "[a]ny claim that the surveyed location is different than the intended location must be clearly supported by evidence of the error," and that pursuant to section 905(c) of ANILCA, they "cannot

^{12/} BLM further notes that on Dec. 30, 1983, the lands within Parcel C were conveyed out of Federal jurisdiction by Interim Conveyance Nos. 778 and 779 issued to Baan-o-yeel kon Corporation and Doyon, Limited, and that "[t]herefore the lands * * * will be reviewed in accordance with the Stipulated Procedures for Implementation of Order dated February 8, 1983, Aguilar v. United States, 474 F. Supp. 840 (D. Alas. 1979)." (May 24, 1999, Decision at 2.)

^{13/} On June 7, 1984, BLM issued a decision legislatively approving Parcel B (with a reservation of coal), and requested that it be surveyed. By notice dated May 24, 1990, BLM conformed Parcel B to U.S. Survey No. 8372, and transmitted a Certificate of Allotment for Parcel B, comprising 79.98 acres, to BIA on Wiehl's behalf on Aug. 3, 1990.

change the location of the allotment after the expiration of the 60 days allowed in this notice.” (Sept. 13, 2002, Notice at 2.)

The Alaska Legal Services Corporation, on behalf of the Heirs, timely filed a document styled “Petition to Replace Forty Acres and Investigate whether Mr. Wiehl’s Relinquishment was Voluntary and Knowing; and Notice of Objection to Notice of Conformance to Plat of Survey” (Petition to Replace Forty Acres). In the Petition to Replace Forty Acres, the Heirs state:

Mr. Wiehl applied for an allotment of 160 acres on December 9, 1970. The BIA assisted Mr. Wiehl in making his application. Although the legal description of the land was incomplete at the time of the application, the BIA officials told Mr. Wiehl they would return to complete the job in several weeks. They never returned. Instead, BIA typed in the legal portion for Mr. Wiehl even though they knew it was incomplete.

(Petition to Replace Forty Acres at 1.)

Regarding BLM’s having closed Alfred Wiehl’s application for Parcel A based upon his signing a relinquishment form covering Parcel A, the Heirs state that he signed the form because he believed that by so doing, Howard Golden, BLM’s field examiner, “would then place the location of his 160 acre claim in one place.” The Heirs are emphatic that Wiehl “wanted all of his land to be one parcel in one location, and that location was Pitka Meadows,” and that he “repeated his desire that his 160 acre allotment be one parcel at Pitka Meadows several times over the years to the BIA, to Tanana Chiefs Conference, Inc. and most importantly to Howard Golden.” Id. They explain as follows:

In 1976, Mr. Wiehl told Mr. Golden that he wanted all of his 160 acre allotment to be in the same location. The record shows that Mr. Wiehl clearly communicated to Mr. Golden his original intent that he wanted one 160 acre parcel (Parcel B contiguous with Parcel C) at Pitka Meadows. Thus, Parcel B and Parcel C were meant to be eighty acres each, for a total allotment of 160 acres. Mr. Wiehl said that Mr. Golden responded by telling him that he would take care of it and so Mr. Wiehl signed the relinquishment form. Clearly, Mr. Wiehl did not understand the consequences of what he was signing and believed if he signed it he

would get what he originally applied for which was one parcel of 160 acres at Pitka Meadows.

Id. at 2-3. Thus, the Heirs contend that Parcel C should contain 80 acres, not 39.97, as described by the Conformance to Plat of Survey Notice, and that by his “purported relinquishment” of Parcel A he did not intend that his allotment be reduced by 40 acres.

Giving Golden the benefit of the doubt, the Heirs surmised that “it is likely that [he] thought he could carry out Mr. Wiehl’s wishes through a relinquishment of Parcel A so that the entire 160 acre allotment would be the combined B and C parcels.” (Petition to Replace Forty Acres at 4.) Examining the evidence, they find the following facts, which are documented in the record:

The record contains nothing that shows Mr. Wiehl knew that he was actually giving up forty acres. Although there is a form entitled Relinquishment, this form is not evidence that Mr. Wiehl waived his right to 160 acres. He did not make a knowing and voluntary relinquishment. The record shows that he thought he was finally getting the one parcel of 160 acres that he had wanted from the beginning. There is nothing to show that Mr. Golden or any other employee of BLM or BIA explained to Mr. Wiehl that he was in fact giving up land if he signed the relinquishment form. Without such knowledge, Mr. Wiehl could not and did not waive any of his rights to his 160 acre allotment claim and therefore Parcel B consists of 80 acres.

Id. at 5.

In its December 9, 2002, decision entitled “Request for Reinstatement of Parcel A Denied,” BLM refers to Golden’s handwritten note, which states: “The applicant, Alfred Wiehl, stated he did not want the parcel and would not be using the land, so he decided to relinquish Parcel A (40 acres).” BLM states that “Parcel A was not addressed again” until Demientieff of TCC called BLM, as memorialized in Jane Miller’s memorandum to the file dated January 28, 1997:

Linda Demientieff of Tanana Chiefs Conference called regarding Native Allotment F-13363, Parcels A and C. She said she had spoken with Mr. Wiehl and he had inquired as to Parcel C. She said that Mr. Wiehl informed her that when the applications were being filed, he was in the hospital and asked a friend to file his application (containing 3 parcels) for him. He had not heard anything about this parcel and found out

that it had never been considered. Mr. Wiehl wants to know if it was still possible to get this parcel.

(Dec. 9, 2002, Decision at 2, quoting Miller's Memo to File dated Jan. 28, 1997.) Further, BLM refers to a March 17, 1997, memorandum from Demientieff in which she states: "I was under the impression that Mr. Wiehl was wanting to reinstate Parcel A. Imagine my surprise when he said that was not his desire." In his affidavit, Alfred Wiehl stated: "I showed them on the map where I hunted and fished because they asked me where I hunted and fished. Then they suggested I put in for 3 parcels. I told them I wanted all my allotment in one place but they wrote down 3 places any way." Id. Further, he stated: "They put Parcel A on Walter Woods claim, but I relinquished that. Walter told me that I could fish at this camp so that's why I had a camp there. I relinquished it because it didn't belong to me." Id.

Based upon these facts, BLM issued the February 20, 2003, decision subject to this appeal. In his statement of reasons (SOR), appellant argues that Alfred Wiehl's sworn affidavit, dated March 15, 1997, alluded to in BLM's decision, "states that although the legal description of the land was incomplete at the time of application, the BIA officials [who assisted Wiehl in preparing his application] told Mr. Wiehl they would return to complete the job in several weeks," but that "[t]hey never returned." Id. at 2 (footnote omitted). Instead, according to Alfred Wiehl's affidavit, "BIA typed in the legal description portion for Mr. Wiehl even though they knew it was incomplete." Id. (footnote omitted). Appellant states that "[t]he errors on the application are obvious: there are only two legal descriptions but there are clearly three parcels listed in Section 4 of the application which is found on page 2," and that "[i]t is also clear from the typed descriptions and the maps attached to the application that Parcel A and B are not contiguous." Id. (footnote omitted).

Appellant maintains that Wiehl's "version of the events surrounding the purported relinquishment is vastly different from Mr. Golden's," and that Wiehl's statements about "the purported relinquishment show that it was invalid." Id. at 3. According to appellant, Wiehl "clearly stated his desire that his 160-acre allotment be one parcel at Pitka Meadows several times over the years" to BIA, to TCC, and to Golden; that Wiehl told Demientieff, TCC's Realty Specialist, in 1997 that he signed the relinquishment form because he believed that Golden would then "place the 160-acre claim in one place;" and that "he wanted all of his land to be one parcel in one location, and that location was Pitka Meadows." Id. Appellant states that Golden told Wiehl "that he would take care of it," upon which Wiehl "signed the relinquishment form." Id. at 4 (footnote omitted). Appellant concludes that Wiehl "[c]learly * * * did not understand the consequences of what he was signing," and that possibly Golden "did not understand it either." Id. I agree with appellant that the "evidence in the record establishes that the relinquishment was not knowing and

voluntary because neither Mr. Wiehl nor Mr. Golden understood and appreciated the procedures necessary to effectuate Mr. Wiehl's desire to obtain one parcel consisting of 160 acres." (SOR at 8, footnote omitted.)

Correctly, BLM treated Wiehl's March 15, 1997, affidavit as a request for an amendment. Subsequent to receipt of this affidavit, BLM issued a Notice entitled "Native Allotment Application Proposed Amendment," stating simply that "an amended land description for [Alfred Wiehl's allotment] has been proposed." The file includes a "Request for MTP/Hi Notation" dated November 17, 1998, which specifies that for "Action Required" BLM was to "Plot Parcel C as shown on sketch (only plot 40 acres)." The supporting documentation for this "Request" specifies "Letter/Affidavit/Sketch Map," dated March 17, 1997, presumably the documents prepared with Demientieff on that date. BLM viewed the affidavit and sketch as a request for an amendment and treated it as such. In its May 24, 1999, decision, BLM recognized that Wiehl "applied for three parcels and wanted all the parcels to be at Pitka Meadow (location of Parcel B)," and that "[i]t is very clear on the application (in the applicant's own handwriting), that he intended to apply for three parcels." In this decision, BLM concludes that "[b]ecause the application indicates 120 acres and the applicant relinquished Parcel A, * * * Parcel C will contain 40 acres." This is the Parcel C for which no legal description whatever was given on his application, and which BLM in its May 24, 1999, decision acknowledged and identified as contiguous to Parcel B, as shown on the sketch accompanying Wiehl's 1999 affidavit. BLM gives no legitimate reason why this amendment should not be for 80 acres rather than 40.

An amendment is justified because the evidence clearly evinces a reasonable likelihood that the land described by the amendment, *i.e.*, the sworn affidavit and supporting map, was the land Wiehl actually intended to claim when the original application was filed. *See, e.g., Heirs of Setuck Harry*, 155 IBLA 373, 378 (2001); *Estate of Stan Paukan*, 146 IBLA 204, 208 (1998). In seeking to have BLM "fix a mistake BIA caused in the first place" (SOR at 7), appellant essentially sought to have BLM amend Wiehl's application by including in Parcel C the 40 acres he originally intended to include in Parcel C, along with the 40 acres already in Parcel C. This, plus the contiguous acres in Parcel B, would provide him the 160 acres for which he originally intended to apply. *See, e.g., State of Alaska (Helen M. Austerman)*, 119 IBLA 260, 266 (1991). As the Board stated in *Estate of Stan Paukan*, 146 IBLA at 208: "It is well established that section 905(c) of ANILCA was intended to permit * * * the amendment of an allotment application so that it would accurately reflect

the land that the applicant originally intended to claim, but that was misdescribed through some error in the application.”^{14/}

In the Petition to Replace Forty Acres and again in his SOR appellant places significant emphasis upon Matilda S. Johnson, *supra*, in which the Board reversed a BLM decision rejecting Johnson’s application as to the 80-acre western half of her allotment. The eastern half of her allotment had been legislatively approved and was not in dispute. The remaining 80 acres, which BLM rejected, had been administratively removed by BIA from her application.^{15/} BLM took the approach that by accepting the 80-acre eastern portion of her allotment without objecting to the loss of the western portion, her application was properly limited to the 80-acre eastern half. As in this case, BLM contended that Johnson “knowingly and voluntarily relinquished” her rights to the western half of her allotment within the meaning of section 905(a) of ANILCA. The Board evaluated Johnson’s purported relinquishment under the following standard:

“Waiver is the intentional relinquishment of a known right with knowledge of its existence and the intent to relinquish it.” United States v. King Features Entertainment, Inc., 843 F.2d 394, 399 (9th Cir. 1988). In Matilda Titus, 92 IBLA 343 (1986), we found that a relinquishment of a portion of a Native allotment claim was arguably not “made voluntarily and with knowledge of the applicant’s allotment rights” where there were irregularities apparent on the face of a handwritten letter of relinquishment that served to “create sufficient suspicion that the document could be inaccurate or not representative of [the applicant’s] intent.” *Id.* at 343, 346. Accord, see Fedorina (Kallander) Pennington, 97 IBLA 350, 355 (1987). In both Titus and Pennington there was a document that directly waived claim to part of an allotment in specific terms.

129 IBLA at 87. In the Board’s view, Johnson’s acceptance of the survey signified her

^{14/} See also United States v. Angeline Galbraith, 166 IBLA 84 (2005) (“An ‘error’ might result from either the improper placement of the allotment claim on a protraction diagram or some other error in the generation of the land description. Heirs of Setuck Harry, 155 IBLA at 378, *citing* S. Rep. No. 413, 96th Cong., 2d Sess. 286 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5070, 5230; Stephen Northway, 96 IBLA 301, 307 n. 5 (1987).”)

^{15/} BLM had given notice that Johnson was required to seek an amendment by a set date, and that she had failed to correct the allotment application to identify the 160 acres originally sought. Johnson had also signed a written document stating that the survey description of 80 acres (the eastern half) was correct. 129 IBLA at 96.

willingness to accept the eastern portion of her claim, but not her willingness to relinquish the western portion. In other words, accepting one portion had nothing to do with the other portion. According to the Board:

The acceptance by Johnson of the partial grant to her of 80 acres cannot reasonably be construed to amount to a relinquishment of the remainder of her Native allotment claim in light of the fact that Johnson was not notified directly of the change in her application made by BIA. This conclusion is inescapable, considering that the Department must view attempts to find a waiver by Native applicants of allotment rights with great skepticism.

129 IBLA at 88-89. ^{16/}

There can be no meaningful dispute that Alfred Wiehl “specifically told BIA that he was applying for one 160 acre parcel of land but BIA filled out his application differently,” and that he “relied upon a BLM employee’s representative that the mistake originally made by the BIA in describing the allotment as two tracts instead of one tract would be corrected.” *Id.* at 1-2. BIA’s initial error in Wiehl’s situation is akin to BIA’s eliminating the western half of the allotment claimed in Johnson. We must analogize that while Wiehl was willing to give up the 40 acres in Parcel A, he has not wavered in his intention to claim 160 acres in the same location, including 80 acres in Parcel C, which is contiguous to Parcel B. There was no ambiguity in his position. Wiehl communicated to BIA and BLM several times over the years his clear desire to have his 160-acre allotment at Pitka Meadows, and he signed the form relinquishing Parcel A in the belief that Golden would correct his application so that Wiehl would get what he originally applied for, *i.e.*, one parcel of 160 acres at Pitka Meadows. The evidence in the record leaves no doubt that Wiehl “believed by signing the form he would get what he originally applied for which was one parcel of 160 acres at Pitka Meadows.” *Id.* at 4 (footnote omitted).

Thus, I conclude that Alfred Wiehl did not knowingly and voluntarily relinquish 40 acres of his allotment--his “relinquishment,” whether knowing

^{16/} Because of its finding that Johnson did not waive her claim to the western tract, the Board concluded that no question of fact was raised by the record, and that there was no reason to order a factfinding hearing as to whether any waiver was knowing and voluntary, unlike as was done in the Titus and Pennington cases. See also Estate of Willie Arkanakyak, 137 IBLA 58, 60 (1996) (“A relinquishment of a Native allotment application must be made voluntarily and with knowledge of the applicant’s allotment rights and the consequences of the relinquishment.”); Katherine C. (Zimin) Atkins v. BLM, 116 IBLA 305, 312 (1990).

and voluntary or not, related to Parcel A and did not amount to a waiver of any amount of his entitlement, nor did it amount to a waiver of his right to amend his application to correct the erroneous legal description BIA provided at the time of the application.^{17/} As in Johnson, his willingness to relinquish Parcel A cannot reasonably be construed to amount to an agreement to accept Parcel C as consisting of only 40 acres of land. Such a construction gives no effect to the amendment, since Wiehl was entitled to 40 acres in Parcel C before the amendment correcting the location of Parcel A. This record clearly demonstrates, by a preponderance of the evidence, that Wiehl did not waive his claim to an allotment of 160 acres, and that his entire application for 160 contiguous acres in Pitka Meadows, defective though it was, through no fault of his own, was pending before the Department on December 18, 1971, and was therefore subject to adjudication under the 1906 Act. The March 15, 1997, affidavit and supporting sketch corroborate Wiehl's claim that he intended to claim 80 acres in Parcel C. They serve to correct the obvious errors and gaps on the face of Wiehl's allotment application, so common in individual Native allotment applications of the time.^{18/} The discrepancy, apparent on the face of Alfred Wiehl's allotment application, is what he intended to correct by his affidavit. Wiehl's consistent efforts to correct the application and properly identify the land he originally intended to claim places this case in line with Estate of Stan Paukan, 146 IBLA at 211, in which the Board found that the "evidence * * * leaves little doubt regarding Stan Paukan's intent."

The majority states that in relinquishing Parcel A, Alfred Wiehl gave up a corresponding amount of acreage elsewhere. In so holding, the majority misconstrues Wiehl's efforts intended to finally begin the process of correcting the location of the parcels misidentified by BIA in his 1970 application. BLM correctly treated Wiehl's March 15, 1997, affidavit as an amendment but gave no legal effect to that amendment. The majority decision, by ignoring the relevant, dispositive facts in the record, perpetuates BLM's mistake, denying consideration of the amendment Alfred Wiehl filed "so as to accurately reflect the land he originally intended to claim,

^{17/} This section of ANILCA provides: "An allotment applicant may amend the land description contained in his or her application if said description designates land other than that which the applicant intended to claim at the time of application and if the description as amended describes the land originally intended to be claimed."

^{18/} The record also shows that earlier, at the time of the 1976 relinquishment, Wiehl made clear to the BLM field examiner that he wished to amend his application to encompass the single 160-acre parcel for which he had intended to originally apply. BLM failed to follow through with that amendment, and did not address the validity of such amendment in its May 24, 1999, Correction, its Sept. 13, 2002, Conformance Decision, its Dec. 9, 2002, Reinstatement Decision, or its Feb. 20, 2003, Protest Decision.

but that was misdescribed through some error in the application.” Estate of Stan Paukan, 146 IBLA at 208.

Accordingly, I would reverse BLM’s ruling that Parcel C of Alfred Wiehl’s allotment was limited to 40 acres, find that it properly encompassed 80 acres, and remand this case to BLM for appropriate action. ^{19/}

James F. Roberts
Administrative Judge

I concur:

Christina S. Kalavritinos
Administrative Judge

^{19/} We are mindful that on Dec. 30, 1983, the lands claimed in Parcel C were conveyed out of Federal ownership to Baan-o-yeel-kon Corporation and to Doyon, Limited, by Interim Conveyance Nos. 778 and 779, respectively. See Feb. 20, 2003, Decision at 1. The Department must provide notice to the State and “all interested parties” including Native corporations, pursuant to 905(c) of ANILCA, 43 U.S.C. § 1634(c) (2000).