

STATE OF ALASKA

IBLA 89-242

Decided May 22, 1991

Appeal from a decision of the Alaska State Office, Bureau of Land Management, confirming approval of a Native allotment application. AA-6208.

Set aside and referred for hearing.

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

Where the State challenges a BLM decision confirming legislative approval of a Native allotment application pursuant to sec. 905(a) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a) (1988), on the basis that BLM effectively amended the description of the land claimed in the application to conform to a 1986 survey, thereby shifting the location of the allotment claim to another section, without requiring the applicant to demonstrate that this was the land she had originally intended to claim and affording the State an opportunity to file a protest, the Board will initially refer the case for a hearing to decide what land the applicant had intended to claim, especially where that land may no longer exist due to erosion of the shoreline bordering that land.

APPEARANCES: Bonnie E. Harris, Esq., Office of the Attorney General, State of Alaska, Anchorage, Alaska, for the State of Alaska; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The State of Alaska has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated January 9, 1989, confirming the approval of the Native allotment application of Helen M. Austerman (AA-6208).

On March 5, 1971, Austerman filed her Native allotment application for what were described as approximately 20 acres of unsurveyed land situated

in "protracted" sec. 6, T. 16 S., R. 46 W., Seward Meridian, Alaska, along the shores of Kvichak Bay, near where the Kvichak River enters the bay. ^{1/} The application was filed pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed effective December 18, 1971, subject to pending applications, by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1988)). In her application, Austerman claimed use and occupancy of the land for the purpose of fishing and berry picking, beginning June 1, 1961, and continuing each year between June 1 and September 30. She listed improvements in the form of a fish rack, built in 1969, and a 6- by 6-foot smokehouse, built in 1970.

Thereafter, BLM undertook to determine whether Austerman had fulfilled the statutory requirement of use and occupancy as to the land described in her Native allotment application. Based on an examination of the allotment claim, a BLM realty specialist prepared a Land Report on February 22, 1974. The report stated that two BLM field examiners and a Native guide had, on June 19, 1973, examined the subject land by helicopter and on the ground, reporting: "No smokehouse, fish rack, other improvements, markers or postings, evidence of fishing or berry picking, or any evidence of any use and occupancy was found or observed on the land" (Land Report at 1).

No attempt was made to contact Austerman, but the examiners talked to three members of the Naknek Native Village Council, where the subject land was within an area withdrawn in part for the Native village of Naknek. The council members stated that Austerman is the daughter of Helen M. Herrmann, who claims, as part of her own Native allotment (AA-5937), a similarly small parcel of land immediately south of the subject land on the shores of Kvichak Bay. They further stated that Austerman "has a set net site in the area of the subject land and commercial fishes in the area during the summer season," but that they did not know whether she had any improvements on the land. Id. at 2. The BLM realty specialist concluded: "It appears that the applicant's claimed use of the land is possibly a family operation whereby the applicant's use and occupancy occurs on her mother's allotment which has cabins, a fish rack, a smokehouse and other improvements." Id.

Finally, based on the lack of any posting of the land or any visible evidence of use and occupancy, the BLM realty specialist concluded that

^{1/} The land was described by metes and bounds as follows:

"Beginning at Corner No. 1 on the high water line of east shore of Kvichak Bay, which point lies 5808 feet Northeast of USGS Station Low, at approximately Latitude 58°49'04" North, Longitude 157°01'01" West; thence East 1000 feet, more or less, to Corner No. 2; thence North 1320 feet to Corner No. 3; thence West 700 feet, more or less, to Corner No. 4 on the mean high water line of Kvichak Bay; thence Southerly along said high water line 1320 feet, more or less, to the point of beginning."

Also, attached to the allotment application was a portion of a protraction diagram for T. 16 S., R. 46 W., Seward Meridian, Alaska, which placed the allotment claim on the shores of Kvichak Bay in sec. 6.

Austerman had not satisfied the statutory requirement of use and occupancy and recommended that her Native allotment application be "rejected." Id.
at 3. The Anchorage District Manager, BLM, concurred in the findings and recommendation of the report.

BLM notified Austerman of the results of the field examination by letter dated April 8, 1975, and stated that it would withhold further action for 60 days from receipt of the letter in order to allow her an opportunity to submit additional information in support of her claim.

On May 9, 1975, three statements, one dated April 25 and two dated April 30, 1975, and signed by friends of Austerman (Rose S. Kie, Daniel J. O'Hara, and John C. Knutsen) were filed with BLM. These statements confirmed Austerman's use of the subject land each year beginning in 1961 for the purpose of fishing, berrypicking, and wood gathering and cutting during the summer months. 2/ According to the statements, the only year that Austerman did not use the land was 1974, when the area was closed to fishing. The statements also reported the presence of a fish drying rack and a smokehouse on the land. 3/ Finally, they stated that the land was not being used by anyone else.

By letter dated November 25, 1975, BLM notified Austerman that, based on the "information submitted," it had determined that she had "used" the subject land and would issue a certificate of allotment after surveying the land, which could take from three to four years because of the large number of allotments already scheduled for surveying. On that same date, the Chief, Division of Technical Services, Alaska, BLM, requested a survey of the allotment, noting that the description "places this claim approximately in protracted section 6, T. 16 S., R. 46 W., Seward Meridian."

On January 27, 1983, the Chief, Division of Cadastral Survey, Alaska, BLM, approved "Special Instructions" for surveying the subject land, which was described generally as situated "on the easterly shore of Kvichak Bay * * * at approximate latitude 58°49.1' North, longitude 157°00.3' West." 4/

2/ The subject land was described in Kie's Apr. 30, 1975, statement, at page 1, as "[l]ocated on the East Shore of Kvichak Bay on the high water line approx[imately] 1000 [feet] in land, the North approx[imately] 1320 [feet], the West approx[imately] 800 [feet]." The other two statements repeated this vague description, almost verbatim.

3/ Kie's Apr. 30, 1975, statement and Knutsen's Apr. 25, 1975, statement also referred to a small cabin which had been moved, presumably inland and possibly off the subject land, due to the tides. O'Hara's Apr. 30, 1975, statement merely indicated that there was another improvement.

4/ The Special Instructions specifically stated, at page 2, that the survey should conform to the following description:

"Beginning at the point for corner No. 1, a meander corner at the line of mean high tide on the left bank of the Kvichak River, located approximately 4 chains northwesterly of the large building on Native

The record indicates that the survey, denoted U.S. Survey No. 7388, was completed on July 9, 1986, and that the survey plat was accepted on November 4, 1987, and deemed to have been officially filed on January 20, 1988. As depicted on the plat, the survey, which encompasses 19.98 acres and several buildings, specifically a cabin, three storage sheds, and a trailer house, is bordered on the north and south, respectively, by U.S. Survey Nos. 8811 and 8040. The survey placed Austerman's Native allotment claim in sec. 5, T. 16 S., R. 46 W., Seward Meridian, Alaska, on the shores of Kvichak Bay, rather than in sec. 6 of that township.

In its January 1989 decision, BLM stated that it was confirming its November 25, 1975, approval of Native allotment application AA-6208, as well as the legislative approval of that application pursuant to section 905(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a) (1988). BLM further stated that the application encompassed the land as surveyed in U.S. Survey No. 7388, thus conforming the application to the survey. 5/ The State appealed from the January 1989 BLM decision.

Section 905(a) of ANILCA provides, subject to valid existing rights, for the legislative approval of pending Native allotment applications on the 180th day following December 2, 1980. See 43 U.S.C. § 1634(a) (1988). This legislative approval is subject to certain exceptions, including where the State files a protest prior to that date pursuant to section 905(a)(5) of ANILCA, 43 U.S.C. § 1634(a)(5) (1988). The timely filing of a protest precludes the legislative approval of an affected application and requires that the application be adjudicated pursuant to the Act of May 17, 1906. 6/ See 43 U.S.C. § 1634(a)(5) (1988); William J. Felix, 114 IBLA 86, 89 (1990).

fn. 4 (continued)

allotment AA-5937, Parcel A (Anchorage), at the northwest corner of Native allotment AA-5937; thence easterly along the northerly line of Native allotment AA-5937, approximately 15 chains to corner No. 2; thence northerly, approximately 20 chains to corner No. 3; thence westerly, approximately 10.6 chains to corner No. 4, a meander corner at the line of mean high tide of Kvichak Bay, and the Kvichak River; thence southerly, with meanders, along the left bank of the Kvichak River and along the line of mean high tide of Kvichak Bay, approximately 23 chains to corner No. 1, the point of beginning."

5/ BLM also notified Austerman that she would have 60 days from receipt of the decision to provide "clear and substantial evidence" that the surveyed location of her claim was not her intended location, otherwise the Native allotment application would be considered "correctly surveyed" (Decision at 2).

6/ Specifically, section 905(a)(5) of ANILCA precludes legislative approval of and, instead, requires BLM to adjudicate a Native allotment application under the Act of May 17, 1906, where the State files a protest "stating that the land described in the allotment application is necessary for access to lands owned by the United States, the State of Alaska,

Before proceeding to address the merits of the present case, we must deal with a procedural matter. Specifically, BLM contends that the State lacks standing to appeal from the January 1989 BLM decision where it was not "adversely affected" by that decision (Answer at 5). We disagree.

Standing to appeal from a BLM decision is accorded to a party to the case "who is adversely affected" by that decision. 43 CFR 4.410(a); see Dorothy A. Towne, 115 IBLA 31, 34-35 (1990). We conclude that the State was adversely affected by the January 1989 BLM decision where BLM thereby effectively denied it the opportunity to file a protest pursuant to section 905(a)(5) of ANILCA prior to confirmation of the legislative approval of Native allotment application AA-6208, to the extent that the application was amended to encompass land which had not previously been described. ^{7/} The amended application did not come into existence until the January 1989 decision when BLM decided to conform the subject allotment application to the 1986 BLM survey. Thus, at no time prior thereto could the State have protested that application. Accordingly, by then holding that this application had, nevertheless, been legislatively approved, BLM effectively denied the State the opportunity to protest the application, which quite clearly adversely affected the State. ^{8/} Thus, we hold that the State has standing to appeal from the January 1989 BLM decision. ^{9/}

fn. 6 (continued)

or a political subdivision of the State of Alaska, to resources located thereon, or to a public body of water regularly employed for transportation purposes, and the protest states with specificity the facts upon which the conclusions concerning access are based and that no reasonable alternatives for access exist."

43 U.S.C. § 1634(a)(5) (1988).

^{7/} Obviously, in the present case, such a protest would be filed after the 180th day following Dec. 2, 1980. Nevertheless, as discussed infra, the State is entitled, by statute, to file a protest where, as here, BLM intends to permit an allotment applicant to amend the land description in her application to encompass the land she had originally intended to claim.

^{8/} That the State would have had a basis for filing a protest pursuant to section 905(a)(5) of ANILCA is evident in the fact that there is a winter trail from Naknek to Levelock crossing the relevant portion of sec. 5, T. 16 S., R. 46 W., Seward Meridian, Alaska, which was reserved, as a public easement, to the United States in the interim conveyance to Paug-Vik Incorporated Ltd. (Paug-Vik), a Native village corporation, and in which the State asserts an interest in its Statement of Reasons for Appeal (SOR) at pages 4-5, 18-19. See 43 U.S.C. § 1634(a)(5)(B) (1988); State of Alaska (Elliot R. Lind) (On Reconsideration), 104 IBLA 12 (1988). This trail, which runs along the shoreline of Kvichak Bay and up the Kvichak River, also appears on the 1952 Geological Survey topographic maps (Naknek (D-3), Alaska and Naknek (D-4), Alaska) contained in the case file.

^{9/} The State's standing to appeal may also be predicated on the fact that approval of the subject allotment application left Paug-Vik, which had also applied for the subject land, free to select other land which the State had or might select. See State of Alaska v. Sarakovikoff, 50 IBLA 284, 288 (1980).

In its SOR, the State contends that BLM improperly confirmed approval of Native allotment application AA-6208 where it effectively permitted the applicant to amend the description of the land claimed "without proof of error in the original land description and without prior notice to the State of Alaska," as required by section 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988) (SOR at 1). Accordingly, the State requests the Board to vacate the January 1989 BLM decision and remand the case to BLM for action consistent with section 905(c) of ANILCA. 10/

[1] Section 905(c) of ANILCA provides that a Native allotment applicant "may amend" the land description in her application if the amended, rather than the original, description designates the land which the applicant "intended to claim at the time of application." 43 U.S.C. § 1634(c) (1988). If the applicant is permitted to amend her application, section 905(c) of ANILCA further requires the Secretary, before adjudicating or recognizing the legislative approval of the application, to notify the State of the "intended correction of the allotment's location," whereupon the State will have the opportunity to file a protest "as provided in subsection (a)(5) of this section." 11/ According to the legislative history of section 905(c) of ANILCA, errors that are "subject to correction under

10/ The record also indicates that the surface and subsurface estates of secs. 5 and 6, T. 16 S., R. 46 W., Seward Meridian, Alaska, were earlier conveyed, respectively, to Paug-Vik (Interim Conveyance No. 265) and the Bristol Bay Native Corporation, a Native regional corporation (Interim Conveyance No. 266) on Nov. 27, 1979, pursuant to sections 14(a) and (f) and 22(j) of ANCSA, as amended, 43 U.S.C. §§ 1613(a) and (f) and 1621(j) (1988). In the interim conveyances, there was no exclusion of Native allotment AA-6208 from the conveyance of sec. 5, rather, the allotment was excluded only from the conveyance of sec. 6. Nevertheless, it is clear that, regardless of where the allotment was ultimately located by survey, it was a "valid existing right" to which the interim conveyances were expressly subject (43 U.S.C. § 1621(j) (1988)).

The important point for our purposes here is that the 1979 interim conveyances had the effect of removing the jurisdiction of the Department to adjudicate the subject allotment application. Thus, the entire thrust of the present adjudication is simply to determine, as a first step, the validity and viability of the current amendment of that application, in order that the Department may ultimately decide whether it is required to pursue recovery of the land for the benefit of the Native applicant. See Stephen Northway, 96 IBLA 301, 310 (1987).

11/ Section 905(c) of ANILCA provides that, where notice of the intended amendment of the land description in an allotment application is provided after the 180-day period following Dec. 2, 1980, the State will have 60 days following the mailing of such notice to file a protest, which "shall be deemed filed within one hundred and eighty days of December 2, 1980, notwithstanding the actual date of filing." 43 U.S.C. § 1634(c) (1988). Therefore, such a protest will require adjudication of the allotment application, in accordance with 43 U.S.C. § 1634(a)(5) (1988).

authority of Section 905(c)" include "[t]echnical errors in land description, made either by the applicant or by the Department in computing a metes-and-bounds or survey description from diagrams." S. Rep. No. 413, 96th Cong., 2d Sess. 286, reprinted in 1980 U.S. Code Cong. & Ad. News 5070, 5230.

It is now well established that section 905(c) of ANILCA is only intended to permit, subsequent to December 18, 1971, the amendment of a Native allotment application so that it accurately reflects the land which the applicant had originally intended to claim, but that through some error was misdescribed, in the application, and not to permit the substitution of new or additional land which the applicant had not originally intended to claim. See, e.g., Donald Peter, 107 IBLA 272, 275-76 (1989); Angeline Galbraith, 97 IBLA 132, 146, 94 I.D. 151, 158 (1987); Joash Tukle, 86 IBLA 26, 27 (1985), aff'd, Tukle v. Hodel, No. A85-373 (D. Alaska Apr. 7, 1987).

The State first contends that BLM effectively permitted Austerman to amend her allotment application without requiring her to establish that the land originally described in her application, viz., sec. 6, T. 16 S., R. 46 W., Seward Meridian, Alaska, was not the land she had "intended to claim," but rather that the land described in the amended description, viz., sec. 5, T. 16 S., R. 46 W., Seward Meridian, Alaska, was that land. 43 U.S.C. § 1634(c) (1988). Moreover, the State contends that Austerman cannot establish that the land originally described in her allotment application was not the land she had intended to claim where she had intended to claim that land, but it had subsequently disappeared through erosion and the resulting movement of the shoreline of Kvichak Bay approximately 1,300 feet to the east. Thus, the State concludes that BLM has confirmed the approval of nothing more than a "relocat[ion]" of the Native allotment claim (SOR at 14).

In rebuttal, BLM contends simply that the land encompassed by the subject allotment application, as legislatively approved, is the "same land" that Austerman had originally intended to claim when she filed her allotment application in 1971 (Answer at 3 (emphasis omitted)). BLM discounts any assertion that erosion of the land occurred after that time which caused the land claimed to change. BLM states: "The description given in the [January 1989 BLM] decision did not move nor amend the land originally described. The only change that occurred was the land is now correctly described as being in Section 5. It is not new nor different land" (Answer at 6 (emphasis in original)). Therefore, BLM concludes that it properly confirmed approval of the subject allotment application as to that land.

The first question presented by this case is whether BLM effectively permitted Austerman to amend the land description contained in her Native allotment application so as to mandate that BLM follow the dictates of section 905(c) of ANILCA by requiring her to establish that the land described

in the amended, rather than the original, application was the land she had "intended to claim." 43 U.S.C. § 1634(c) (1988).

At the outset, it is clear that Austerman, relying on a protraction diagram of T. 16 S., R. 46 W., Seward Meridian, Alaska, originally applied in 1971 for land situated in sec. 6 and that, thereafter, she made no effort to amend her allotment application. It was not until BLM's 1986 survey of the land claimed by her that BLM determined that the land was situated in sec. 5. At that point, BLM effectively permitted Austerman to amend the description originally set forth in her allotment application to encompass land in sec. 5, rather than in sec. 6. 12/

In these circumstances, we conclude that section 905(c) of ANILCA mandated that BLM require Austerman to affirmatively establish that the land described in the amended, rather than in the original, description was the land which she had intended to claim. 13/ BLM did not do so. Rather, in its January 1989 decision, BLM only required that she establish that the land described in the amended description was not the land she had intended to claim, i.e., that the "surveyed location is different than the intended location" (Decision at 2). Where it clearly benefitted Austerman to remain silent (especially where the land she originally described was then located out in the bay), she understandably made no effort to assert that the BLM survey did not encompass her "intended location." In any case, this was a clear perversion of the

12/ BLM contends, however, that there has been no change in the description of the land sought by Austerman where both the description in the original application and the description eventually used as the basis for the 1986 survey, referred to the claim as bordered by the water. See Answer at 8. While the land, as eventually surveyed, was deemed to border on Kvichak Bay, BLM completely ignores the fact that the description of the location of the land was altered radically. Rather than being described as located in sec. 6, the land is now described as situated in sec. 5. Also, the location given for the southwestern corner of the allotment claim in the original application (58°49'04" N., 157°01'01"W.) is approximately the same as the location now given in the 1986 survey for the witness corner for the northwestern corner of the claim (58°49'13.75" N., 156°59'41.71" W.). This indicates a southwestern shift in the described location of the claim. This change in the description of the land claimed is what invokes section 905(c) of ANILCA.

13/ As we said in Angeline Galbraith, supra at 147, 94 I.D. at 159, the determination of whether an applicant intended to claim the land in the amended, rather than the original, description is a "question of intent," which "must be determined based on the facts and circumstances reflected in the record." Thus, we said that an applicant must demonstrate in part "why the original application did not correctly describe the intended land" and that her activities since filing the application "have been consistent with the present claim that other land was intended." Id.; see also Edith Jacquot, 27 IBLA 231 (1976).

requirement in section 905(c) of ANILCA that an applicant take affirmative steps to demonstrate exactly what land she had intended to claim before being allowed to amend the land description in her allotment application.

At this point, we normally would set aside the January 1989 BLM decision and remand the case to BLM so that it might adjudicate the question of whether the land described in the amended, rather than in the original, description of Austerman's allotment claim was the land she had originally intended to claim. However, the State has provided evidence on appeal that the amended description does not encompass land which Austerman had intended to claim, but that she had only intended to claim the land as described in her original application, which has eroded away. In response, BLM has challenged the State's assertions. Therefore, we will address this controversy.

The State specifically contends that Austerman had intended to claim land on the shore of Kvichak Bay in sec. 6 of the subject township and that this land was in existence in 1971 when she filed her allotment application, but has since been lost through the eastward movement of the shoreline. As proof of this, the State relies in part on the reported change in the location of the U.S. Coast Guard's (Coast Guard) "Bend Light," situated on the shores of the Kvichak River, as it enters Kvichak Bay, in sec. 32, T. 15 S., R. 46 W., Seward Meridian, Alaska, immediately north of sec. 5, T. 16 S., R. 46 W., Seward Meridian, Alaska.

In particular, the State submits a copy of the "Aid to Navigation" file regarding the Bend Light, provided to the State by the 17th District, Coast Guard. Reports in this file indicate that 12 times during the 23-year period from June 1944 to October 1987 the Coast Guard had to rebuild the light due to "erosion" and the resulting destruction of the light.

While the aid to navigation file clearly establishes that the Bend Light has been destroyed numerous times due to the adverse effects of erosion, it does not establish that the location of the shoreline of the Kvichak River changed to any noticeable extent at any time during the period from June 1944 to October 1987. The file indicates that the light was originally located on the river bank, but that, in 1954, the Coast Guard moved the light 300 yards across the beach and up to the top of a 40-foot high bluff overlooking the beach. ^{14/} The light was relocated in order to avoid the possible loss of the light each year. Thereafter, while the light was still repeatedly lost (though not each year), this appears to

^{14/} In a June 11, 1954, memorandum, the Commander, 17th District, Coast Guard, stated that if a permanent structure was desired for the Bend Light, the Coast Guard would have to locate the light "on a forty (40) foot ridge * * * ; this would position the light about three hundred (300) yards in from the river bank" (Exh. 8 attached to State's SOR at 8). This 300-yard wide area was clearly the beach where the Commander further stated that the extreme high water mark of the river, which was defined by the presence of driftwood and flattened grass and was believed to occur "only at the ice break-up period," "extends some three hundred (300) yards inland from the river bank." *Id.*

have occurred because of a sloughing of the bluff, possibly caused by the action of water upon the base of the bluff during the ice break-up period, when the water reached all the way to the base of the bluff. 15/ See Exh. 8 attached to State's SOR at 8. In rebuilding the light, the Coast Guard moved the location of the light each time further away from the edge of the bluff, which continued to erode. 16/

In any case, there is no evidence in the aid to navigation file that there was any permanent change in the location of the shoreline, as opposed to the edge of the bluff, due to erosion. Furthermore, even if we were to find that a change in the location of the shoreline had occurred, this would only establish that the bank of the river in sec. 32, T. 15 S., R. 46 W., Seward Meridian, Alaska, had moved to the east, not that the shore of the bay in sec. 5, T. 16 S., R. 46 W., Seward Meridian, Alaska, had moved to the east during the same time period.

The State, however, presents further evidence in the form of aerial photographs taken July 8, 1951, June 29, 1962, and July 27, 1980, of the area surrounding secs. 5 and 6, T. 16 S., R. 46 W., Seward Meridian, Alaska. As a reference point for determining the rate of erosion of the shore of the bay, which was represented by the limits of vegetation at the edge of a bluff overlooking the shore, rather than the edge of the mud flats along the shore (which varied with the tide), the State used the westernmost end of the largest lake in sec. 5, as shown on all of the photographs. From this, the State determined:

Approximately 526 feet of land were lost between 1951 and 1962, which equals an estimated rate of bluff retreat of 48 feet per year. Between 1962 and 1980 an additional 611 feet were lost thus yielding an erosion rate of 34 feet per year. * * * The overall air photo estimated erosional rate from 1951 to 1980 is 39 feet per year. Between 1980 and the surveys of 1988 one could project continued erosion of about 150 to 200 feet, even allowing for a declining rate.

(Exh. 9 attached to State's SOR at 1-2).

15/ An Apr. 30, 1967, "Report on Aid to Navigation" noted that the light was threatened: "Cliff is breaking off causing the structure to be in danger of falling to the beach" (Exh. 8 attached to State's SOR at 15). Next, a July 12, 1967, report stated that the light had been destroyed because the "bank caved in." Id. at 16. The light was then relocated inland away from the edge of the bluff. See id. at 17. Further, a July 21, 1976, report stated that the light had been relocated up on the bluff following "wave erosion of bluff and resulting fall of structure to beach." Id. at 20.

16/ The aid to navigation file indicates that, starting in 1958, the light was moved a total of 335 feet east from its 1954 position, in order to compensate for the retreat of the bluff. However, the position of the light remained relatively unchanged. In 1958 and again in 1979, the light was reported as situated at latitude 58°50.1' N., longitude 156°59.7' W.

The State concludes that this evidence supports its contention that the shoreline of Kvichak Bay moved 1,300 feet eastward through sec. 5, thus causing the land Austerman originally intended to claim to disappear between the time she filed her allotment application in 1971 and the 1986 survey of her allotment claim.

We are not persuaded that the shoreline of Kvichak Bay eroded so substantially between the filing of Austerman's allotment application in 1971 and the July 1986 survey that we can conclude that the land which she had originally desired in section 6 disappeared completely through a 1,300-foot movement in the shoreline of Kvichak Bay. ^{17/} Nevertheless, the unrebutted evidence submitted by the State, particularly the 1962 and 1980 aerial photographs, indicates that there was some movement of that shoreline between 1971 and the 1986 survey. ^{18/} See Exh. 9 attached to State's SOR at 7, 8. Where, as described in the allotment application, the subject allotment claim was located along the shore of Kvichak Bay, it undoubtedly would have been affected to some degree by any eastward movement of the shoreline during this time period. Thus, the State has raised a question of fact as to whether and to what extent the land that Austerman originally intended to claim along the bay was affected by an eastward movement of the shore-line of the bay after the filing of her allotment application in 1971. ^{19/}

Accordingly, we must set aside the January 1989 BLM decision and, pursuant to 43 CFR 4.415, refer the case for a hearing and decision by an Administrative Law Judge. See Daniel Roehl, 103 IBLA 96, 102-03 (1988). The purpose of the hearing and decision will be to determine whether and to what extent the land that Austerman originally intended to claim when she filed her allotment application in 1971 was affected by any subsequent movement of the shoreline of Kvichak Bay. The allotment applicant will bear the ultimate burden of proof regarding the location of the land she

^{17/} Indeed, using the State's estimate of an erosion rate of 34 feet per year between 1962 and 1980, this would only mean the erosion of 544 feet from a claim, which was between 700 and 1,000-feet wide, between 1971 and the 1986 survey.

^{18/} That the shoreline which runs along the subject allotment claim is subject to extreme natural forces is evident in the field notes for U.S. Survey No. 7388, which state, at pages 1 and 4, that no monuments would be set for corner Nos. 1 and 4, which are the meander corners on the shore of Kvichak Bay, "due to the liability of destruction by ice and water action." This is further supported by the aid to navigation file regarding the Bend Light, situated a short distance from the subject land.

^{19/} We reject any suggestion that, where Austerman's allotment claim was properly located on the shore of Kvichak Bay at the time of the filing of her application, it somehow followed any subsequent eastward movement of the shoreline. Rather, at the time of that filing, the claim had a fixed location on the earth's surface, which the record may ultimately show is now at the bottom of Kvichak Bay and, thus, lost. At the present time, that possibility cannot be discounted.

originally intended to claim and whether and to what extent this land was affected by any subsequent movement of the adjacent shoreline. The State will be recognized as a party to this proceeding.

The decision by the Administrative Law Judge will, of course, be subject to appeal to the Board by any adversely affected party. However, in the absence of a timely appeal, this decision will constitute the final decision of the Department.

If it is ultimately determined that, at the time of the 1986 survey, none of the land Austerman had originally intended to claim then remained, the Administrative Law Judge must conclude that the allotment is no longer subject to disposal under the Act of May 17, 1906, because Federal title to the land has been extinguished. See Frank Rulland, 41 IBLA 207, 211-12, 86 I.D. 342, 344-45 (1979). In such circumstances, the Administrative Law Judge should reject the subject allotment application. No further action by the Department, either by way of adjudicating its validity or confirming its legislative approval, can be taken with respect to the application.

If, however, it is determined that, at the time of the 1986 survey, some portion of the land Austerman had originally intended to claim then remained, the Administrative Law Judge must remand the case to BLM so that it may, pursuant to section 905(c) of ANILCA, amend the land description in the allotment application to encompass that land after first affording the State an opportunity to file a protest. Only following this opportunity for filing a protest may the Department either adjudicate the validity of the application or confirm its legislative approval.

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 set aside and the case is referred to the Hearings Division, Office of Hearings and Appeals, for further action consistent herewith.

John H. Kelly
Administrative Judge

I concur:

James L. Byrnes
Administrative Judge