

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment location amendment A-052690.

Set aside and remanded for a hearing.

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

BLM may not deny a request to amend a Native allotment application because it was filed subsequent to the adoption of a final plan of survey in the absence of evidence that the applicant received notice that the final plan of survey was to be adopted and had an opportunity to object to the contents of the plan.

2. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Administrative Procedure: Hearings--Hearings--Rules of Practice: Hearings

Under sec. 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. | 1634(c) (1982), a Native allotment applicant may amend the land description contained in the application if the description designates land other than that which the applicant intended to claim and the new description describes the land originally intended to be claimed. Where the record presents disputed facts concerning whether applicant's new description describes the land originally intended to be claimed, the Board will refer the case to the Hearings Division, Office of Hearings and Appeals, for a hearing on the matter pursuant to 43 CFR 4.415.

APPEARANCES: Richard B. Brown, Esq., Anchorage, Alaska, for appellant; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, for the Bureau of Land Management; Lance B. Nelson, Esq., Assistant Attorney General, for the State of Alaska.

## OPINION BY ADMINISTRATIVE JUDGE KELLY

Daniel Roehl has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated December 6, 1985, rejecting his request to amend Native allotment application A-052690 (Parcel B).

On March 20, 1968, the Bureau of Indian Affairs (BIA) filed the original allotment application on behalf of Roehl pursuant to the now repealed Native Allotment Act of 1906, 34 Stat. 197, as amended, 43 U.S.C. || 270-1 through 270-3 (1970). The factual background of this case, as described in BLM's December 6, 1985, decision, is set forth below:

The original application described the allotment by metes and bounds with a latitude/longitude position for a point of beginning. That point is located approximately 37 chains from the eastern section line, in the southeast quarter of Sec. 3, T. 9 S., R. 31 W., Seward Meridian, Alaska. From this point, the metes and bounds encompasses land to the south and east, placing the claim in the eastern halves of Secs. 3 and 10. The application was supplemented by a USGS [United States Geological Survey] quad sketch which also shows the allotment in the east halves of Secs. 3 and 10. Both sources indicate that this claim was to be adjacent to and directly south of the Native allotment of Nellie Roehl (AA-2714), sharing common corners and a common boundary along a line extended from the eastern point of Sid Larson Bay.

On June 26, 1978, Mr. Roehl accompanied a Bureau of Land Management field examiner to his allotment. There he identified the claimed lands and the improvements which he had claimed in this original application. The examiner also reported they found a corner of Nellie Roehl's allotment which was represented by a tree with a marker. A metes and bounds description was written by the field examiner which was virtually the same as the description submitted in Mr. Roehl's application. The only difference was that instead of the point of beginning being the latitude/longitude location, it was changed to be one of the corners in common with Nellie Roehl's allotment (the marked tree near the eastern point of the bay). The metes and bounds description around the parcel used exactly the same distances and directions as the original application and also included a second corner in common with Nellie Roehl's allotment which marked the eastern-most point of both parcels, just as the original description had done.

On December 7, 1979, the Native allotment was approved and a survey was requested. The final plan of survey and special instructions were adopted May 10, 1982, (U.S. Survey No. 7128). The metes and bounds description in the instructions is virtually the same as the field examiner's metes and bounds description (which was used to request the survey). Subsequently, the instructions encompass the same land as the description submitted in the original application.

A memo to the survey instructions filed dated August 11, 1983, by the Chief of Survey Planning and Records Section, stated that an adjudicator from the Native Allotments Section had talked to Mr. Roehl by phone concerning his request to move his allotment 600 feet westerly because "the bay was drying up." The outcome of this situation was that the survey was still to be done according to the description in the survey instructions. (It was also noted that to move the allotment would have created a conflict with an adjacent allotment to the west.)

On June 11, 1985, the Chief of the Native Allotment Section received a letter from James Vollintine, private counsel to Daniel Roehl, requesting that the allotment be moved toward the west in order to locate it on the shore of Sid Larson Bay. (No new metes and bounds description was provided as the intended location, and the request for amendment was not approved by the Bureau of Indian Affairs.) Mr. Vollintine stated that the applicant had intended for his claim to be on Sid Larson Bay originally, but it was presently on a slough at the end of the bay which only had water in it part of the year. Therefore, he argued, the Bureau of Land Management should move the allotment toward the west where Mr. Roehl could be on the shore of the bay having water year-round. He also stated that to move the allotment of Mr. Roehl would create conflicts with two Native allotments, but the Sec. 905(b) of the Alaska National Interest Lands Conservation Act (ANILCA) (43 U.S.C. | 1634(b)) provided a vehicle to resolve the subsequent conflicts.

(BLM's Dec. 6, 1985, Decision at 1-2).

In its decision, BLM denied Roehl's amendment request because "Mr. Vollintine has not convinced us that the land description we are presently using does not properly encompass the land Mr. Roehl originally intended to claim." Id. at 3. As authority for its decision, BLM quoted the following portions of section 905(c) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. | 1634(c) (1982):

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. \* \* \* 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.

In his statement of reasons (SOR), Roehl interprets BLM's decision as having denied his amendment request on two grounds. BLM's first ground for rejection, as explained by Roehl, is that section 905(c) of ANILCA, "bars

amendments for location following adoption of 'a final plan of survey'" (SOR at 2). Thus, Roehl's amendment request, which was submitted in June 1985, some 3 years after the adoption of BLM's final plan of survey on May 10, 1982, was untimely under section 905(c) of ANILCA. Roehl views BLM's second ground for rejection as having been based upon a "finding that Mr. Roehl did not seek an amendment encompassing land which he intended to claim at the time of application, as required by section 905(c)" (SOR at 2).

Regarding the first ground for rejection of his application amendment, Roehl argues that "because he never received notice of the adoption of a plan of survey or its impact on his right to amend his application BLM's assertion that his request was untimely represents a violation of his constitutional right to procedural due process and must be overturned" (SOR at 2). Citing Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), Winkler v. County of DeKalb, 648 F.2d 411 (5th Cir. 1981), Strang v. Marsh, 602 F. Supp. 1565 (D. R.I. 1985), and Goldberg v. Kelly, 297 U.S. 259 (1970), Roehl maintains that

persons who seek to amend their location must receive some kind of notice before adoption of a final plan of survey. This notice should, at a minimum, apprise them of the fact that a plan of survey will shortly be adopted and inform them of the impact this will have on their ability to obtain an amendment.

(SOR at 5). Roehl points out that BLM "appears to have followed a consistent practice of notifying claimants in advance of the proposed outcome of surveys," <sup>1/</sup> and that "[t]here was no justification for departing from this procedure in this case \* \* \*." Id. at 6.

Roehl challenges BLM's second ground for rejection: that his amendment request affects land which he did not seek to claim in the original application. He argues that at the field examination on June 26, 1978, "the field examiner conducted only a cursory examination of the land and did not attempt to locate the boundaries and corners" (SOR at 8). Moreover, he terms "ludicrous" BLM's conclusion that Roehl's "amendment is inconsistent with the original intent underlying the initial application" (SOR at 8). In his affidavit, Roehl states: "My original intention was to have the western boundary of my allotment between 600-1000 feet west of where I understand it to have been located on the sketches completed by the BLM field examiner and attached to the 'Plan of Survey'" (Roehl Affidavit at ` 5). His statements are corroborated by the affidavit of Gabriel Olympic, who states that he "personally hammered a stake into the ground on a point of land to the west of the beach" (Olympic Affidavit at ` 3). Roehl concludes that this case

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<sup>1/</sup> Exhibit D to Roehl's SOR consists of five letters demonstrating that BLM has, at least on occasion, notified Native allotment applicants that a plat of survey covering the land described in their applications has been filed with BLM, and that if BLM does not hear from the applicant within 30 days, it will consider the survey correct. There is no evidence in the case file that Roehl received such a letter.

involves issues of material fact regarding whether his application "describes the land originally intended to be claimed," and requests that the matter be remanded for an evidentiary hearing.

[1] We will first address Roehl's argument that for section 905(c) of ANILCA to be constitutionally applied, "BLM must first notify him of the fact that a plan of survey has been prepared and also of the impact this event has on his rights [to amend his application] under section 905(c)" (SOR at 4). In Peter Paul Groth, 99 IBLA 104 (1987), BLM moved for dismissal of appellant's appeal arguing that (1) his protest was untimely under 43 CFR 4.450-2 because it was filed after approval of a dependent resurvey, and (2) his appeal was untimely under 43 CFR 4.411(a) because it was not filed within 30 days either after BLM's approval of the resurvey or after his predecessor-in-interest admitted to knowing of the resurvey. In denying BLM's motion to dismiss, the Board reasoned as follows:

Clearly, 43 CFR 4.450-2 contemplates that those persons affected by an action "proposed to be taken" will in some way be put on notice of that proposed action whether it be by public notice, such as publication in the Federal Register (e.g., Steinheimer Trust, 87 IBLA 308, 309 (1985); California Association of Four Wheel Drive Clubs, 30 IBLA 383, 384 (1977), or by an official BLM record (e.g., Sierra Club Legal Defense Fund, Inc., 84 IBLA 311, 318 (1985)), or by personal notification. In the present case, however, there is no evidence that affected persons, such as Glover, were alerted in 1966 to the "action proposed to be taken," i.e., the official filing of the plat of resurvey. The purpose of notice of action proposed to be taken is so that BLM may resolve objections to the resurvey prior to the official filing of the plat \* \* \*.

Where there is a lack of evidence in the record that BLM provided interested parties an opportunity to file objections to the official filing of a plat or resurvey prior to such filing, objections filed subsequently will not be subject to dismissal as untimely protests under 43 CFR 4.450.2. Rather, they will be considered as objections to the resurvey lodged with BLM, and BLM's adjudication of those objections will result in a decision which is subject to appeal to this Board. [Footnotes omitted].

99 IBLA at 109-110.

There is no question that under section 905(c) of ANILCA BLM may deny a request to amend an allotment application filed after the "adoption of a final plan of survey which includes the location of the allotment as described in the application." However, based upon the rationale in Groth, we conclude that BLM may not reject an amendment application because it is filed subsequent to the adoption of a final plan of survey in the absence of evidence that BLM provided notice that the final plan of survey was to be adopted, thus allowing interested parties the opportunity to object to the

contents of the plan. To rule otherwise would be "patently unfair." 99 IBLA at 109. The record in this case does not indicate BLM provided any notice to Roehl of the proposed adoption of a final plan of survey. Thus, BLM's rejection of Roehl's amendment on the grounds that it was filed after the adoption of the final plan of survey cannot be sustained.

[2] Contrary to BLM's decision, Roehl claims that his amendment application meets the criteria embodied in section 905(c) of ANILCA. His amendment application may be approved under that section provided he "establishes that the new description describes the land originally intended to be claimed." Angeline Galbraith, 97 IBLA 132, 147, 94 I.D. 151 (1987); see also Pedro Bay Corp., 78 IBLA 196, 201 (1984). In its answer, BLM argues that Roehl's amendment application amounts to an "attempt to apply for new land which had neither been described in the original application nor originally intended to be claimed by appellant" (Answer at 7).

If BLM is correct, Roehl's amendment application must be denied under section 905(c) of ANILCA. The legislative history of that provision, cited by BLM in its answer, makes clear that "the amended application [must] describe the land the applicant originally intended to apply for and does not provide authority for the selection of other land." S. Rep. No. 413, 96th Cong., 1st Sess. 286, reprinted in 1980 U.S. Code Cong. & Ad. News 5230. As stated by the Board in Joash Tukle, 86 IBLA 26 (1985), "this provision was intended to enable Native allotment applicants to correct the legal description of the land for which they originally applied. \* \* \* It does not authorize the substitution of a different parcel of land." 86 IBLA at 27 (citation omitted).

In the recent decision, Angeline Galbraith, supra, the Board enunciated the following criteria for evaluating whether BLM should approve an amendment to a Native allotment application under section 905(c) of ANILCA:

That an applicant contends his amendment describes the land originally intended does not, of course, settle the matter. Rather, the question of intent must be determined based on the facts and circumstances reflected in the record. Relevant to the question of intent are the geographic positions of the land described in the original application and the proposed amendment, the relation of the parcels to each other and to any landmarks or improvements, the history of the legal status of the parcels, and the reasons why the original application did not correctly describe the intended land. See Pedro Bay Corp., supra. Moreover, an applicant should show how his or her activities since filing the application have been consistent with the present claim that other land was intended. Such factors should clearly indicate a reasonable likelihood that the land described by the amendment was the land intended to be claimed at the time of the original application.

97 IBLA at 147, 94 I.D. at 159.

The current record does not enable us to engage in a meaningful application of the Galbraith standards. BLM's decision and the affidavits filed by Roehl and Olympic are the major documents which provide evidence as to whether Roehl's amendment describes the land originally intended. In his affidavit, Roehl addresses BLM's statement that during the June 26, 1978, field examination, "he identified the claimed lands and the improvements which he had claimed in this original application" (Decision at 1-2). Roehl's recollection of the field examination is as follows:

The field examiner looked over my improvements and took a picture of me holding a sign and standing by the cabin I had built on the land. He then nailed a tag of some sort to the cabin. I remember telling him that one boundary of the allotment lay on the other side of the sandy beach. He said this was okay but did not ask me to show him the boundaries or corners of the land. We left without the field examiner trying to locate the boundaries or corners of the land.

(Roehl Affidavit at ` 10). Placed in this light, the assertion in BLM's decision that "[a] metes and bounds description was written by the field examiner which was virtually the same as the description submitted in Mr. Roehl's application" indicates nothing about Roehl's intent or whether there was an error in the original description. Moreover, Roehl states that when he and his friends staked the land in September 1967, they "placed a corner stake on a point of land just to the west" of the beach. He explains:

The stake was intended to mark part of the western boundary of the allotment. It was placed in the ground by Gabriel Olympic. We then placed the other stakes in a way which caused the allotment to be aligned in a roughly rectangular shape with the long side of the rectangle running in the same general direction as the shoreline. The shape of my allotment, layed out in 1967 was, thus, much different from what is shown on the sketches made by BLM.

(Roehl Affidavit at ` 6).

Of additional note is the following assertion regarding the preparation of the original allotment application: "When I originally sought assistance from BIA in completing my allotment application, I made it clear that I wanted the beach to lie within the boundaries of the allotment, and it was my understanding that the application was completed according to my desires" (Roehl Affidavit at ` 9).

Roehl's affidavit contains assertions which, if substantiated, support his argument that he intended to claim land not described in the property description contained in the original allotment application. Where there are disputed facts determinative of the legal issues involved in a case, this Board has the authority to order a hearing on the matter before an

Administrative Law Judge pursuant to 43 CFR 4.415. Edward L. Johnson, 93 IBLA 391, 400 (1986); see First American Title Insurance Co., 100 IBLA 270, 291 (1987). We conclude this is such a case.

Accordingly, pursuant to 43 CFR 4.415, we refer this case to the Hearings Division for assignment to an Administrative Law Judge for a hearing on the question of whether the land described in Roehl's amendment request is the land he intended to claim at the time of the original application. The Judge will issue a decision which will be final for the Department in the absence of a timely appeal therefrom to this Board.

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 reversed in part, set aside in part, and the case is referred for a hearing.

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John H. Kelly  
Administrative Judge

We concur:

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Franklin D. Arness  
Administrative Judge

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R. W. Mullen  
Administrative Judge