



LYDIA M. HAVILAND

179 IBLA 281

Decided July 7, 2010



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

LYDIA M. HAVILAND

IBLA 2009-306

Decided July 7, 2010

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving Native allotment application and denying the request to amend the application to add acreage to a parcel of land. F-16062, Parcel B.

Affirmed.

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

Under section 905(c) of ANILCA, an 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. However, no allotment application may be amended for location following adoption of a final plan of survey that includes the location of the allotment as described in the application or its location as desired by amendment.

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

Where a plan of survey was adopted sometime prior to July 2000 and appellant received a Notice to Amend in 1982 to which she did not respond, any further opportunity to amend her application was cut off. Section 905(c) of ANILCA does not provide for any relief from the effect of adopting a final plan of survey that includes the allotment at issue. Once cut off, the opportunity to seek an amendment cannot be revived.

APPEARANCES: Carol Yeatman, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for appellant; Steven Scordino, Esq., Office of the Regional Solicitor,

U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Lydia M. Haviland has appealed from a July 29, 2009, decision of the Alaska State Office, Bureau of Land Management (BLM), approving her Native allotment application, F-16062, Parcel B, for 49.98 acres of land, and holding the allotment is not subject to a non-exclusive trail or easement, but denying her request to amend the application to include an additional 30 acres of adjacent land.¹

For the reasons that follow, we affirm BLM's decision.

I. Background

Haviland filed her Native allotment application with BLM on March 20, 1972, pursuant to the Act of May 17, 1906, 43 U.S.C. §§ 270-1 through 270-3 (1970).² In that typewritten application, she sought two parcels of land, denoted Parcel A and Parcel B, which were described by aliquot part of the U.S. public-land survey system.³ They were described as follows:

Parcel A: A fractional part of SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 9 [and] S $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 8, T. 20 N., R. 22 W., KRM Kateel River Meridian], containing 38 acres, more or less. (northeast of Krusenstern Lagoon)

Parcel B: A fractional part of W $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 21, T. 20 N., R. 23 W., KRM [and] NE $\frac{1}{4}$ sec. 20, T. 20 N., R. 23 W., KRM (Lying northeast of Kotzebue Sound), containing 50 acres, more or less.

¹ On Oct. 23, 2009, Haviland and BLM jointly requested the Board to suspend final action on the present appeal until a decision was issued in the pending case of the *Heir of Fred Hurley*, IBLA 2009-178, since the two appeals raised the same legal issues concerning a request to amend a Native allotment application. On Nov. 20, 2009, we issued a final decision in *Sophie Kaleak (Heir of Fred Hurley)*, 178 IBLA 217 (2009), and now proceed to finally adjudicate Haviland's appeal.

² The 1906 Act was repealed effective Dec. 18, 1971, subject to pending Native allotment applications, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (2006).

³ BLM separately approved Haviland's allotment application for 37.99 acres of land in Parcel A, under the 1906 Act, by decision dated July 29, 2005, and a Certificate of Allotment (No. 50-2005-0449) was issued on Sept. 10, 2005. Parcel A is not at issue in this appeal.

As shown on the attached portion of USGS [U.S. Geological Survey] quadrangle map Noatak A-4 which becomes a part of this application.^[4]

A copy of USGS Quadrangle (Quad) Map Noatak (A-4), Alaska (1952), was attached to Haviland's application. A hand-drawn depiction of the two parcels placed Parcel A on the eastern side of the Krusenstern Lagoon, opposite Parcel B. Parcel B borders Kotzebue Sound in the Chukchi Sea, but not the lagoon. The application also noted that Haviland had "marked and posted" the corners of both parcels.

Haviland claimed qualifying use and occupancy of both parcels consisting of hunting, fishing, and berrypicking during the spring, summer, and fall, since 1941, the year of her birth. She later filed an affidavit dated March 26, 1999, attesting to her use and occupancy of land "at Cape Krusen[s]tern (Sealing Point)[.]" The affidavit appears to have been accompanied by the March 25, 1999, affidavit of Samuel T. Williams, Sr., Haviland's uncle, and the March 26, 1999, affidavit of Lena S. Hanna, Haviland's cousin, both of whom generally attested to her use and occupancy. In a February 4, 2005, affidavit, Haviland later reported that she had initially gone to the two parcels in the company of family members, but began using the land on her own at about age 12 after her brothers were married. Feb. 4, 2005 Affidavit, ¶3 at 1.

The application was signed by Haviland on July 8, 1971, and on March 13, 1972, an official of the Bureau of Indian Affairs (BIA), U.S. Department of the Interior, certified that Haviland is an Alaskan Native entitled to an allotment under the 1906 Act. Haviland's application was forwarded to BLM on March 20, 1972.

BLM initially identified Parcel B on an undated plat for unsurveyed Ts. 19 and 20 N., Rs. 21-23 W., KRM, current to March 17, 1972, and date-stamped as "processed" by BLM on November 28, 1973. According to the handwritten notation on the reverse of the plat, it is a "Multi Township Plat" (MT Plat). The MT Plat

⁴ Based on the protracted township and section lines for T. 20 N., R. 23 W., KRM, Parcel B is shown to encompass lands mostly in fractional sec. 21. It appears that a sliver of Parcel B may extend into sec. 20, which is shown as a tiny fractional section. Presuming that the protracted sections encompass a uniform 160 acres, the parcel encompasses less than 80 acres.

The words "VABM [Vertical Angle Benchmark] Krusenstern" are noted on the map, indicating the presence of a U.S. Coast and Geodetic Survey survey marker in the vicinity of Parcel B. A better copy of this USGS map was attached to BLM's Feb. 26, 1981, Land Report, and it notes the presence of "VABM Krusenstern" using a small triangle containing a dot between "VABM" and "Krusenstern" in the same location relative to the surrounding topographic features just north of Parcel B.

includes a reference to protraction diagram No. K4-16, which was officially filed on September 14, 1960. Haviland therefore located Parcel B by reference to the protracted township and section lines, although she did not describe the lands she claimed “by metes and bounds and tied to natural objects,” as required by 43 C.F.R. § 2561.1(c) (1971).

The record contains a second MT Plat bearing a processing date-stamp of November 28, 1973, and it shows Haviland’s claim in relation to other adjacent Native allotment claims. These three adjacent claims bordered the coastline, along Kotzebue Sound.

Herbert A. Brownell, a BLM Realty Specialist, conducted the field examination of Parcel B on June 29, 1980. Haviland did not participate in the field examination, but she was interviewed by Brownell. He reported that Haviland “was able to describe the area,” and that she informed him that she had used and occupied Parcel B for her entire life, originally as a minor child with her parents, and with her husband for the last 15 years. Feb. 26, 1981, Land Report (Land Report) at unpaginated 5.⁵ Brownell was accompanied by Bert Haviland, Haviland’s husband, her uncle, Samuel Williams, and her brother, Frank Williams. In his Land Report, Brownell stated that he had found Haviland’s husband to be “well acquainted” with the lands claimed by his wife in Parcel B. Land Report at unpaginated 5. He found that Haviland had identified the lands on the ground with a single small wooden post “near the southwest corner,” and attached a BLM tag and orange flagging to the post. *Id.* at unpaginated 4. He also noted the presence of a large tower “just to the north of the parcel,” “directly over VABM Krusenstern” that was used by the community to spot sea mammals. *Id.* at unpaginated 6.

Brownell concluded that Haviland had engaged in qualifying use and occupancy of Parcel B for the requisite 5 years and was entitled to a Native allotment under the 1906 Act. *See* Land Report at unpaginated 6. He generated a metes and bounds description of the lands sought by Haviland using the three corners he set during the field examination and attached a “Site Plot” sketch and part of what appears to be a color version of USGS Quad Map Noatak (A-4), Alaska (1952) showing Parcel B.

⁵ The Land Report was “accepted” by the Area Manager, Arctic-Kobuk Resource Area, Fairbanks District, Alaska, BLM, and the Chief, Division of Resources, Alaska State Office, BLM, respectively, on Mar. 2 and 3, 1981. Land Report at unpaginated 2.

The Site Plot and USGS Quad Map depict Parcel B in relation to other adjacent Native allotment claims.⁶ While both the original 1952 USGS map and the 1973 MT Plat show Haviland's claim as extending north all the way to the protracted line between secs. 16 and 21, beyond the north boundary of Williams' adjacent claim, Brownell's metes and bounds description placed the north boundary of Haviland's claim as south or below the protracted section line between secs. 16 and 21, as an extension of the north boundary of Williams' claim. As a result, the north boundary of Haviland's parcel is not north of the VABM Krusenstern marker as shown on the original USGS map attached to her application, but just south of the marker. As shown on the Site Plot, a small rectangular area along the coastline, just north of the north boundary of Haviland's claim, is labeled "Tower" and shows "V.A.B.M. Krusenstern" as a triangle containing a dot or filled circle, which we will refer to as the "Tower area."

Brownell described Parcel B as a triangular area as follows:

Beginning at the BLM location marker, head west^[7] to the mean high tide line of Chukchi Sea, corner # 1; thence meander the mean high tide line southeasterly for approximately 45 chains to corner # 2, this being common with the southwest corner of F-16063 [William's parcel]; thence north approximately 30 chains to corner # 3, common to the northwest corner of F-16063; thence west approximately 30 chains to corner # 1. Portions of this last line are in common with F-17999 [Mills' parcel] and not abutting the area around VABM Krusenstern may be adjusted to include 50 acres.

Land Report at unpaginated 6. Below the metes and bounds description, a handwritten notation appears: "Note: Corner #'s and adjustment area has been added on the 'Site Location Map' for clarification of instructions. DNE 3/22/85 This allotment is to be surveyed after F-17999 has been completed." *Id.* A companion notation appears on the Site Plot: "Note: Corner numbers and described adjustment area has been added on the 'Site Location Map' DNE 3/22/85."

⁶ Parcel B is bordered to the north by the claim of Lester Gallahorn (F-17549), which surrounds the claim of Kenneth A. Mills (F-17999) on its north and east boundaries, and to the east by the claim of Frank W. Williams, Haviland's brother (F-16063). Case abstracts obtained from BLM disclose that the Gallahorn, Mills, and Williams claims were all approved under the 1906 Act, and Certificates of Allotment were issued in August 2003 and February and April 2008.

⁷ The typed word "west" had been used. It was manually crossed out and "east" was written above it. Land Report at unpaginated 6.

By letter dated March 31, 1982 (Notice to Amend), BLM initially notified Haviland that her Native allotment claim for Parcels A and B appeared to have been legislatively approved under section 905(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a) (2006), effective June 1, 1981, “pending confirmation of location.” Letter, dated Mar. 31, 1982, at 1. BLM informed her that pursuant to section 905(c) of ANILCA, 43 U.S.C. § 1634(c) (2006), within 60 days of receipt of the letter, she might amend the land description in 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[.]” *Id.* (quoting 43 U.S.C. § 1634(c) (2006)). In the absence of a timely amendment, BLM stated that it would then proceed to survey the two parcels, expressly cautioning her: “The location of your allotment *cannot* be changed after we have issued the request for survey.” *Id.*

Maps showing the “approximate location” of the two parcels containing a total of 88 acres were attached. Letter, dated Mar. 31, 1982, at 1. In the case of Parcel B, the map was a copy of the USGS map attached to Brownell’s 1981 Land Report, which showed the parcel in the interior of protracted sec. 21, rather than abutting along its north section line, and showed other adjacent Native allotment claims. The map also depicted VABM Krusenstern just north of, and along, the north boundary of the parcel, rather than inside the parcel. The map should have put Haviland on notice that BLM had determined the location of her claim relative to Williams’ claim was not as she had indicated it on the 1952 USGS map attached to her allotment application.

Haviland received BLM’s March 1982 Notice to Amend on or about May 13, 1982, as evidenced by her signature on a certified mail return receipt card. She did not respond to the March 1982 Notice and, by memorandum dated October 25, 1982, BLM requested that Parcel B be surveyed in accordance with Brownell’s metes and bounds description, which placed the parcel in protracted sec. 21, T. 20 N., R. 23 W., KRM.

BLM later rescinded its March 1982 notification of legislative approval by decision dated December 18, 2007, once it determined that legislative approval had been precluded by the fact that the lands sought in Parcels A and B were situated within the Cape Krusenstern National Monument. As a result, section 905(a)(4) of ANILCA, 43 U.S.C. § 1634(a)(4) (2006), required BLM to adjudicate Haviland’s allotment application under the 1906 Act. BLM initially approved the application in a December 18, 2007, decision, described below, but that decision was vacated by the Board on March 11, 2008.

BLM surveyed Haviland’s parcel in July 2000. These lands were surveyed as Lot 8 of United States Survey (USS) No. 12624, Alaska, and were depicted on a final

survey plat that was accepted by the Acting Deputy State Director for Cadastral Survey, Alaska, BLM, and officially filed on June 8, 2001. Under USS No. 12624, Alaska, BLM surveyed 11 lots running down much of the length of the western edge of the Krusenstern Lagoon, including the Gallahorn (Lot 6), Mills (Lot 7), and Williams (Lot 9) claims and the Tower area (Lot 10). The relative locations of the various claims had not changed from that depicted on Brownell's Site Plot and USGS map. However, Haviland's allotment, which still bordered Williams' claim to the west, again extended north of the north boundary of Williams' claim. As surveyed, Parcel B encompassed 49.99 acres of land.

BLM sent a Notice entitled "Conformance to Plat of Survey" (Notice to Conform) to Haviland on January 22, 2002, notifying her that Parcel B had been surveyed as Lot 8 of USS No. 12624, Alaska. BLM informed her that, while her lack of response to its March 31, 1982, Notice to Amend indicated that the 2001 survey was "correct," she would have 30 days from receipt of the new letter to advise BLM, in writing, "if the survey does not include the land described in the final date to amend letter," referring to the March 31 Notice.⁸ Notice to Conform at 1. Copies of the official 2001 survey plat, a November 15, 2001, Master Title Plat (MTP) (identical to the July 19, 2001, MTP), and the March 31 Notice were attached to the Notice to Conform.

Haviland received BLM's January 2002 Notice to Conform and February 2002 Corrected Notice, as evidenced by the signature of Tracy Haviland on certified mail return receipt cards. Haviland did not respond to the Notice to Conform or the Corrected Notice.

By letter dated January 13, 2004, the Native Village of Kotzebue (Kotzebue) inquired about the status of Haviland's allotment, asserting that she had originally claimed 80 acres of land under the 1906 Act, as "clearly indicate[d]" by the map attached to her "original" application.⁹ Letter, dated Jan. 13, 2004. Kotzebue therefore sought "correct[ion]" of the application to include the additional 30 acres in Parcel B, since she had "never relinquished any portion of Parcel B[.]" *Id.*

By June 2004, questions regarding the survey had arisen. A meeting among BLM, the Alaska Regional Office of the National Park Service, the BIA Office of the Special Trustee for American Indians (OST), Kotzebue, and the BIA Native Allotment

⁸ BLM corrected the original Notice to Conform by letter dated Feb. 1, 2002, in order to accurately place Parcel B in protracted sec. 21, T. 20 N., R. 23 W., KRM.

⁹ According to Kotzebue's Jan. 13, 2004, letter, the map sketch was enclosed. It appears Kotzebue failed to enclose the map. However, it was later provided to BLM as an attachment to Kotzebue's Jan. 10, 2007, letter similarly asserting an application for an 80-acre Parcel B.

Coordinator was held on June 18, 2004. In virtually identical letters dated June 29 and 30, 2004, from BLM to the meeting participants, BLM explained the situation as follows:

As we discussed, the original intent of the survey was to encompass the lands applied for by Kenneth A. Mills (F-17999), Lydia Haviland (F-16062, Parcel B), and Frank W. Williams (F-16063) and to survey out a small tract of land containing a tower used by the community. However, the boundaries of Lots 7 - 9, U.S. Survey No. 12624 were incorrect because of the erosion and loss of the VABM Krusenstern marker between the time of request for survey [1982] and the time survey was completed [2000]. The location of the lot intended for the tower was incorrectly surveyed out of Kenneth Mills' allotment and left the tower located within Lydia Haviland's allotment. We will adjust this survey, as depicted on the color map (enclosed), to correctly survey out the community use lands containing the tower and readjust the boundaries of all three allotments to include the lands the applicants intended.

Letter to Kotzebue from BLM dated June 29, 2004, at 1. In the letters to the OST, NPS, and BIA, BLM indicated that it would adjust U.S. Survey No. 12624 "as soon as we get concur[rence] from the allottees." Letters from BLM dated June 30, 2004, at 1.

BLM issued a supplemental request for a survey of Parcel B on August 11, 2004, stating only that the parcel had been surveyed and "needs to be relotted as shown on the attached proposal." The attached Supplemental Plan of Survey provides for re-lotting to create a new Lot 14 to exclude the Tower area, now shown to be within Haviland's claim, and the re-numbering of other lots. Gallahorn's parcel (F-17549) was designated new Lot 12, Haviland's Parcel B was designated new Lot 15, and Frank Williams' parcel (F-16063) was designated new Lot 17. Adjustments in the positions of Haviland's, Gallahorn's, and Williams' east allotment boundaries resulted in the creation of new Lots inuring to each applicant: the land Haviland sought was now described as Lots 15 and 16; the land Gallahorn sought was now described as Lots 12 and 13; and Williams now sought lands described as Lots 17 and 18 of USS No. 12624, Alaska.¹⁰

A final survey plat was accepted by the Deputy State Director for Cadastral Survey, Alaska, BLM, on December 23, 2005, and officially filed with BLM on

¹⁰ When resurveyed, 2.85 acres (Lot 14) was taken from Haviland's claim for inclusion in the Tower area. That acreage was replaced with 2.84 acres (Lot 16) from Williams' claim, and 2.84 acres (Lot 18) was added to Williams' east boundary.

March 22, 2006. As resurveyed, Parcel B was south of the protracted line between secs. 16 and 21, and encompasses 49.98 acres of land.

BLM did not send a second Notice to Conform with a copy of the new survey plat for Parcel B to Haviland.

By notice dated January 26, 2005, BLM requested additional evidence from Haviland demonstrating her qualifying use and occupancy of Parcel B, identifying the lands in Parcel B as the former Lot 8 of USS No. 12646, Alaska, within protracted sec. 21, T. 20 N., R. 23 W., KRM.

As shown by her signature on a certified mail return receipt card, Haviland received BLM's January 2005 notice on January 26, 2005. She responded with a February 4, 2005, affidavit, in which she described Parcel B as "on the Kotzebue Sound, located within Sec. 21, T. 20 N., R. 23 W. Kateel River Meridian, Alaska (See Exhibit 1)." Haviland Affidavit, ¶9 at 2. "Exhibit 1" was not attached to Haviland's Affidavit, but was subsequently submitted by Kotzebue by letter dated February 8, 2005.¹¹ Exhibit 1 is part of a USGS Quad Map that appears to be a copy of the same 1952 Quad Map that was attached to Haviland's allotment application. It depicts Parcel B as immediately south of the VABM marker and in the same position as shown on the Site Plot and USGS map included in BLM's 1981 Land Report, and not inside Parcel B as Haviland had shown it in her application. Most importantly, Haviland now attested that her allotment was south of the protracted north section line of sec. 21, where in the map attached to the typed application filed with BLM, she had drawn the parcel with its north boundary sharing the protracted section line.

¹¹ The map submitted with Kotzebue's Feb. 8, 2005, letter bears the handwritten notation "Exhibit 1 Attachment, F 16062 Lydia Haviland Affidavit of Samuel T. Williams, Sr. 2/2/05." On Feb. 7, 2005, Williams filed his affidavit in which he stated: Haviland's claim is "on Sheshalik Spit and more specifically . . . on the shore of Kotzebue Sound, within Sec. 21, T. 20 N., R. 23 W., Kateel River Meridian, Alaska," "shar[ing] common boundaries with Native allotment applications F-17999 and F-16063, belonging to the Heirs of Kenneth Mills and Frank Williams, respectively." Williams Affidavit, ¶4 at 1.

In addition, Haviland's cousin, Hanna, filed an affidavit on Feb. 2, 2005, principally to correct a statement in her earlier affidavit dated Mar. 16, 1999, in which she had alluded to the presence of a home on Parcel B that was in poor condition. Hanna explained that "this correction is needed because I thought the land in question was for a camp at Sheshalik Spit because she [Haviland] did stay there[.]" Hanna Affidavit, ¶5 at 1. She further explained, "Lydia Haviland did speak of the Native allotment at Saluq or Aniauq at different times when she shared her food with me." *Id.*, ¶6.

In a one-page letter dated January 10, 2007, Kotzebue, acting on Haviland's behalf, again informed BLM that Haviland had originally claimed 80 acres of land in Parcel B.¹² It again requested "correct[ion]" of her application to include an additional 30 acres in Parcel B. Kotzebue attached a copy of the first page of Haviland's handwritten application and "the map that accompanied that application."¹³ The description of Parcel B in the handwritten application agreed with the typewritten application and description filed with BLM on March 20, 1972. It is apparent that the attached map of Parcel B is a hand-drawn sketch of the Noatak (A-4) Quad Map.¹⁴ While the handwritten description states that the parcel contains 50 acres, the map itself bore the notation "80 acres." Nothing on the face of the handwritten page of the application and the sketched map confirms or suggests they were received by BLM or BIA.

In a one-page letter to BLM dated February 23, 2007, Kotzebue acknowledged receiving a letter from Ken Butner, a BLM Land Law Examiner, regarding the status of Frank Williams' allotment and the necessity of a conflict resolution. Kotzebue stated that on July 27, 2004, a package containing the concurrences of Haviland, Williams' heirs, and Mills' heirs had been transmitted to Butner. The letter noted that those three allotments had been surveyed, and that the survey plats were officially

¹² Kotzebue filed a similar letter concerning Parcel A, thus seeking to increase the total allotment acreage from 88 to 160 acres, the maximum amount to which she might be entitled under the 1906 Act.

¹³ Kotzebue purported to provide the entirety of Haviland's original application. Although the first page was handwritten, the second page was the second page of the typewritten application filed with BLM on Mar. 20, 1972.

¹⁴ It seems clear the hand-drawn map is a tracing of the relevant portion of the 1952 USGS Quad Map, which accords with the practice at the time. See p. 71 of a Mar. 9, 1981, deposition (Attach. 2 to Statement of Reasons (SOR)) given by Delores N. Roullier, a BIA Realty Officer in Anchorage, Alaska, from 1968 to 1975, in the case of *Barr v. United States*, No. A 76-160 (D. Alaska) (*Barr*), confirming that Native allotment applicants, following instructions provided by BIA to third parties who assisted them with their applications, prepared sketch maps of the lands they claimed using "tracing paper" and official maps. See also *United States v. Melgenak*, 127 IBLA 224, 228 (1993), *aff'd in part, rev'd in part, remanded sub nom., Heirs of Palakai Melgenak v. United States*, No. A95-0439 CV (JKS) (D. Alaska May 5, 1997); Deposition of Audrey L. Tuck, BIA Realty Assistant, Anchorage, Alaska (1969-Present), in *Barr*, dated Nov. 4, 1977 (Attach. 3 to SOR), at 63-64; Deposition of William H. Mattice, BLM Adjudicator (1964-1967) and BIA Realty Officer, Fairbanks, Alaska (1967-1976), in *Barr*, dated Aug. 1, 1977 (Attach. 4 to SOR), at 32.

filed on March 22, 2006.¹⁵ Lastly, the letter stated that Kotzebue had nothing in its files “indicating that BLM officially issued a notice or requested more information about the conflict resolution, so we assumed that it had been accepted back in 2004.”

A one-page BLM memorandum to the file dated April 11, 2007, from the Branch of Preparation and Resolution to the Branch of Survey Planning and Preparation states that Kotzebue has requested a resurvey of Haviland’s Parcel B to 80 acres. The memorandum notes that there is “significant erosion in the area, and BLM is not obligated to add acres when loss of land occurs because of erosion.” A map showing “the approximate amount of land lost for the area of Parcel A of F-16062 [sic]” was requested to accompany a decision denying the request for additional acreage.

On December 18, 2007, BLM issued a decision in which BLM informed Haviland that Parcel B had been resurveyed in 2006 as Lots 15 and 16 of USS No. 12624, Alaska, and acknowledged Kotzebue’s January 2004 and 2007 letters seeking “correction” of Haviland’s allotment application to encompass 80 acres in Parcel B. The Decision denied these requests because “[t]here has been no explanation why or how an error was made on the application filed with BLM.” Decision, dated Dec. 18, 2007, at 2. BLM relied on several facts: (1) Haviland’s typewritten and handwritten applications stated that the lands sought as Parcel B embraced approximately 50 acres; (2) the land examined as Parcel B in the company of Haviland’s husband and other representatives in 1981 consisted of about 50 acres; (3) the March 31, 1982, letter erroneously informing Haviland that her application for Parcel B had been legislatively approved stated that the parcel contained 50 acres; and (4) Haviland did not object to BLM’s January 2002 Notice to Conform in which she was informed that the parcel had been determined, by survey, to contain 49.98 acres.¹⁶ Decision at 2.

Haviland timely appealed. With her SOR filed on February 19, 2008, Haviland submitted a complete copy of the original handwritten version of the application (SOR, IBLA 2008-72, Ex. A-2) she had signed on July 8, 1971, that had been in Kotzebue’s possession and the hand-drawn map sketch (SOR, IBLA 2008-72, Ex. A-3) previously submitted by Kotzebue that referred to 80 acres. In addition, she

¹⁵ Butner’s letter to Kotzebue dated Feb. 9, 2007, is not in the record, nor is Kotzebue’s package transmitting the allottees’ concurrences. Nevertheless, it is apparent that Kotzebue was referring to formal concurrence in the adjustments and re-lotting of the Haviland, Mills, and Williams allotments described above.

¹⁶ The Jan. 22, 2002, Notice to Conform actually stated that the parcel had been surveyed as Lot 8 containing 49.99 acres. In light of the larger issue raised by this appeal and the fact that the 2006 resurvey reported 49.98 acres, the error is *de minimis*.

submitted her affidavit dated February 11, 2008 (SOR, IBLA 2008-72, Ex. C), and the affidavit of Michael D. Tabor, Kotzebue's Realty Director, dated February 8, 2008 (SOR, IBLA 2008-72, Ex. D). In her affidavit, Haviland explained that she had filled out her application and identified the land she claimed on a map, but BIA had supplied a legal description of the land she claimed, not she. Haviland Affidavit dated Feb. 11, 2008, ¶¶ 5, 6 at 1. In his affidavit, Tabor confirmed that the legal description was provided by a BIA representative. Tabor Affidavit dated Feb. 8, 2008, ¶3 at 1.

On March 10, 2008, BLM and Haviland jointly requested the Board to vacate the December 2007 decision, so that BLM could issue a new decision after considering the BIA application file and the hand-drawn map sketch (SOR, IBLA 2008-72, Ex. A-3). That request was granted by order dated March 11, 2008, and the case was remanded to BLM for further action.

Following the remand, BLM issued its July 2009 Decision. BLM first noted requirements for timely filing amendments and raising the question of whether the requested amendment was pending before the Department on December 18, 1971, when the Native Allotment Act was repealed. Decision at 3-4. BLM denied Haviland's request to add acreage to her application for Parcel B, finding that the application was not pending before the Department on the relevant date. *Id.* Noting that the map sketch "showing 80 acres standing alone is not sufficient to overcome the greater weight and consistency of the record as a whole," BLM determined:

Since the typewritten application, which was the only application certified by BIA specifies 50 acres and because there is no independent corroborating evidence such as a timestamp on the map, correspondence from BIA showing Parcel B was for 80 acres, or certification by an authorized officer of the department that the map was before the department on or before December 18, 1971, the January 13, 2004 and January 26, 2005^[17] requests for amendment to include an additional 30 acres are denied.

Id. at 4-5. BLM declared the application for Parcel B approved as to 50 acres and not subject to any non-exclusive use for trails or any easement.

Haviland timely appealed, contending that BLM erred initially by characterizing her "request for reinstatement" as a request to amend her application, arguing she intended to, and did, apply for 80 acres in Parcel B, and that she has never relinquished her claim to the additional 30 acres. SOR at 1. Haviland

¹⁷ These are the dates BLM received Kotzebue's letters. The year of the latter date is erroneous. Kozebue's second letter was dated Jan. 10, 2007.

contends BIA unilaterally eliminated 30 acres, and that, in accordance with our holdings in *Heirs of George T. Hoffman, Sr.*, 134 IBLA 361 (1996), and *Matilda S. Johnson*, 129 IBLA 82 (1994), such acreage must be reinstated in the application and adjudicated under the 1906 Act. See SOR at 12-14. Finally, Haviland argues that under the due process clause of the U.S. Constitution, she is entitled to prior notice and an opportunity for a hearing in accordance with *Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976), before BLM can reject her claim to the additional 30 acres. See SOR at 14-15.

Haviland asks the Board to reverse BLM's July 2009 decision, and remand the case to BLM for adjudication of the merits of her Native allotment claim for an additional 30 acres in Parcel B under the 1906 Act.

II. Analysis

BLM is authorized by the Act of May 17, 1906, to allot up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to a Native applicant where she presents satisfactory proof of "substantially continuous use and occupancy of the land for a period of five years," and otherwise complies with the requirements of the 1906 Act and its implementing regulations at 43 C.F.R. Subpart 2561. 43 U.S.C. § 270-3 (1970).

With the repeal of the 1906 Act as of December 18, 1971, an Alaskan Native was thereafter barred from filing a new allotment application pursuant to the Act. See, e.g., *Stephen Northway*, 96 IBLA 301, 307 (1987). Moreover, an Alaskan Native was precluded from amending an allotment application filed before the repeal, where the applicant sought new or additional lands not previously included in the original claim. *Id.* However, where an application fails to describe lands an applicant intended to claim, a timely filed application may be amended.

[1] With the passage of ANILCA on December 2, 1980, Congress afforded an Alaskan Native the ability to amend an allotment application to include lands the applicant had originally intended to claim at the time of application, but which, owing to the need to rely on protraction diagrams or other error, were not included in the description in the application. We again quote at length *Heirs of Alice Byayuk*, 136 IBLA 132, 137-38 (1996), in which the Board explained the genesis, scope, and limitations on the opportunity to amend a native allotment application:

An amendment of this nature was permitted because the placement of a claim on a protraction diagram might not conform to the land that the applicant actually intended to claim on the ground, since the land sought was often unsurveyed at the time of application, and reliance had to be placed on the projection of survey lines in such

diagrams. Further, applications were often prepared on behalf of the applicant, so that the description might not conform to what he in fact intended to claim. As a result, after the repeal of the Act of May 17, 1906, and prior to ANILCA's enactment on December 2, 1980, applicants were permitted to amend their applications to ensure that they encompassed the land the applicants originally intended to claim.

Section 905(c) of ANILCA provided similar amendment authority, stating that an 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." 43 U.S.C. § 1634(c) (1994). The legislative history of ANILCA establishes that errors that are "subject to correction under [the] authority of Section 905(c)" include "[t]echnical errors in land description, made either by the applicant or by the Department in computing a . . . survey description from diagrams" (S. Rep. No. 413, 96th Cong., 2d Sess. 286, *reprinted in* 1980 U.S. Code Cong. & Admin. News 5070, 5230).

It is now well established that section 905(c) of ANILCA was intended to permit only 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. Amendment to permit the substitution of new or additional land which the applicant had not originally intended to claim was not authorized. *See Hermann T. Kroener*, 124 IBLA [57] at 64-65 [(1992)]; *State of Alaska (Helen M. Austerman)*, 119 IBLA 260, 266 (1991), and cases cited.

Moreover, although the statute did not place any limitation on the time for seeking amendment of an application, it authorized the Department to do so:

[T]he Secretary [of the Interior] may require that all allotment applications designating land in a specified area be amended, if at all, *prior to a date certain*, which date shall be calculated to allow for orderly adoption of a plan of survey for the specified area, and the Secretary shall mail notification of the final date for amendment to each affected allotment applicant, and shall provide such other notice as the Secretary deems appropriate, at least sixty days prior to said date. [Emphasis added.]

43 U.S.C. § 1634(c) (1994); *see also* S. Rep. No. 413, 96th Cong., 2d Sess. 286, *reprinted in* 1980 U.S. Code Cong. & Admin. News 5070, 5230; *Angeline Galbraith*, 97 IBLA 132, 144-45, 146, 94 I.D. 151, 157-58, 158 (1987). The effect is to grant the Secretary authority “to set a deadline for amending all allotment applications in a designated area by notice mailed to them at least 60 days prior to the deadline.” *Id.* at 144, 94 I.D. at 157. An applicant’s failure to respond to such notice terminates the right to amend. *Silas Solomon*, 133 IBLA 41, 47-48 (1995).

The statute also provides that, in any event, “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.” 43 U.S.C. § 1634(c) (1994); *see also* S. Rep. No. 413, 96th Cong., 2d Sess. 286, *reprinted in* 1980 U.S. Code Cong. & Admin. News 5070, 5230; *Angeline Galbraith*, 97 IBLA at 146, 94 I.D. at 159. Thus, where a plan of survey is adopted subsequent to the enactment of ANILCA, the adoption of such plan of survey cuts off any opportunity to amend the application. *Id.* at 146, 94 I.D. at 159.

136 IBLA at 137-38. We have applied section 905(c)’s limitations on amendments in recent appeals, rejecting as untimely requests to add acreage to approved applications. *See, e.g., Sophie Kaleak (Heir of Fred Hurley)*, 178 IBLA at 223; *William M. Tennyson, Sr.*, 178 IBLA 138, 152 (2009); *United States v. Heirs of Harlan L. Mahle*, 171 IBLA 330, 390-91 (2007).

As we observed in *Heir of Ann A. Carney*, 176 IBLA 130, 141 (2008), “the disclosure of incomplete versions of a Native allotment application, without more, does not *per se* demonstrate the applicant’s intentions with respect to the application actually submitted to BLM for processing.” Something more than a lone acreage notation in a version of the application that was not filed with BLM is required to demonstrate an applicant intended to claim more or different acreage than that identified in the application that was filed with BLM. *Sophie Kaleak (Heir of Fred Hurley)*, 178 IBLA at 220-21; *William M. Tennyson, Sr.*, 178 IBLA at 147-48.

On the one hand, we have an array of facts that is consistent with the conclusion that Haviland received the land she sought as Parcel B, which, as it happens, embraced not more than 50 acres. Haviland’s husband, accompanied by her uncle and brother, identified her claim on the ground during the field examination, presumably witnessing the identification and marking of the land. According to the record, none of her representatives disputed the extent of the land

thus marked off as Haviland's claim. Haviland did not question or challenge the 50-acre figure, even when she was erroneously informed that the application was legislatively approved. She did not respond to the Notice to Amend in 1982, and she did not respond to the January 2002 Notice to Conform by which she was informed that the parcel had been determined, by survey, to contain 49.99 acres. Haviland has not identified the 30 additional acres, in a protracted fractional section¹⁸ surrounded by other Native allotments, she used and occupied to the potential exclusion of others.

Not one affidavit submitted by Haviland or her witnesses has ever expressly averred that the land she claims encompasses 80 acres, more than 50 acres, or a different position or configuration, nor has anyone alleged any difficulty in finding or locating Haviland's land because it was unsurveyed. To the contrary, the affidavits address only Haviland's qualifying use and occupancy. Haviland perhaps may have hoped that Parcel B would be larger to bring her total allotment closer to the statutory acreage maximum for which she could apply, but all the maps in the record, including the map sketch attributed to Haviland, consistently depict a fractional, triangular Parcel B that could not possibly embrace 80 acres. Neither Haviland nor her affiants has offered any explanation for the failure to raise any issue about the size of the parcel in the 32 years before Kotzebue discovered a handwritten version of her application in its files. Moreover, Haviland formally concurred in the adjustments to be accomplished by the 2004 resurvey, as did Williams' and Mills' heirs. If Haviland's concurrence was dependent or conditioned on or in any way tied to a favorable resolution of her claim for additional acreage, it does not appear in the record and she has not raised or argued it before BLM or this Board. Her concurrence is simply not consistent with her claim for additional acreage, and yet it completely squares with the administrative record of the application BLM adjudicated and with the conclusion that Haviland intended to apply for the approximately 50 acres contained in Parcel B.

[2] On the other hand, in contrast, we have an "80-acre" notation on the map sketch that was attached to a handwritten version of the identical typewritten application that was filed with BLM, the only departure in an otherwise remarkably

¹⁸ As we have observed in the past, a fractional section by definition embraces less than a regular, 640-acre section because a portion of it is cut off by an overlapping survey, a river or lake, water-course, reservation, other irregular boundary, or some other external interference that renders such sections fractional. See *Okalena Wassillie*, 175 IBLA 355, 358 n.4 (2008). In this case, protracted sec. 21 could not consist of 640 acres upon survey, because roughly half of it is cut off by the Chukchi Sea in the Arctic Ocean. Given that Haviland's parcel abuts the curving shoreline and the adjoining Tower area and allotments, it is clear that the parcel could not in any circumstance embrace a regular 80-acre parcel.

consistent record. If the facts and circumstances of this application retained any relevance to this appeal, we would find that Haviland has not shown, by a preponderance of the evidence, that the land she claimed as Parcel B was mis-described in her application. The attendant facts and circumstances are not relevant, however, because section 905(c) of ANILCA provides 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.” 43 U.S.C. § 1634(c) (2006).

In this case, the plan of survey was adopted sometime prior to July 2000, when BLM surveyed Haviland’s and other allottees’ parcels in the area. Haviland did not respond to the 1982 Notice to Amend, issued long before a final plan of survey had been adopted, and she did not respond to the January 2002 Notice to Conform, an opportunity to challenge the correctness of the survey by showing that “the survey does not include the land described in the final date to amend letter” BLM typically affords applicants, even though it occurs after the survey has been performed and well after the adoption of a final plan of survey. 2002 Notice to Conform at 1. ANILCA does not provide for any relief from the effect of adopting a final plan of survey that includes the allotment at issue, even if it appears that the land description contained in an application does not accurately reflect the land that the applicant originally intended to claim. Once cut off, the opportunity to seek an amendment cannot be revived. Haviland’s 2004 and 2007 requests to amend her allotment application therefore are untimely and must be denied.¹⁹

We have one further comment. BLM premised its decision on the conclusion that Haviland’s request, which was based on a single notation on a map sketch that BIA never submitted to BLM, constituted a new allotment application that was not pending before the Department on December 18, 1971, rather than an attempt to correct an erroneous land description in a timely filed application. To reach that conclusion, BLM necessarily weighed the facts of record as we did, though it did not

¹⁹ Haviland contends that *Pence v. Kleppe*, 529 F.2d 135, requires a hearing before BLM can reject her request to amend her application for Parcel B. That contention is misplaced. The principle established by *Pence v. Kleppe* is that “when BLM adjudicates a Native allotment application presenting a factual issue as to the applicant’s compliance with the use and occupancy requirements, BLM must initiate a contest giving the applicant notice of the alleged deficiency in the application and an opportunity to appear at a hearing to present favorable evidence prior to rejection of the application.” *Jacqueline Dilts*, 145 IBLA 109, 114 (1998). This is not an instance in which BLM determined that Haviland failed to satisfy use and occupancy requirements and on that basis rejected the applications she filed, but an untimely attempt to add new acreage to a pending allotment application in which use and occupancy is established. *Pence v. Kleppe* is therefore not relevant.

marshal them as exhaustively as we have in this opinion. BLM's decision rationale is thus clearly sustainable. Although we could have affirmed on that basis, we chose to give Haviland the benefit of the doubt by accepting her characterization of her request as an effort to "receive all the land she originally claimed in her application." SOR at 2.²⁰ Viewed from either perspective, however, the result is the same: Haviland's request to obtain additional allotment acreage is untimely.

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

/s/
T. Britt Price
Administrative Judge

I concur:

/s/
James F. Roberts
Administrative Judge

²⁰ Haviland also argues she "never amended or relinquished that original application or in any manner waived her right to an allotment of two 80 acre parcels." SOR at 12. We agree that Haviland never attempted to amend her application while it was pending. Because our review of the record discloses no error in the description of the lands Haviland applied for and, through her representatives, confirmed on the ground, we also agree that relinquishment is not an issue in this case. The decisions in *Heirs of George T. Hoffman, Sr.*, 134 IBLA 361, and *Matilda S. Johnson*, 129 IBLA 82, are therefore inapposite. We have explained more than once recently that in *Hoffman* and *Johnson*, BLM reduced the acreage described in the allotment applications for which the appellants had intended to apply to avoid conflicting applications. *Hoffman* and *Johnson* agreed to reduce the acreage they applied for, but both had adequately communicated their intention to claim other lands in lieu of the reductions BLM requested. *Matilda S. Johnson*, 129 IBLA at 84; *Heirs of George T. Hoffman, Sr.*, 134 IBLA at 364. Thus, "[t]hose cases stand for the basic proposition that BLM is required to adjudicate the application the applicant intended to submit." *Heir of Okalena Wassillie*, 175 IBLA at 361.