



UNITED STATES v. HEIRS OF HARLAN L. MAHLE

171 IBLA 330

Decided June 29, 2007



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



UNITED STATES
v.
HEIRS OF HARLAN L. MAHLE

IBLA 2004-234

Decided June 29, 2007

Appeal from decision of Administrative Law Judge rejecting claim by Native applicant's heirs to (1) that portion of Parcel A, described as Lots 3 and 4, and that area between those two lots containing the Skagway-Dyea Road right-of-way which is part of Lot 5, U.S. Survey No. 5110, Alaska, and Lot 42, Tract E, U.S. Survey No. 3312, Alaska), and (2) that portion of Parcel A, if any, in U.S. Survey No. 5110, Alaska, which lies adjacent to and north of the contested land. AA-6528A.

Affirmed in part; appeal dismissed in part.

1. Alaska: Native Allotments--Evidence: Burden of Proof--
Evidence: Sufficiency--Government Contests

A decision of an administrative law judge finding that a Native allotment applicant's use and occupancy before the date of withdrawal of land from appropriation was not established by a preponderance of the evidence will be affirmed on appeal where the evidence fails to establish qualifying use and occupancy of any particular location potentially exclusive of others that was substantially continuous in nature and not intermittent. Where evidence shows that the applicant's use and occupancy, to the extent it was qualifying, began at the earliest in 1953, but the land had been withdrawn from appropriation in 1952, the contestees did not preponderate. Where the evidence failed to show that a claimant's use would put others on notice of his superior claim, but rather indicates common use by large numbers of residents, potential exclusivity is not shown.

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

Where BLM's tentative approval of an Alaska State selection expressly excluded a Native allotment claim by its serial number

and parcel designation, whether or not lands were approved for or excluded from tentative approval depended on whether the lands were included in the plats of survey designating the claim. Where the State selection pre-dated the filing of the Native allotment application, the lands in question were validly selected by the State, and were therefore not “unreserved” on Dec. 13, 1968. Accordingly, the applicant’s claim could not be legislatively approved under section 905(a)(1) or section 906(c) of ANILCA, but instead had to be adjudicated pursuant to the requirements of the Native Allotment Act of May 17, 1906, ANCSA, and implementing regulations.

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

The right to amend a Native allotment application provided by section 905(c) of ANILCA, 43 U.S.C. § 1634(c) (2000), terminates by the adoption, after Dec. 2, 1980, of a plat of survey for either originally described or newly described land.

4. Administrative Authority: Generally--Administrative Procedure: Adjudication--Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Patents of Public Lands: Suits to Cancel

Where land described in a Native allotment application has been patented, the *Aguilar* Stipulated Procedures require a hearing before a BLM hearing officer, whose decision is final for the Department and not subject to appeal to the Board of Land Appeals. Where the parcel only in part describes lands conveyed out of U.S. ownership and a hearing on the entire parcel is required, Government contest procedures may properly be used. Despite the potential overlap in issues in such proceedings, the fundamental character of the proceeding with respect to the patented land is no more than investigatory. Because the *Aguilar* procedures make no provision for review by the Board of such an investigatory determination, the Board properly dismisses an appeal from the administrative law judge’s determination made pursuant to the *Aguilar* Stipulated Procedures.

APPEARANCES: Carol Yeatman, Esq., Alaska Legal Services Corp., Anchorage, Alaska, and Vance L. Sanders, LLC, Juneau, Alaska, for the Heirs of Harlan L. Mahle; Regina L. Sleater, Esq., Office of the Regional Solicitor, Alaska Region, Anchorage,

Alaska, for Bureau of Land Management; John T. Baker, Esq., Office of the Attorney General, State of Alaska, Anchorage, Alaska, for the State of Alaska; and Julia B. Bockman, Esq., Anchorage Alaska, for the City of Skagway.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

The Heirs of Harlan Lavern Mahle have appealed an April 15, 2004, decision of Administrative Law Judge (ALJ or Judge) Harvey C. Sweitzer rejecting additions of land to the portion of Parcel A certificated to the Heirs under Native allotment application AA-6528.¹ The land is located between Skagway and Dyea, Alaska, along the Skagway-Dyea Road. On behalf of the United States, the Bureau of Land Management (BLM) contested additions to Parcel A described as (a) Lots 3 and 4, U.S. Survey No. 5110, Alaska (USS 5110) (3.74 acres); (b) the area between Lots 3 and 4 containing the Skagway-Dyea Road right-of-way which is part of Lot 5, USS 5110 (approximately 0.5 acres); and (c) Lot 42, Tract E, U.S. Survey No. 3312, Alaska (USS 3312) (1.33 acres). The Heirs also claimed that lands within USS 5110, which lie north of the contested lands, should be considered as a part of Parcel A, an assertion BLM disputed. Judge Sweitzer rejected all of the Heirs' claims.²

Setting. The City of Skagway is in southeast Alaska in T. 28 S., R. 59 E., Copper River Meridian, approximately 11 miles from the Canadian border south of the White and Chilkoot Passes through the Coastal Range connecting Juneau to Canada in the direction of Whitehorse. A winding road from Skagway connects it to Dyea to the west-northwest. The road leaves Skagway to the north then heads south, curving around the base of AB Mountain, then heads north along the east side of Nahku Bay and around the Bay towards Dyea.³ A peninsula of land extends south of the Skagway-Dyea Road along Nahku Bay (also Long Bay) into Taiya Inlet (also Lynn Canal) and west of the Skagway River. The southernmost point of this peninsula is Yakutania Point which, with lands along the Bay on the peninsula, was reserved and withdrawn for a City park in the 1920s. U.S. Survey No. 1499, Alaska (USS 1499).

¹ Because many participants in the matters related to the appeal share last names, we frequently refer to individuals by their first names.

² Government Exhibits are identified by numerals (Ex. #) and Contestees' Exhibits by letter (Ex. X). Ex. 1 is the five folder case record. Documents not identified by "Ex." are found in one of the folders in Ex. 1.

³ Few maps in the record depict the location of Dyea or AB Mountain. See "The Chilkoot Trail, a Guide to the Goldrush Trail of '98," Figure 1, "Route to Dyea." A Skagway Quadrangle map (Ex. 3), shows Dyea at the mouth of the Taiya River as it flows into Taiya Inlet in T. 27 S., R. 59 E., to the west of the Skagway-Dyea Road. AB Mountain appears to be north of Skagway and northeast of any lands we discuss in relation to Parcel A and wholly outside the Skagway Quadrangle. Ex. 3.

Ex. 6. The Chilkoot Pass was used by fortune-seekers traveling from Seattle into Yukon Territory during the Klondike gold rush of 1897-98. The Chilkoot Trail, a 33-mile trail between Dyea and Bennett, Canada, followed a Tlingit Native trade footpath. "Camp Dyea" was generally established by prospecting groups by the 1880s. The gold rush turned "Camp Dyea" and other locations along the trail, including "Finnegan's Point," into temporary gold rush settlements and camps.⁴

In the 1940s, Edward A. Hosford settled lands north of Dyea and constructed a sawmill and associated logging road, ultimately submitting a homestead application in July 1947. Oct. 23, 1948, Letter from Hosford to Alaska Department of Transportation.⁵ In 1946-48, local government authorities and individuals sought to develop a year-round road from Skagway to Dyea, as inhabitants in the Dyea Valley sought to raise families there. *E.g.*, Sept. 30, 1946, letter of named Dyea settlers (petitioning Alaska Road Commission); Apr. 23, 1947, Letter of Skagway Chamber of Commerce (same); Sept. 2, 1948, Letter of Ludwig Frolander (same). In 1961, the State of Alaska employed prisoner work crews to clear the Chilkoot Trail for hikers and collectors of Tlingit and gold rush relics. *See* July 2, 1962, State of Alaska Memorandum, "Chilkoot Trail Project," and attached maps. The Trail is now a part of the Klondike Gold Rush National Park. 45 Fed. Reg. 31805 (May 14, 1980).

Native Allotment Application AA-6528. Harlan Mahle was an Aleut born in 1930. He and his two younger brothers, Andrew and Fred, born in approximately 1931 and 1935, resided on Kodiak Island in southwest Alaska near the Aleutians, approximately 600 miles across the ocean from Skagway. In 1938 or 1939, the boys were sent to live in Skagway at Father Gallant's Pius X Catholic Mission boarding school after their mother could no longer care for them.⁶ They were raised to adulthood at the Mission. Father Gallant was superintendent of the Mission from 1931-59. During this time he took "small groups" on trips into the Dyea Valley up the Chilkoot Trail. "Historic Use of the Chilkoot Trail, Alaska," prepared by Robert L. Spude, Historian, March 1984, at 9.

Harlan left Skagway for the Army in 1950, returning sometime after 1952. In 1954 he married Billie Belle Barry, who had moved with her family from Texas to

⁴ The information above is taken from several documents including "Historic Use of the Chilkoot Trail, Alaska," prepared by Robert L. Spude, Historian, March 1984.

⁵ On Dec. 31, 1955, Hosford amended his homestead application to apply for a 40-acre Trade and Manufacturing (T & M) site, at BLM's direction, and requested a 5-acre homesite. Hosford ultimately relinquished his claim to the T & M site in 1959 and the homestead file was closed in 1963 without conveyance.

⁶ At the time the Mahle brothers resided there, the school had a population of approximately "80-100 kids." Ex. 31, Oct. 4, 1984, Affidavit of John E. Feero.

Skagway when she was a child. Harlan and Billie had two children in 1955 (Gerald or Jerry) and 1956 (Douglas or Doug) and divorced in 1968.⁷ Billie Barry eventually moved to Missouri.

The Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970) (1906 Act), granted the Secretary of the Interior authority to allot up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Native Alaskan Indian, Aleut, or Eskimo, 21 years old or the head of a family, upon satisfactory proof of substantially continuous use and occupancy for a 5-year period. Initially, the 1906 Act allowed applicants to select any land available for acquisition, obtaining a preference right only for parcels they had occupied. In 1956, the Act was amended to condition issuance of any allotment on a showing of “substantially continuous use and occupancy of the land for a period of five years.” Section 3, Act of Aug. 2, 1956, 70 Stat. 954, 43 U.S.C. § 270-3 (1970). This requirement applied, however, to any land for which use or occupancy began after 1935, when, by Circular No. 1359, the Department issued rules requiring Native allotment applicants to complete 5 years of use and occupancy as a precondition for obtaining any allotment. See 55 L.D. 282, 285 (1935); *United States v. Heirs of Harry McKinley*, 169 IBLA 184 (2006). The Act was thereafter repealed effective December 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (2000), with a savings provision for applications pending on December 18, 1971.

On June 14, 1971, Harlan Mahle signed two Native allotment applications for two parcels of land. Ex. 2. They were timely filed October 7, 1971, before repeal of the 1906 Act. Parcel A (or Tract 1) was identified in Mahle’s handwriting as a parcel 880 yards by 440 yards, totaling 80 acres, as follows: “From turn of road at point where it turns north into Long Bay at base of A.B. mountain post #1 - north - thence west 440 yards to post #2 thence south 880 yards to post #3 thence east to post #4, 440 yards thence north 880 yards back to post #1.” Ex. 2. This description depicted the parcel as a rectangle beginning at the point of the road, which all agree is the Skagway-Dyea Road, where it turns north and away from Yakutania Point. Harlan Mahle drew a sketch of Parcel A locating it in its entirety to the southwest of the Skagway-Dyea Road between “Long Bay” (Nahku Bay) and the road as it curves south from Skagway and then north toward Dyea.⁸ The sketch depicts a cabin in the center of the parcel. *Id.* In response to paragraph 5, requiring a description of

⁷ The Mahles also had two other children who were subsequently adopted by Barry’s second husband. They are not heirs for purposes here. Ex. S, Order Determining Heirs, Nov. 29, 1983.

⁸ Early maps depict the body of water west of Yakutania Point as Long Bay. See July 2, 1962, State of Alaska Memorandum “Chilkoot Trail Project” and attached maps. Later maps describe it as “Long (Nahku) Bay.” We understand references to Long Bay Point to refer to the location now identified as Yakutania Point.

“fishing, trapping, and other uses of the land,” Mahle wrote that he “used land for summer use, small garden, built cabin, 14 x 14” in 1961. *Id.*

Parcel B (Tract 2) was 80 acres in size, and was located some miles north of Parcel A along the Taiya River north of Dyea in Dyea Valley. Mahle also claimed that his use of Parcel B was in 1961, and he drew this parcel spanning the Chilkoot Trail at its center. Parcel B has consistently been plotted in T. 27 S., R. 59 E., Copper River Meridian, abutting Harlan’s brothers’ Native allotment applications to the north (AA-6272, Andrew) and to the south (AA-6529, Fred), east of the Taiya River and along the Chilkoot Trail, near Finnegan’s Point and north of Dyea. Parcel B is not in dispute here, but we include certain information related to it, as information regarding both tracts was frequently established contemporaneously.

Retyped Descriptions. Mahle’s handwritten land description for Parcel A was typed, apparently by BIA, and stapled to the application. Ex. 2. When BIA retyped the application for Parcel A, it depicted a location different from the hand-drawn sketch submitted by Mahle in protracted section 11 in that the parcel contained lands both east and west, instead of southwest, of the Skagway-Dyea Road. Further, as typed, Parcel A described 40 acres, rather than 80 acres. *Id.* The retyped description contains lands partially within USS 1499, USS 5110, and Lot 42, Tract E, USS 3312. It contains all of the lands within Lot 38, Tract E, USS 3312 and USS 5107A.

Conflicts. Mahle’s applications were serialized AA-6528A and AA-6528B. BLM plotted both parcels in 1971. Parcel A, as plotted by BLM in 1971 (and later found to include Harlan’s cabin), conflicted with the City park reserved in the 1920s, surveyed as USS 1499 and conveyed in 1931 by Patent No. 1052080. Exs. 5, 6. It also conflicted with Lot 38 of USS 3312 (Ex. 8) to the east, which had been patented in 1959 to Osborne Selmer by Patent No. 1200428. Moreover, on October 21, 1952, all land in protracted sec. 11 had been withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws by Public Land Order (PLO) 868, 17 Fed. Reg. 9603 (Oct. 23, 1952). *See* Exs. 7, 35. Likewise, the land subject to Parcel B had been withdrawn from entry by PLO 436 dated January 13, 1948. *See* Exs. 7, 35. The Department revoked both withdrawals on March 30, 1961, pursuant to PLO 2317, 23 Fed. Reg. 2825 (Apr. 5, 1961), and afforded the State a preferred right to select any of the affected lands within 90 days. Both parcels were located on lands within State selection A-061057, dated June 23, 1961. Accordingly, most of the land effectively had been withdrawn continuously after January 13, 1948 (Parcel B), or October 21, 1952 (Parcel A). As a result, BLM sent a memorandum to BIA dated November 17, 1971, demanding more information, including the exact date Harlan began use and occupancy of each tract. Ex. 1 File 1.

Efforts to Define the Parcels. In July 1972, field examiner Stanley Bronzyk conducted a field examination of both tracts. In August 1972, BLM submitted a

request for an exclusion survey to the Division of Cadastral Engineering. On September 11, 1972, the survey assignment was made: “USS Nos. 5107A and B provide for survey of two tracts of land situated near Skagway, Alaska, applied for by Harlan L. Mahle, Serial No. AA-6528.” On December 4, 1972, BLM sent a letter advising Mahle that he could substitute a primary place of residence application for his Native allotment application. On December 19, 1972, Harlan responded by submitting a signed election to proceed with the Native allotment applications.

On February 23, 1974, after the completion of USS 5107A (Ex. 20) and B, Bronzyk submitted his report. He explained that Parcel A “has since been surveyed and . . . identified as Lot 39, USS 3312, and USS 5107A.”⁹ Parcel A “has been reduced in size because of the location of the applicant’s marked corner and because of conflicts with adjoining patented lands.” Ex. 19, Field Examination Report, Feb. 23, 1974. The examiner explained that Parcel A included only Lot 39 of USS 3312 (4.02 acres) and USS 5107A (8.60 acres), totaling 12.62 acres. Thus, the examiner excluded lands within USS 1499 to the south, USS 5110 to the north, and Lots 37 and 38, USS 3312, to the east.

Bronzyk claimed to have discussed the matter with Harlan Mahle at his home in Skagway. Harlan joined the examiner for the examination of Parcel B, but not for Parcel A. Bronzyk concluded that Harlan had little knowledge of the lands. With regard to Parcel A, Bronzyk found an old cabin, which Harlan “did not claim to own” and a single marked tree. For both parcels, Harlan claimed to have marked boundary trees with his brother in 1972. Bronzyk concluded that Harlan had not shown sufficient evidence of use and occupancy on either parcel for a period of 5 years, noting that the State had selected the lands in the same year, 1961, that Harlan began to use them. Ex. 19, Field Examination Report, Feb. 23, 1974.

The City of Skagway objected to Parcel A, claiming that it conflicted with the City park (USS 1499) and with other uses in USS 3312. *E.g.*, May 22, 1972, letter from Alaska State Office, BLM, to City of Skagway. It also conflicted with land in Lot 38, USS 3312, patented to Osborne Selmer in 1959. With respect to Parcel B in Dyea Valley, National Park Service (NPS) and the State contended that it was impossible for Mahle to have established potentially exclusive use and occupancy on lands straddling the historic Chilkoot Trail openly used by Tlingit Natives, settlers, prospectors, State workers, and hikers. Jan. 31, 1975, letter from State to BLM.

Tentative Approval of the State Selection. On June 25, 1974, BLM gave tentative approval (TA) for State selection application A-061057, but rejected the application, *inter alia*, as to Lots 37, 38, and 39, Tract E, USS 3312. The 1974 TA

⁹ In USS 3312, Lots 37, 38, and 39 were all located within Tract E. The western portion of Lot 37, USS 3312, was later designated as Lot 42, Tract E, USS 3312.

decision (Ex. U) explained that those “described lands . . . are within pending Native allotment applications.” BLM excluded Parcel A from the TA by referencing AA-6528A and by attaching maps showing lands that were rejected for approval, based on the existing “status plats and U.S. Survey 3312.” The status plats in existence at the time of and incorporated into the TA decision showed Parcel A as covering a rectangle of land surrounding what was plotted as USS 5107A and later conveyed to the Heirs, and Lots 37, 38 and 39, Tract E, USS 3312, extending south into USS 1499, and including a small area of land to the north, now USS 5110. Oct. 21, 1971, and May 8, 1974, “Official Status Plats.”¹⁰

BLM’s Demands for Proof of Use and Occupancy from Mahle. On April 18, 1975, BLM sent a letter to Harlan Mahle laying out problems with both parcels. Ex. 21. This letter stated: “Your application is for approximately 120 acres of land” (that is, 80 acres for Parcel B and 40 acres for Parcel A). BLM concluded, based on the field examination, that there was little evidence in support of Mahle’s use or occupancy of either tract, and that the application should be denied because Mahle had not met the requirements of the 1906 Act. BLM gave Harlan 60 days to submit additional information to support his claim. He did not respond to this letter.¹¹

On May 1, 1975, Mahle’s attorney submitted an Entry of Appearance of Counsel. Other counsel submitted a Notice of Substitution of Counsel in August. Nothing more was submitted by or for Harlan. He died on January 22, 1977.

Heirs’ Involvement. By letter to BLM dated February 28, 1977, Andrew Mahle requested information about all three brothers’ applications. A telephone record dated April 25, 1977, indicates that Billie Barry called BLM about Harlan’s application asking “what could be done by the heirs.” BLM explained to her that nothing had been submitted in response to the April 18, 1975, letter demanding information. By letter dated April 11, 1977, and received May 31, 1977, “J. W.” Mahle asked about the status of his father’s application. BLM responded that nothing had yet been recorded. May 25, 1977, letter to Jerry Mahle.

On October 19, 1979, BLM received the Heirs’ first attempt to support Harlan’s use and occupancy of Parcels A and B. Jerry Mahle submitted three affidavits. Ex. 22. The first two, signed by Mr. and Mrs. C.R. Coffey, and dated September 21, 1979, stated: “I have known Harlan most of my life, and he has used tract #1 and tract #2 and a lot of other land in the Skagway area for the past 20 years and maybe longer. He used the land for fishing, camping, hunting and trapping.” The third

¹⁰ Parcel A so appeared on Master Title Plats for T. 28 S., R. 59 E., Copper River Meridian, Alaska, dated, *inter alia*, Sept. 4, 1979, July 21, 1981, and Aug. 8, 1983.

¹¹ BLM sent similar letters to Fred and Andrew Mahle, but only Andrew responded. May 5, 1977, letter from BLM to Senator Ted Stevens.

affidavit was prepared by Barry, “being his wife” between 1954 and 1969; she stated that Harlan had used tracts 1 and 2 “and a lot more land” for “trapping, hunting and berry picking.” Exs. 22 and B, May 3, 1979, Affidavit of Billie Barry. These affidavits did nothing to establish timely qualifying use prior to the 1948 and 1952 PLOs, nor did they identify use of any particular land.

By letter to BLM dated May 11, 1982, Jerry Mahle expressed interest in Parcels A and B, and a willingness to grant an easement for the Chilkoot Trail across Parcel B. According to a case review sheet, Dave Fleurant, allotment paralegal from Alaska Legal Services Corporation (ALSC), reviewed the Harlan Mahle application file on behalf of Doug Mahle. Ex. 34 (documented case file reviews). Fleurant delivered a letter to BLM on June 28, 1982, asking why Parcel A, which “consisted of 40 acres,” had been reduced to “±8” acres. Ex. 23. A September 7, 1982, Memorandum from NPS to the BLM Regional Director documents that Jerry Mahle visited the Superintendent of the Klondike Gold Rush National Historic Park, at which time he threatened to block public access to the Chilkoot Trail within the Park and asserted that he and his uncles were planning to move onto the Dyea Valley allotments.

BLM responded to Jerry’s May 11, 1982, letter, explaining, *inter alia*, that the State had selected the lands subject to Harlan’s application, which required BLM to adjudicate both parcels. BLM provided Jerry a copy of the November 17, 1971, BLM memorandum to BIA, and asked again for information to substantiate Harlan’s qualifying occupancy of the parcels. Ex. 24, Sept. 13, 1982, BLM letter to Jerry. BLM sent the same information and the 1971 memorandum to ALSC. Ex. 25, Sept. 21, 1982, BLM letter to Fleurant.

1984 Evidence. A year and a half passed. On May 7, 1984, Fleurant sent BLM affidavits of Fred and Andrew Mahle in support of both Parcels A and B. Ex. 26. Both brothers claimed to be “very familiar with both parcels.” Ex. L, 1984 Affidavit of Fred Mahle at ¶ 4; Ex. J, 1984 Affidavit of Andrew Mahle at ¶ 2. They referred to Parcel A as the land at Long Bay or Long Bay Point. Fred stated:

5. In the late 1940’s and early 1950’s my brother and I would hunt rabbits on his land near Long Bay. . . .

6. In the late 1950’s I helped Harlan build a cabin on parcel 1. We built the cabin from wood that was abandoned from the U.S. Army Elliot Barracks and the old T. B. Sanitarium. We built the cabin in about 3 days. After separating from his wife, my brother lived in his cabin regularly for about six years. Harlan stopped going regularly to his cabin when he moved into the “Pumpkin Patch” trailers in downtown Skagway.

7. My brother used to invite his friends to his cabin on parcel 1 for parties and fish bakes. I attended many of these parties that my brother had at his cabin. He began having these parties in the early 1960's.

8. I helped my brother to identify his land by blazing trees on the corners. My brother liked the land on parcel 1 for many reasons, but he valued the beach front because it had good anchorage.

9. There is no doubt in my mind that my brother regularly used parcel 1 since the early 1950's.

Ex. L, 1984 Affidavit of Fred Mahle.

Andrew Mahle's contentions were similar, although dates in his affidavit did not square with other evidence of record:

3. I remember in the late 1940's and early 1950's when Harlan used to trap . . . and hunt . . . on his land.

4. My brother separated from his wife in the late 1950's^[12], and began to regularly stay on his land at Long Bay Point. He would stay in a cabin that he built with [Fred]. . . .

5. In 1971 or 1972, Harlan moved back into Skagway where he rented a trailer at the "Pumpkin Patch." He had to move from his land at Long Bay because he took a job with the city of Skagway. However, he would still go to his cabin on weekends . . . until the day he died.

Ex. J, 1984 Affidavit of Andrew Mahle. Fleurant also submitted the affidavit of Jan A. Nelson claiming to be a friend of Harlan's after 1958; this affidavit related only to Parcel B "near Finnegan's Point." Ex. 27, 1984 Affidavit of Jan A. Nelson.

1984-85 Evidence of Use and Occupancy Established in Fight Over Dyea Valley Parcels. In 1984, the Mahle family claimed that the historic Chilkoot Trail followed the west side of the Taiya River at the latitude of the Mahle brothers' allotments to the east of the river, and thus that the NPS trail was in the wrong historical location. By letter to BLM dated July 3, 1984, Andrew Mahle refused to reserve a right-of-way for the Trail across his allotment, claiming that the "Chilkoot Trail ran up the west side of the river" making those hiking the trail trespassers on his land. A handwritten

¹² Barry testified that they divorced in 1968, but that she separated from Harlan on two occasions during their marriage. It is unclear whether this date is a typographic error or whether Andrew viewed the couple as separated after the 1950s.

note dated “8-4” states that in a telephonic communication, Jerry Mahle also claimed “trail on wrong side of river, want to stop hikers this year.” On July 9, 1984, a Realty Specialist for the Central Council, Tlingit and Haida Indian Tribes of Alaska (Tlingit Council) sent three affidavits each signed jointly by Jim Matthews, Edith Lee, and Malcolm A. Moe, asserting support for the three brothers’ applications. Ex. 29, Ex. N. All three affiants attested to Harlan’s use of 40 acres in Parcel A and claimed that all three Mahle brothers “had exclusive use of the land since childhood.”¹³

The City, State, and NPS expended considerable effort to demonstrate the location of the trail on the east side of the river, providing various studies and maps prepared for purposes of the National Park designation. See August 1897 “Map, Showing Trails from Skagway to Lakes Tooche and Bennet Through White Pass, also from Dyea to Lake Bennet through Chilcoot Pass.” Alaska submitted the Affidavit of General John V. Hoyt, repudiating the suggestion that the Mahles’ were settlers in the Dyea Valley. See also Oct. 23, 1948, Hosford letter; May 14, 1954, letter from Hosford to Land Office (explaining he built road “at [his] own expense”). NPS submitted 1985 Affidavits of William J. Porter, Thomas R. Branton, and John B. Warder, Jr., who claimed familiarity with the trail and denied that the Mahles were present during the reconstruction period. See July 3, 1985, NPS Report to BLM.¹⁴

Relevant to Parcel A, NPS commissioned Glenda Choate, Alaska Archives Resource and Records Management, to interview local people about the Mahles’ use of land around Skagway. She compiled eight witness interviews in the “Chilkoot Trail Project, NPS” attached to her letter dated August 31, 1985. Ex. 1 File 2. Her efforts revealed nothing definitive about the Mahles’ use of land in Dyea Valley or elsewhere. The information provided during the debate over the location of the Chilkoot Trail relative to Parcel B provided nothing informative regarding Parcel A.

The Mahles and ALSC retreated from their position regarding trespass, and resurrected the idea of an easement across the Mahle allotments. July 9, 1985, letter from ALSC to BLM. NPS and the State continued to oppose the allotments. In July 1985, Fleurant submitted more affidavits updating prior statements in support of the Mahles’ applications. Ex. 32. The 1985 Affidavit of Malcolm Moe asserted that he knew the Mahles used land in Dyea Valley because they passed by his land in Dyea on their way there. In his affidavit, Oscar Selmer claimed knowledge that the Mahles

¹³ On Aug. 2, 1984, Fleurant submitted affidavits of Moe, Matthews, Oscar Selmer, and Ed Hestnes, all attesting to the Mahle parcels near Dyea. Ex. 30. In a later 1984 affidavit, John E. Feero claimed to have gone to high school with Harlan and Fred and to hunt and trap with the Mahles in the Taiya area during the 1940s. Ex. 31.

¹⁴ A March 1985 Affidavit of Robert L. Spude documents the trail location with six maps dating from 1897 to 1948, first-hand accounts from the late 1800s and later of the gold rush and tourists, and from a 1919 Metro-Goldwyn Mayer movie crew.

hunted and trapped because he saw them returning home with game. A 1985 affidavit of J.M. Matthews stated that on Long Bay he saw the Mahles “pass through occasionally to go hunting, I assume.” At Dyea Valley he saw them “coming to fish . . . on the land they were claiming.” By affidavit dated June 1985, Andrew Mahle submitted a “correction” to specify that Harlan had begun to hunt rabbits and pick berries on “his land” in 1946. Ex. K.

1987 Field Exams. In September 1987, BLM conducted supplemental field examinations of Parcels A and B, with the participation of Fred and Jerry Mahle, John Brower, Realty Officer for the Tlingit Council, and a State representative. The Field Examiner found no evidence of use or occupancy on Parcel B. Ex. 1 File 2, Field Report dated Jan. 13, 1988. The Field Examiner prepared a November 18, 1987, Land Report for Parcel A in which she expressly identified the conflict between the handwritten and the typed descriptions of Parcel A. She acknowledged “much confusion” over a proper description during a September 16, 1987, field examination. Both Jerry and Fred discussed Harlan’s application for Parcel A with the Field Examiner, and denied that Harlan had ever expressed an interest in land east of the road or for more than 40 acres. Ex. 35, Nov. 18, 1987, Field Report at 1. On page 1A she described two different applications, one handwritten for 80 acres and one typed for 40 acres, and described evidence that would support what she felt was a correct interpretation of the application. Noting Harlan’s sketch map showing the parcel west of the road, she explained that Jerry stated that his “father talked about his ‘40 acres’ west of the road * * * never mentioning land to the east of the road.” *Id.* Fred stated that he “deem[ed] USS5107A and USS3312 TrE lot 39 [Harlan’s] correct claim, a total of (8.6 + 4.02) 12.62 acres.” The Field Examiner explained that Fred and Jerry knew that area well. Despite the relatives’ comments that 40 acres reflected Harlan’s intent, she stated that “a determination needs to be made in consultation with BIA and the solicitor as to which application (the handwritten or the typed) is the correct one,” pointing out that “[n]o acceptance of an amendment by the applicant exists” in the file. Ex. 35 at 4. The examiner found the remains of a cabin on Lot 39, accessible by a driveway from the Skagway-Dyea Road, next to a new cabin built by Doug Mahle in the 1970s. She found no other evidence of Harlan’s use and occupancy. *Id.*

Further Communications Between Heirs and BLM About 80-Acre Handwritten Application. Subsequent evidence in the record confirms that the Mahles discussed the handwritten application for 80 acres in Parcel A, but expressly disclaimed any interest in it. BLM received a letter from Brower dated December 4, 1987, “intended to respond to the confusion created during the field examination, report dated November 17, 1987, . . . [which] involves the amount of acreage the applicant intended to apply for.” Ex. 36. He continued:

I have spoken at length about this matter with the heirs to the Harlan Mahle Estate[,] . . . Douglas and Jerry Mahle. Both heirs are in strong agreement and have little doubt about it, that the correct acreage as Harlan Mahle applied for on this parcel is 40 acres. It is also my understanding that the entire 40 acres tract was on one side of the road - the westside which borders Nahku Bay. This agrees with the allotment application sketch map.

Though there is dispute about the difference between the handwritten application (which describes 80 acres), the typewritten application (which describes 40 acres, with the land being on both sides of the road), and the sketch map which accompanied the typed application, there is little doubt in my mind that the applicant's original intent was to apply for 40 acres on the west side of the road.

Ex. 36, Dec. 4, 1987, Brower letter to BLM (emphasis and errors deleted). Brower attached a copy of the sketch map from the original 1974 Field Report on which he claimed to have drawn the "approximate 40[-]acre boundary . . . which the heirs believe their father originally intended to apply for." This sketch identifies the "old shack" on Lot 39 and a "Jacobson old cabin" in the northern area at the same level as a "cove" on Nahku Bay, referring to the "land originally intended." It also identifies a "corner marked by the applicant" on the eastern boundary of the allotment adjacent to the Skagway-Dyea Road. This letter was copied to Jerry Mahle and ALSC.

By memorandum dated June 1, 1988, BLM requested a survey of the metes and bounds typewritten description of Parcel A. BLM stated that the portion extending south into USS 1499, the City park, did not need to be surveyed but that "*its area does need to be considered as part of the total 40 acres allowed.*" (Emphasis added). It stated that the portion of Parcel A extending into USS 5110 needed to be surveyed "into two lots, one on each side of the Skagway-Dyea Road . . ." BLM requested subdivision of Lot 37, Tract E, USS 3312, so that the portion extending into that lot (as per the typewritten description) could be separately identified.

June 1988 Decision. On June 9, 1988, BLM issued its first adjudication of Parcel A. Ex. 37. BLM determined that, despite the narrative in the 1987 Land Report regarding the claim placing it west of the road and the sketch submitted by Harlan Mahle, BIA's typed metes and bounds description represented the proper location of Parcel A. Regarding the typewritten aliquot part description, BLM stated that "[t]here is no rectangular system in place in this township" and that plotting the description by protracted section lines resulted in placing the claim "primarily in Nahku Bay." 1988 Decision at 5. BLM depicted the parcel on a "Composite Drawing" attached to the decision that was essentially the same as that on the October 21, 1971, Official Status Plat. It shows Parcel A as covering USS 5107A, Lots 38, 39, and

the western half of Lot 37, Tract E, USS 3312, with portions extending north into lands later surveyed as USS 5110, and south into USS 1499 (the City park).

BLM approved the allotment for Lot 39 (on which Mahle's cabin was located) and conveyed it, containing 4.02 acres, to the Heirs on December 13, 1988. Ex. 43. BLM rejected the southernmost portion of Parcel A because it conflicted with USS 1499, the City park patented in 1931.¹⁵ BLM noted that a portion of the application lay within Lot 38, USS 3312, Alaska. Because the land had been patented to Selmer in 1959, authority over it lay outside the jurisdiction of the Department. Harlan's brothers nonetheless continued to allege that he commenced use and occupancy in 1946, predating Selmer's homesite application for such land. BLM thus directed that the status of Lot 38 be adjudicated pursuant to Stipulated Procedures adopted with approval of the District Court by the United States and other parties to *Aguilar v. United States*, 474 F. Supp. 840 (D. Alaska 1979). With respect to the remaining land described in the typewritten metes and bounds description, USS 5107A, part of Lot 37, Tract E, USS 3312, and part of USS 5110, BLM held that Mahle's entitlement hinged on whether he had initiated qualifying use and occupancy of that land prior to its withdrawal on October 21, 1952, since the land was thereafter either withdrawn from appropriation by PLO 868 or segregated by State Selection. BLM stated that the preference right, which arose when Mahle filed his application on October 7, 1971, would relate back to the date of initiation of such qualifying use, and thus take precedence over the intervening State selection application. But BLM concluded from the record that "there is simply a lack of sufficient evidence which could support an approval for this portion of the claim, and there is incongruity between the application and supporting evidence." Ex. 37, 1988 Decision at 13. BLM provided Mahle's Heirs 60 days within which "to submit clarifying or additional evidence on behalf of the allottee, to substantiate the occupancy date and to bolster the claim for *this portion* of the applied-for lands." *Id.* (emphasis in original). BLM stated that if no evidence was submitted within the time allowed, or, if the evidence was insufficient, it would initiate a Government contest for that portion of the allotment.

The decision notified Mahle's Heirs that BLM would survey the unsurveyed portion of Parcel A in accordance with BIA's typewritten metes and bounds description attached to the allotment application. However, BLM afforded BIA 60 days from receipt of the decision to object, on behalf of Mahle's Heirs, to the location of the claim "[i]f the land described . . . is not what the applicant intended to apply for." Ex. 37, 1988 Decision at 15. BLM stated that the location of the claim could not be changed "after survey instructions have been written or expiration of the 60 days allowed for amendment," citing section 905(c) of the Alaska National

¹⁵ Maps in the record demonstrate that this rejection encompassed 14.13 acres. *E.g.*, Dec. 6, 1999, Parcel A.

Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(c).¹⁶ Ex. 37 at 15. BIA, Jerry Mahle, and Douglas Mahle received the decision. No recipient filed an appeal or objection. Thus, the decision became final as to rejecting that part of the allotment within USS 1499, and as to the location of Parcel A.

BLM forwarded the decision to the Selmer family by notice dated July 1, 1988, to begin the process that would lead to the *Aguilar* proceeding to determine whether Harlan's use of Lot 38, USS 3312, predated Osborne's, such that the land should be subject to title recovery for purposes of reconveyance to Mahle's Heirs.¹⁷ The Selmers disputed the Heirs' claim to Lot 38. Sept. 13, 1988, letter from Brooke Selmer to BLM. Brooke claimed that his forefathers homesteaded after arriving from Norway in 1898, long before Harlan's relocation to Skagway, and that to the extent Harlan used the property, he was neither the first nor the only Skagway resident to do so. Brooke stated it was used by his family for parties and recreation and "at one time or another, by every other able bodied resident of Skagway." *See also* Sept. 25, 1988, Letter of David G. Knapp (Selmer's cousin).

1988 Evidence of the Heirs' Understanding that Parcel A Lay at Yakutania Point. On behalf of the Heirs, Brower (the Tlingit Council Realty Officer) submitted what purported to be the necessary additional evidence in support of Mahle's claim to Parcel A on July 18, 1988. Ex. 38. That evidence consisted of affidavits executed by Doug Mahle, Jerry Mahle, and Brower. In the cover letter, Brower stated:

I also discussed with Doug and Jerry Mahle the land status and situation involving the remaining approximate 25 acres to the Harlan Mahle allotment at the Point. Doug and Jerry have little doubt that their father used that area as well, but neither, unfortunately, can factually substantiate having been doing things with their dad on that land in question. Therefore, their belief and conclusion, after many hours of discussion, is that *their dad must have only initially intended to claim the approximate 15 acres that Harlan had his son (Doug) blaze marks on the trees. The blaze marks approximate the surveys of*

¹⁶ "[N]o 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) (2000).

¹⁷ Though the *Aguilar* Stipulated Procedures were adopted for conveyances of land to the State of Alaska, they are followed with respect to other conveyances as well. In *Lillian Pitka*, 164 IBLA 50, 53 n.4 (2004), we explained that the "Department has extended the use of the *Aguilar* Stipulations to investigate applications involving all conveyances out of Federal ownership, not just conveyances to the State of Alaska. *State of Alaska v. 13.90 Acres of Land*, 625 F. Supp. 1315, 1319 (D. Alaska 1985); *Wassilie Roberts*, 153 IBLA 1, 4 (2000)."

USS 5107A and Lot 39. This is the contention of Fred Mahle, Sr., as he stated during the September, 1987 field examination.

Ex. 38 (emphasis added). Brower's July 12, 1988, affidavit (Ex. 41) documented this to be true based on visiting the parcel on July 10, 1988, with Doug and Jerry.

The Heirs' contemporaneous affidavits verified Browers' understanding that they could only support Harlan's use of "the approximate 15 acres," which included Lot 39 and USS 5107A, including an area called "the cove" on Long Bay, where a sauna and dock were located. See Ex. 41, Map attached. Jerry's 1988 affidavit explained that he was familiar with the allotment "at the Point" but that "Doug is much more familiar with the land and what my father's original intentions were as far as how much land he wanted to claim. Doug blazed the boundaries to have an area of approximately 15 acres – the area included the cabin area all the way down to the 'cove'." Ex. 39. Jerry claimed that his first visit to the cove was on July 10, 1988, the date of his affidavit. He claimed to have picked berries with Harlan on "USS 5107A," and that Doug hunted, trapped, and fished there with Harlan.

From talking with Doug, [I am] now positive that my Dad's original intent was as Doug blazed and he says. I believe Dad originally wanted the approximate 15 acres Doug blazed. However, it was always known to me as a 40 acres claim. How that got to be is really unknown to me, but this is why I refer to it as a 40 acre claim. From all I know, and what my memory allows, I positively know my father is entitled, at a minimum, to the approximate 15 acres Doug blazed, and the BLM has designated as USS 5107A and lot 39.

Thus, while failing to rule out that Harlan might be entitled to more land, Jerry failed to specify any fact that would support qualifying use of any other land.

Doug's affidavit was consistent. Ex. 40. He claimed that Harlan had taken him in the 1960s to the cove, the sauna, the dock, and the cabin. Doug claimed to have hunted with his dad, and that Harlan fished from the dock and with a boat. He identified a trail between the cabin and the cove area. He said: "it was me who did all the grunt work for my Dad when I blazed the lines as to what boundaries he believed this allotment at the point to be. The blazed lines encompass an area of about 15 acres . . . used most extensively. *The additional acreage was, I believe, what the BIA officials added on in order for it to be a 40 acre parcel.*" Ex. 40, July 10, 1988, Affidavit of Doug Mahle at 2 (emphasis added).

On July 12, 1988, Brower added three affidavits. Ex. 1 File 3. In a July 6, 1988, affidavit, Jerry described the allotment boundaries, stating that the northeast side of the allotment "took in part of the mountainside, as it is surveyed." Jerry

stated that the northwest corner was “just off the trail to your right” where there was another marker. Doug’s July 6, 1988, affidavit stated that “the survey at present is what Harlan used and intended to apply for. There was and still is freshwater slues on his property. I am very familiar with my Dad’s property and [have] been there with him a lot. It is in its present place, where its always been.” Fred’s July 11, 1988, affidavit explained that “upon completion of the survey, Harlan felt that he was completely satisfied because it was in the area of his general intent.” Fred agreed that the survey reflected Harlan’s “original intended location.” Ex. 1 File 3. The 1988 statements of Brower, Jerry, and Doug thus all support a finding that, as of that time, they believed that Harlan had claimed only the lands now described as Lots 39 and USS 5107A, totaling 12.62 acres.

November 1988 Decision. On November 30, 1988, BLM approved the land in USS 5107A as part of Harlan’s application for Parcel A and rejected State selection application A-061057 for that land. BLM advised that adjudication of Harlan’s claim for the patented lands in Lot 38, USS 3312, was suspended pending action pursuant to the Stipulated Procedures of *Aguilar*, and that BLM’s next action on that portion of the allotment claim would be taken through a separate letter notifying interested parties that an informal hearing would be necessary. Nov. 30, 1988, Decision at 2. BLM advised that the “remainder of [Harlan’s] claim was under review for a government contest,” citing the unpatented lands within USS 5110 and partially in Lot 37, Tract E, USS 3312. *Id.* BLM also expressly ruled that Harlan’s Native allotment application had not been legislatively approved and had to be adjudicated under the criteria set forth in section 905(a)(4) of ANILCA, 43 U.S.C. § 1634 (2000), because a valid protest covering those lands had been filed by the State of Alaska. BLM conveyed lands in USS 5107A, containing 8.6 acres in the lot adjacent to the Bay, to Mahle’s Heirs on June 16, 1989. Ex. 44, Certificate No. 50-89-0349. At this point, the Heirs had received Lot 39, USS 3312, and USS 5107A totaling 12.62 acres.

Approval of Parcel B. By decision dated December 1, 1988, BLM approved the application for Parcel B, rejecting State selection application A-061057, as to the land in USS 5107B in Dyea Valley, reserving a right-of-way and easement for the Chilkoot Trail. The State appealed this decision to this Board but withdrew that appeal based on “considerations” involving another matter not in the record. *State of Alaska*, IBLA 89-194 (Order dated Dec. 27, 1990).

1989 Aguilar Proceeding for Selmer’s Land. On September 12, 1989, Elizabeth P. Carew, Hearing Officer, held a hearing in accordance with the *Aguilar* Stipulated Procedures with respect to Lot 38, USS 3312, the property patented to Selmer. Barbara Kalen testified for the Selmers, and Doug and Jerry Mahle and Billie Barry testified for the Heirs. Kalen testified that the land in Lot 38, comprising 4.31 acres, belonged to Osborne “Ockey” Selmer, whose family used it for recreation. She stated that her husband and the Mahle brothers were close friends. Ex. 45, 1989 Hearing

Transcript at (1989 Tr.) 9. She claimed that Harlan's interest in land arose after the City expressed interest in it and that when he filed his claim "he had not been using that land before. He didn't camp up there. They didn't live up there." *Id.* at 10.

Doug Mahle testified that he and his uncle Fred blazed Harlan's trees in the 1970s for the purpose of marking Harlan's claim. He testified that his father hunted on weekends on Skyline Trail next to Lot 38,¹⁸ and that his Uncle Fred told him that it was Fred who had built the cabin on *Selmer's* property. He said that his father used the cabin "to get out of town. Have a few drinks and such." 1989 Tr. 25-26. Jerry testified that he went hunting with his father at the top of AB Mountain and on the Skyline Trail. He testified that in 1974, he and Harlan discussed and looked at papers regarding Harlan's allotment. "*I found Dad's original allotment, and what he applied for, and I talked to Dad about it. I said, 'Dad, what is this?' And he says, 'Well, there's a 40-acre tract that I plotted, plus the 80-acre tract we had in the valley'.*" *Id.* at 33 (emphasis added). He testified that the tract was "[o]n the point of Skagway, Yakatani (ph) Point," and that there was a "list of 30-some different people that my dad had hunted or used the area with," who were "pretty specific" about "the 40-acre parcel," and there was "[n]o doubt in my mind that my dad claimed the 40 acres." *Id.* at 34-35. He stated that hash marks on trees on the Selmer tract "were almost identical to the same hash marks that you'll find on Dad's allotments in the valley and Dad's allotments on the Point." *Id.* at 36.¹⁹ He confirmed that Harlan and Osborne used the cabin on the Selmer tract "for partying." *Id.*

Billie Barry testified that she first knew Harlan when he and his brothers ran a milk delivery service from the Mission school, and that when they were not working for the Mission they were "out all over." 1989 Tr. 46-47. She and Harlan started dating in August or September 1953 and married the next May. She stated that the "party cabin," *id.* at 50, was constructed so that Selmer could be out of his own family home to drink, and that Harlan drank with him. *Id.* at 49. "It was definitely to go there to drink." *Id.* at 51. She testified that Harlan "used the general area" in 1955, and that she did not know of any other cabin except the party cabin. *Id.* at 55.

Brooke Selmer testified that his grandfather Osborne had used the entire peninsula area for hunting and fishing, that his father had a "trapline up A-B trail," that this was not uncommon, and that other people had traplines "all over the place there." 1989 Tr. 57. He testified that his family used the cabin during the 1964

¹⁸ Though the Skyline Trail becomes critical to testimony at the hearing before Judge Sweitzer, we note here that its location is never precisely identified in the record.

¹⁹ Curiously, though Doug testified that it was himself and Fred who had marked Harlan's boundaries, it was *Jerry* who testified as to the similarity in hash marks. Doug, who was present, did not testify regarding where he marked the trees or whether he did so on the Selmer tract.

earthquake. He and John Drake Selmer agreed that the “cabin up on the hillside” was their father’s and that people requested Osborne’s permission to use it. *Id.* at 59. John described “two types of recreation in Skagway. There’s drinking and there’s hunting and fishing. And everybody used the area for hunting and fishing.” *Id.*

In a decision dated November 16, 1990, Carew rejected the Mahles’ claim to Lot 38. She concluded that the Heirs failed to establish that Harlan had a valid claim to the land that predated initiation of Osborne’s claim in 1953. Ex. 46.

Filing of the Plats of Survey for Parcel A. On March 22, 1990, BLM officially filed two plats of survey for the remaining unsurveyed land subject to Mahle’s Parcel A. One survey designated the remaining land north of USS 5107A and Lot 39, USS 3312 as Lot 3, USS 5110 (2.68 acres), and the remaining land north of Lots 37 and 38, USS 3312, as Lot 4, USS 5110 (1.13 acres). The area between those two lots containing the Skagway-Dyea Road right-of-way was designated as part of Lot 5, USS 5110. The other survey designated land east of Lot 38, which was originally the western part of Lot 37, as Lot 42, Tract E, USS 3312.

1991 Contest. On July 22, 1991, as it indicated it would in its November 1988 decision, BLM initiated a contest, charging that Mahle had failed to comply with the use and occupancy requirements of the 1906 Act, and thus was not entitled to an allotment for remaining land subject to Parcel A, which included Lots 3 and 4, and part of Lot 5 (the area in between those two lots containing the Skagway-Dyea Road right-of-way), USS 5110, and Lot 42, Tract E, USS 3312. Since BLM had failed to notify the City of the contest proceeding, by order dated July 7, 1992, Judge Sweitzer dismissed the complaint without prejudice to refileing.

By letter dated September 2, 1992, ALSC advised the Regional Solicitor that Jerry wanted the “full allotment” adjudicated, that “he now demands that the BLM either approve the entire allotment or contest it,” and that ALSC was “having the land surveyed.” Ex. 47. ALSC contended that the 1988 decision “was not final and not properly subject to appeal,” and that ALSC would “notify BLM if the description they previously relied on was incorrect and if an amendment was necessary.” *Id.* ALSC cautioned that “[d]etermining what land the full allotment contains . . . may not be simple,” noting that the original application contained a handwritten description for 80 acres, and suggesting that the Heirs’ acceptance of 40 acres (as noted in BLM’s June 9, 1988, decision) was not final. Plainly, the Heirs anticipated asserting that Harlan had intended to apply for 80, not 40 acres.

1993 Decision. BLM issued a decision dated July 26, 1993, approving Mahle’s allotment application with respect to the land described as Lots 3 and 4, the road right-of-way (part of Lot 5), and Lot 42, apparently based on a BLM policy that 40 acres of unsurveyed land was the smallest area to which an allotment could be

reduced. Ex. 48, 1993 Decision at 6. BLM rejected in part the State's selection application as to Lots 3, 4, and part of 5, based on the 1974 TA decision excluding that land and the fact that Mahle had initiated a valid claim to the land prior to the State's June 1961 selection. BLM stated that an easement for the Skagway-Dyeya Road would be reserved in the certificate of allotment issued to Mahle's Heirs. BLM noted the TA decision had excluded land in Lot 42, when that land was part of Lot 37. See Ex. U, June 25, 1974, TA decision. The 1993 decision also explained that since the Heirs had not objected to the description of Parcel A included in the 1988 decision, "the description is considered to be correct and cannot be amended." 1993 Decision at 3, citing section 905(c) of ANILCA, 43 U.S.C. § 1634(c).

The Appeals and the Heirs' Waiver. The City of Skagway and the State of Alaska appealed from BLM's decision. IBLA 93-628 and IBLA 94-37. The Heirs appealed on August 30, 1993. IBLA 93-651. The Heirs withdrew their appeal on December 3, 1993, asserting a reservation of a right to brief any issue in response to the City and the State. Nonetheless, the Heirs, represented by ALSC, did not brief their position. Thus, although the 1993 decision stated that the land description could not be amended, the Heirs waived their right of appeal of that decision.

Instead, by letter dated February 10, 1994, the Tlingit Council submitted to BLM a request that it adjudicate Harlan Mahle's application as an 80-acre parcel. Ex. 49. Thus, having waived appeals of the 1988 decision, the conformance to survey in 1990, and the 1993 Decision, the Heirs, through the Tlingit Council, presented the issue of Parcel A's proper description for action by BLM during a time when IBLA had jurisdiction due to the pendency of the State's and City's appeals. On March 9, 1995, Grenelda M. Edmiston, ANILCA Specialist of the Tlingit Council, forwarded another affidavit of Jerry Mahle asserting a desire to obtain the "non-adjudicated portion of his 80-acre claim that was erroneously left off the description" of Parcel A. In this affidavit, Jerry denied having seen the original application, claimed that Harlan must not have known his own rights in the face of the change in acreage, and demanded that an 80-acre application for Parcel A be adjudicated. Ex. M, Dec. 1, 1994, Affidavit of Gerald Mahle. Two maps with the Tlingit Council logo were attached to the letter. The maps draw the 80 acres as comprising 12.62 acres already certificated (USS 5107A and Lot 39, USS 3312) plus "6.84 acres" that were approved in and subject to the appeal of the 1993 BLM decision (Lots 3 and 4, and part of Lot 5, USS 5110), and adding 49.2 acres due north of the previously described land (and Selmer's private land) along the Skagway-Dyeya Road. By letter dated March 22, 1995, BLM responded that it could take no action until IBLA restored its jurisdiction.

IBLA's Decision. The Board issued its decision in *City of Skagway, State of Alaska*, 136 IBLA 3, on June 13, 1996. The State had contended that BLM could not approve the lands in question for allotment because they had been tentatively approved to the State in the 1974 TA decision and were beyond the jurisdiction of

the Department by virtue of section 906(c)(1) of ANILCA, 43 U.S.C. § 1635(c)(1).²⁰ The State concluded that any conveyance of the lots in question to Harlan Mahle's Heirs required title recovery proceedings in accordance with *Aguilar*. IBLA disagreed.

Although the State may have believed at the time of the TA, based on the February 1974 Field Report, that Parcel A only encompassed the 12.62 acres of land in Lot 39 and U.S. Survey No. 5107A, there is no evidence that BLM's official public land records at that time showed Parcel A to be limited to those lands. In fact, the record contains an "Official Status Plat," dated May 8, 1974, which depicts the parcel as encompassing the same land as the October 21, 1971, plat, including part of Lot 37 and part of U.S. Survey No. 5110, later surveyed into Lots 3, 4, and part of Lot 5.

136 IBLA at 14. We held that "*where the official BLM public land records at the time of the TA showed the lands in question to be included in the allotment, the express exception in the TA of Mahle's Native allotment application, by serial number and parcel designation, was sufficient to exclude them from the effect of the TA.*" *Id.* (emphasis added).

But we set aside the 1993 decision awarding the lands because of insufficient evidence of qualifying use and occupancy. Noting the Heirs' decision not to appeal the 1988 decision or the 1990 conformance of Parcel A to the survey, we held that the "heirs were thereafter precluded from amending the description." 136 IBLA at 11 n.15. Proceeding to consider the relevant lots, we held that the 40-acre policy was improperly applied. *Id.* at 14-15. Then we held:

First, there is no evidence in the record, despite the description provided by BIA and that utilized by BLM for the claim, that Mahle ever intended to claim any land to the east of the Skagway-Dyee Road. Mahle's sketch on his application shows his entire claim west of the road. The first field examiner, who represented that he interviewed Mahle, reduced the size of Parcel A to 12.62 acres, thereby eliminating the lands presently at issue. In 1975, BLM provided Mahle with a copy of the examiner's Field Report, which contained a description of the claim limited to that area. The record contains no objection by Mahle to the report or the claim description prior to his death in 1977.

²⁰ Section 906(c)(1) of ANILCA provides: "All tentative approvals of State of Alaska land selections pursuant to the Alaska Statehood Act are hereby confirmed, subject only to valid existing rights . . . and the United States hereby confirms that all right, title, and interest of the United States in and to such lands is deemed to have vested in the State of Alaska as of the date of tentative approval."

Following his death, others provided statements of his use for 40 acres west of the road. The 1987 field examination revealed evidence of use only on Lot 39, west of the Skagway-Dyea Road. That examiner reported that one of Harlan Mahle's brothers and one of his sons made statements that Harlan Mahle's claim was west of the road.

Second, when BLM issued its 1988 decision approving Lot 39 for conveyance to the heirs, it requested additional evidence of use and occupancy for the lands in question and for U.S. Survey No. 5107A. In response, BLM received evidence of use and occupancy of U.S. Survey No. 5107A and affidavits from Mahle's sons that they believed it was their father's intention to claim only the lands in that survey and Lot 39. They provided no evidence of use and occupancy of any lands east of the road or of any lands in U.S. Survey No. 5110 lying to the north of Lot 39 and U.S. Survey No. 5107A.

Thus, in June 1988, BLM concluded, regarding Harlan Mahle's use and occupancy of the present lands in question, that there was "simply a lack of sufficient evidence which could support an approval" for such lands (1988 Decision at 13). Since that time, no evidence of any use and occupancy of Lots 3 and 4, part of Lot 5, and Lot 42 by Harlan Mahle has been presented to BLM.

In order for the heirs to be entitled to the land in question, the record must show by a preponderance of evidence that Harlan Mahle's substantially continuous use and occupancy of this land began prior to the October 21, 1952, withdrawal of the land from appropriation under the 1906 Act . . . and that it continued for the requisite 5 years. Such use and occupancy must be substantial actual possession and use of the land at least potentially exclusive of others and not merely intermittent. See 43 CFR 2561.0-5(a); *United States v. Estabrook*, 94 IBLA 38, 53-54 (1986).

In its July 1993 decision BLM improperly approved Mahle's Native allotment application as to the land in question without determining whether he had complied with the use and occupancy requirements of the 1906 Act . . . and its implementing regulations. Under such circumstances, we must set aside BLM's decision and remand the case to BLM for initiation of a Government contest.

136 IBLA at 15-16 (footnotes omitted).

Heirs' 1997 Parcel Description. On March 20, 1997, Vance A. Sanders, Esq., sent a letter to BLM as counsel to Douglas and Gerald Mahle requesting adjudication of “the entire remaining parcel for which Mr. Mahle applied.” Sanders’ position was that the Heirs are entitled to serial adjudications until they receive 80 acres. Thus, notwithstanding that some lands (4.31 acres in the Selmer property and 14.13 acres conveyed to the City in USS 1499) had already been adjudicated and rejected as part of Parcel A, Sanders subtracted from 80 the 12.62 acres allotted to the Heirs and claimed an additional “remaining 67.38 acres encompassing so-called Parcel A.”

In a letter dated April 15, 1997, the City of Skagway pointed out that the location of Parcel A could not be changed, and the parties began to discuss the appropriate way of resolving the issues. On August 15, 1997, Joel Nudelman, Tlingit Council Natural Resources Specialist, prepared a memorandum of a site inspection which he made with Jerry Mahle and a Council intern on July 24, 1997, which Nudelman claimed should “serve as an affidavit to support the 80 acre allotment claim.” Ex. 52.²¹ Attached to this exhibit is a color map setting forth the Heirs’ position regarding the location of Parcel A. Areas in red depict the 12.62 acres certificated; in gray, the Selmer Lot 38; in green the areas in Lots 3-5 and Lot 42, which the Board had sent back for contest; and in yellow lands which the map identified as “applied-for, to be adjudicated.” *Id.* Following Sanders’ legal theory, Nudelman claimed to have subtracted the 12.62 acres already awarded, “6.84 acres in pending status,” and “the remaining 60.56 acres is what we examined.” Ex. 52.

[We] began our examination at the Southeast corner of the claim and followed the line 832 feet northward to the northeast extent of the pending portion. From that point we continued our survey northward following the same bearing.

In a parallel line, 84 feet east of the line we were running, we found four carved bearing trees. All four trees were Lodgepole pines and were about 70 years old. According to increment borer core samples I took in each tree, I determined the age of the blazes to be about 25 years old. To test the accuracy of the dating technique, I dated the blazes on the trees carved as bearing trees by BLM surveyors on the Certified and pending portions. Those blazes were determined to be nine years old, which is consistent with the survey field notes. Of the four trees, *two were definitely carved by human hands. The other two were most likely hand carved, but were possibly done by animals.* A large amount of *sap covering the blaze made identification difficult* on the two trees in question.

²¹ This inspection was apparently a *sua sponte* decision on the part of the Tlingit Council to support the Heirs’ latest position.

The furthest north of the blazed trees is about 1300 feet from the southeast corner. It is possible that bearing trees continue further up the mountain, but we had very little time to look. After reaching the furthest north carved tree, *we spent about an hour scouting for additional reference trees, but found none* [sic]. We did however find what appears to be pieces of a trap. Wire pieces of the trap were wrapped around two trees and were once connected. The trap was 60 feet Southwest of the northern carved bearing trees.

I took pictures of each tree and the trap, but unfortunately the film was misplaced.

Ex. 52, Aug. 15, 1997, Nudelman Memorandum (emphasis added).

On December 6, 1999, BLM issued a notice regarding the Heirs' claim to additional lands north of the land subject to various adjudications thus far. At some point unclear to us, the Heirs had settled on approximately 58 additional acres (additional lands), which we understand to be supplemental to the lands ordered to be subject to contest by the Board (contested lands). BLM explained that this acreage had already been conveyed to the State of Alaska by the 1974 TA decision approving State Selection A-062057. BLM thus identified two categories of disputed land: The first category was 36.47 acres previously adjudicated or subject to current contest, as follows: (a) 14.13 acres in USS 1499 adjudicated and rejected for allotment as having been conveyed to the City in 1931; (b) 12.62 acres already conveyed to the Heirs by allotment certificates in Lot 39, USS 3312 (4.02 acres) and USS 5107A (8.6 acres); (c) 4.31 acres in Lot 38, Tract E, USS 3312, determined in 1990 to belong to Selmer; and (d) (the contested lands) 5.57 acres²² ordered by IBLA to be subject to contest in Lots 3 (2.59 acres) and 4 (1.15 acres) and the part of Lot 5 (.34 acres) covering the road, USS 5110, and Lot 42, Tract E, USS 3312 (1.33 acres). The second category (the additional lands) comprised 58 acres previously conveyed to the State, which Sanders had proposed to include in Parcel A in 1997. BLM explained that in order to make any determination regarding the additional lands it must conduct a title recovery proceeding under the *Aguilar* Stipulated Procedures and that it would combine a contest hearing for the contested lands with the *Aguilar* proceeding for the additional lands. This Notice was served, *inter alia*, on the State, the City, Sanders, ALSC, the Tlingit Council, Gerald Mahle, Doug Mahle, and BIA. On December 20, 1999, BLM ordered any person with an interest in the disputed land to submit evidence within 90 days.

The State and City objected to BLM's proposal to combine *Aguilar* and contest

²² IBLA ordered a contest on 5.41 acres. 136 IBLA at 4 n.2. IBLA computed the disputed portion of Lot 5 at .34 acres, while the Complaint states that it is .5 acres.

proceedings. Feb. 7, 2000, letter from State to BLM; Feb. 14, 2000, letter from City of Skagway to BLM. They argued that it was not possible to conduct an *Aguilar* proceeding until BLM first determined that the application for Parcel A could be amended to describe the additional lands. They contended that this was not possible in light of the 1988 and 1993 final decisions of BLM, the Board's decision, and the fact that Parcel A had been conformed to survey, which process stopped any further amendment under section 905(c) of ANILCA, 43 U.S.C. § 1634(c) (2000). By letter dated March 16, 2000, BLM notified all parties that by agreement of counsel, the combined proceeding would take place. BLM did not address the demand that it determine whether Parcel A's location could be amended before proceeding.

By letter dated March 18, 2000, Sanders responded to the order to submit additional information (Ex. 53), providing a December 3, 1999, Transcript of a Telephonic Deposition of Billie Belle Barry, with attached exhibits (Exs. D, 55), and a March 18, 2000, Affidavit of Stanley E. Reddekopp (Exs. P, 54). Barry testified by telephone from her home in Missouri due to her poor health. Reddekopp claimed to have lived and worked in Skagway in 1964-65, during which time he became friends with Harlan and his brothers, to visit Harlan's cabin on "the Point," to hunt with them "on A.B. Mountain," and to reminisce with them about their lives at the Mission and Harlan's subsistence activities "in Dyea Valley and on the Point." *Id.*

By letter dated May 18, 2000 (Ex. 56), Sanders submitted five more affidavits, generally supporting Harlan's use and occupancy of land on "Yakutania Point." Jasper Sullivan explained that he had been friends with Harlan who "staked lands on Yakutania Point" at the direction of Sullivan's brother Richard; Richard had advised Harlan to stake 160 acres as Richard had done. Exs. Q and 57, 2000 Sullivan Affidavit. James L. Alexander claimed to have hunted, fished and trapped with Harlan in Dyea Valley and on Yakutania Point. He attested that Harlan's allotment was at the "foot of AB Mountain" and that Harlan's extensive subsistence use "at the Point" was known in Skagway. Exs. A and 58, 2000 Alexander Affidavit. Larry O. Sullivan claimed to have hunted and trapped with Harlan on Yakutania Point and to have helped build a cabin "below the Dyea Road." Exs. R and 59, 2000 Larry O. Sullivan Affidavit. George Logan described Harlan's land use at the Point, and that, from 1947 when Logan was 6 years old until Harlan's departure for the Army in 1950, Harlan and Billie had been like a family to him. Exs. I and 60, 2000 Logan Affidavit.²³ The May 18, 2000, Affidavit of Joel Nudelman, described Nudelman's visit to the "60.56 acres which Mr. Mahle applied for but which had not yet been adjudicated." Exs. O and 61. Contradicting his own 1997 memorandum of the 1997 trip (Ex. 52), he now claimed to have been able to discover the boundaries of the "applied-for parcel" based on the "exact legal description" in the application.

²³ According to Barry, she did not start dating Mahle until 1953.

THE GOVERNMENT CONTEST AND AQUILAR HEARING

The Contest Complaint. On November 21, 2000, BLM issued a Contest Complaint challenging the Heirs' entitlement to the contested lands on Parcel A. BLM challenged that the latest description of Parcel A submitted by the Heirs was an attempt to amend the application to include lands Harlan never intended to claim and that the handwritten description on the 1971 application did not encompass land now in the Heirs' new description. Complaint ¶ 14. The Contest Complaint gave notice that the contest hearing would be combined with an *Aguilar* proceeding to address whether to initiate title recovery for the additional lands in USS 5110 north of the contested lands.²⁴ BLM contended that Harlan did not use or occupy either the contested lands or the additional lands. The Heirs answered and denied the charges.

Legislative Approval Motion. ALJ Sweitzer conducted a hearing in Skagway on May 29-31, 2002. The Heirs were represented by Sanders and Carol Yeatman, ALSC. The Government was represented by Regina Sleater. The State's attorney was John Baker and Julia Bockman appeared for the City. At the outset, the Heirs challenged the hearing process altogether, claiming for the first time that the disputed land in Parcel A (including both contested and additional land) was required, under section 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (2000), to be legislatively approved without a hearing.²⁵ They contended that all of the disputed land in Parcel A was expressly excluded from the 1974 TA decision approving the 1961 State Selection A-061057. They reasoned that the lands had never validly been selected by the State, were unreserved in 1968, and therefore ANILCA required the application to be legislatively approved. The State, City, and Government opposed the motion. Judge Sweitzer took it under advisement and conducted the hearing.

The Government's Opening Case. The Government presented the testimony of two witnesses: Jerry Bill Lewis, BLM Land Surveying Section Chief, and Patricia LaFramboise, BLM Land Law Examiner. Lewis testified regarding his review of the handwritten 80-acre application and BIA's typed 40-acre description. He explained the record analyzed above and introduced Exs. 2-19, including Exs. 15-18, which are maps of the variously described parcels and U.S. Surveys. Lewis identified the

²⁴ The lands at issue in USS 5110 were transferred from Federal ownership to the State and reconveyed by the State to the City of Skagway. Complaint ¶ 7.

²⁵ Section 905(a)(1) required such approval in certain circumstances:

“Subject to valid existing rights, all Alaska Native allotment applications made pursuant to the Act of May 17, 1906, . . . which were pending before the Department of the Interior on or before December 18, 1971, and which describe . . . land that was unreserved on December 13, 1968, . . . are hereby approved on the one hundred and eightieth day following December 2, 1980, except where provided otherwise by . . . this subsection”

location of Parcel A using Harlan's handwritten description and sketch and showed that Harlan's calls and description would overlap land already adjudicated as Parcel A and extend both into Nakhu Bay and south into the City park. See Ex. 18 (Map blue area). This map depicted in pink the Heirs' latest description of the parcel and placed its southern edge at the northern boundary of the City park, with Parcel A including unspecified acreage to the due north.²⁶ Lewis stated that the "only way" he could understand BIA's typed description was "if you notice, where [Mahle] claimed his land was mostly park, and that's, would be a logical deduction why they lowered the land value, lowered the amount" to 40 acres. Tr. 115. Lewis believed Mahle "just didn't realize the distances that were involved, is the only thing I can see." Tr. 116.

On cross-examination of Lewis, the Heirs' contended Harlan was unable to comprehend cardinal directions on his own sketch map and description. ALSC's Yeatman asked Lewis to draw Parcel A by reversing the north and south cardinal directions in Mahle's handwritten description. Tr. 95. "I'm going to now again read you the description that the IBLA translated from Mr. Mahle's handwritten description on the Application, and I'm going to change the word 'south' to 'north'." *Id.* (Yeatman). Yeatman contended that Mahle may not have "know[n] what north, south, east, west was." Tr. 108 (Yeatman's comments). Noting that the sketch in the original 1971 application contains a hand-drawn compass legend indicating cardinal directions and correctly depicts the road's course between Skagway and the Bay, Lewis responded that Yeatman's assumption was "absurd," because if Mahle had reversed cardinal directions, he "couldn't have drawn the picture like he did. You, you'd have to turn the picture over. If north is supposed to be that way, now the road does this. But it doesn't do that." *Id.* Yeatman proceeded to introduce into evidence a map, Ex. X, in which she reversed the north-south calls handwritten and sketched by Mahle. Tr. 137; Ex. X. Ex. X places Parcel A mostly north of the road, in contrast with Harlan's sketch map which placed it south of the road.²⁷ Yeatman questioned Lewis whether the measurements in the handwritten application (440 by 880 yards)

²⁶ It cannot be determined from the Heirs' description precisely where they would plot Parcel A. A rectangle due north of the park necessarily includes Selmer's land and some of the Bay, due to a jagged coastline. Yet, the Heirs seek the land already received and enough additional land to total 80 acres. This would cause their plot of Parcel A to extend north of what even the Heirs suggest Mahle intended, given that his handwritten depiction undoubtedly was a rectangle, to compensate for the Selmer tract and the jagged boundary that would place some part of a rectangle into the Bay.

²⁷ Ex. X also depicts Parcel A as encompassing only the northern edges of USS 5107A and Tract 39, USS 3312. It is unclear whether Yeatman meant to suggest that the Heirs received patents to land for which Mahle never intended to apply.

may have reflected Harlan's measuring distance as he walked up and down slope, rather than across a horizontal plane on a map. Tr. 104-05.²⁸

LaFramboise described the evidence regarding Parcel A, as well as the various land tracts at issue and drawn on Ex. 15. Having introduced many of the documents and affidavits we have described above, LaFramboise testified as to her belief that the land sought by the Heirs at the hearing "was not the intent of the applicant for those lands when he originally applied." Tr. 168. Much of her cross-examination related to legal analysis of the meaning of statutory terms and ANILCA, and we address it no further. *E.g.*, Tr. 179-90, 270-88 ("relinquishment" and "amendment").²⁹

Contestees' Rebuttal Case. The Government rested its case and the Heirs moved to dismiss the contest for failure of the Government to present a prima facie case. Tr. 290. After oral argument the ALJ denied the motion. Tr. 302. The Heirs proceeded to submit their evidence through the testimony of Nudelman, Barry's 1999 telephonic deposition, and testimony of Logan, Reddekopp, Paul Morreno, Desiree Welch, Grenelda Edmiston, Larry Jacquot, and Jerry Mahle.

Nudelman testified that he worked for the Tlingit Council as a cartographer and Natural Resource Specialist at the time of his involvement with the Mahle application.³⁰ He testified regarding his trip with Jerry Mahle which is the subject of his 1997 and 2000 affidavits. *See* Exs. 16, 52, 61, O.³¹ Nudelman testified as to having gone to the property first in 1992 and in 1995 for other purposes, at which time he found Mahle's survey corner for Tract 39, which he marked on the map in orange, seemingly in the same location identified on Browers' 1987 sketch map. Ex. 36. Beginning here, Nudelman claimed to have found a rock mound, inside of

²⁸ If the Heirs think that Mahle depicted a 440 x 880 yard rectangle but improperly measured distance by counting space on sloping land, it follows that Mahle's description could not possibly have totaled 80 acres. Bockman and Baker illustrated this mathematical concept through Lewis' testimony. Tr. 118, 121-22; State Ex. I.

²⁹ At this point, ALSC moved to strike the contest as to the portion of Lot 5 covering the road right-of-way, asserting that the Heirs had no notice. The ALJ properly denied the motion. Tr. 172. This issue was addressed in IBLA's 1996 decision.

³⁰ Nudelman testified that he has not taken the "Surveyors Exam" and that his principal work involving Native allotments involved checking their logging status and taking "regeneration surveys to see how the forest lands are regenerating." Tr. 205.

³¹ The witnesses, including Nudelman, used Exs. 15-18 to depict their contentions, drawing on maps with orange, green, yellow, pink, and blue marker, and black and blue pen. Ex. 16 contains so many scribes that witnesses appeared to overwrite each other or squeeze in marks where they could find space to make them.

which was a 4-by-4 post, which he concluded must have been Mahle's.³² He testified that he began at the rock mound and walked east "[b]ecause that's what Jerry felt were the boundaries of their Native Allotment Claim." Tr. 221. In pink, Nudelman depicted this walk to be along Selmer's south boundary on Lot 38. Ex. 16.³³ He testified that they walked north to the highway (presumably Skagway-Dyeya Road), and another half mile north.³⁴ They

continued up. And Jerry, Jerry was, was real adamant that there were blazes there that his, that his father had, had carved.

And we looked all over along this line, and there's so much surveyor's ribbon and, and their blazes, it was hard to find anything there at that spot. And we, and I don't recall who suggested it, but we, we decided we better look, you know, expand and see where else; you know, really check the area out.

We spent quite a considerable amount of time in that area, and walked a pretty good radius around these survey corners. And we found a tree up here that was some, probably 100 feet to the northwest of this survey, of this upper survey corner.

Tr. 224. He testified that he took a core sample and was able to tell that the tree was 75 years old, and that the "hatch marks" on it were "20, 25, or so years less than the age of the tree." Tr. 225. Nudelman testified to finding four such trees and marking them in pink X's which appear in a line to the west of the yellow area depicting the Heirs' claimed additional lands on Ex. 16. Tr. 225-29. Near the fourth tree, he found rusty wirings of an old deadfall trap. Tr. 229-31. He could not recall which bearing they followed (Tr. 233), but they turned west to the water. Tr. 234. He testified that walking these lines took him up a 50% slope, and that the land appeared "suitable" for subsistence activities. Tr. 236. He testified that at no point did they cross the Skyline Trail. Tr. 237. A line to the east of the yellow parcel depicting the additional lands is defined on Ex. 15 in blue ink as "trail," possibly to depict Skyline Trail.

³² Nudelman drew these two spots in orange on Ex. 16, as "Nudel initial point" and "rock mound Nudel found." He submitted pictures of survey markers as Exs. Z and BB, taken by Desiree Welch in 1992.

³³ Later, Nudelman admitted knowing it was Selmer's land, but he testified that he decided to follow that line, because, as he answered affirmatively, it was a well-established boundary between private land and the City park. Tr. 247.

³⁴ He claimed to have found a survey corner, marked in blue ink on Ex. 15; writing on Ex. 15 states "blue creeks marker on Ex. 16 not Ex. 15." This is obscure to us.

Nudelman believed that where he walked was Harlan Mahle's claim because they were allowed a 20-chain-by-40-chain piece of property. They were allowed 80 acres, and it really, and Jerry at this time, every time I was on this property with Jerry, he was pretty adamant that this was the lower portion, and where this rock mound was, that was his father marking his boundary.

And, and then there were also some cut trees on this line, too, and I don't remember the specifics of the cut, but he was, you know, as we were walking from here to here, you know, he was pretty confident that this is, "This is my father's Claim." And he was all, from, from the first time I met Jerry, he was, he was pretty confident of that.

And I never really thought anything otherwise. You know, and I wasn't there.

I'm not an adjudicator, a Realty Specialist, and I wasn't there to do that. I was just there to, to run the boundary, or to look at, in the, in the first instance, look at the potential hazards of that landfill being above, being above them.

Tr. 239-40.

On cross-examination, Nudelman conceded that "there were a whole lot" of marked trees. "There's so much surveyors' [marks. T]hey had stakes in trees, blazes on trees. There was lots of evidence of them being there. And I didn't, didn't record any of that" Tr. 242. While he testified that he thought the blazes on the four trees he marked on Ex. 16 were made by the same person, he conceded that he did not have "any recollection" of what the blazes looked like in other areas. Tr. 243. The following colloquy took place:

Q. Did you find any indication of a corner in the northern, northeast portion of the pink line you've now drawn?

A. No, I didn't. Did not.

Q. Did you find any blazes up there?

A. No.

Q. Did you find any indication at all of the northern boundary line in that area?

A. Just the, just the trap. Beyond the trap, no.

Q. You found nothing that went from the northeast to the northwest at all?

A. Oh, no.

Tr. 244-45. Nudelman conceded that he had no idea who had made the blazes “other than Jerry’s word” (Tr. 250), and that his conclusions regarding the trap, the lines to walk, the southern boundary of the claim, and the trees were based on what Jerry told him. Tr. 250-52. “All what I have to go on is [from] talking to Jerry and looking at, [the] 20-by-40-chain Claim.” Tr. 256. Nudelman thought it likely that Harlan had reversed north and south on his application. Tr. 260. But, on re-cross-examination, Nudelman conceded that a depiction of *Harlan’s* 1971 handwritten description would appear as Lewis had drawn it on Ex. 17, overlapping Nahku Bay and the City park. Tr. 261.

George Logan testified by telephone. He explained that he lived in Skagway as a child during the 1940s, and came to know Harlan while Harlan was at the Mission school because “everybody knew everybody” in Skagway. Tr. 305. Logan helped Harlan with his milk runs in 1947-48 and they became good friends. Harlan became a teacher of sorts to Logan. Tr. 309. Logan testified that he and Harlan ran a trap line and fished and hunted in Dyea Valley. Tr. 310. But with respect to the disputed land subject to the hearing (Parcel A), Logan stated that he and Mahle trapped from the road down to the water, stating “most of the trapping was centered around the edge of the river there and around on the Point.” Tr. 312. He stated that he trapped with Mahle in the mid-1950s at Smuggler’s Cove. Tr. 316. There is no dispute that the land down to the water and Smuggler’s Cove are in the City park. See Ex. 52 (Tlingit Council map showing Smuggler’s Cove in City park).

Logan denied trapping with Mahle above the road to AB Mountain or near Skyline Trail: “I don’t remember of us trapping up in there. I know in later years there was some trapping confrontations up in that area, but I don’t remember other than being off the Point there from the road towards the water, trapping any further than that with Harlan.” Tr. 311-12. Logan consistently denied personal knowledge (Tr. 313 (“not that I recall”)) of anything above the road except confrontations there among trappers using the area jointly. Asked whether Harlan trapped above the road, he said: “I know in later years there was some confrontations going on, guys crossing over each other’s trap lines up there.” Tr. 313. “[T]here was some old homesteads up through there, and some of the families had boundaries that as their children got older and became interested in trapping or hunting, you know there was some disputes . . . of who had the right to trap there and who didn’t.” Tr. 314.

Logan and Harlan would hunt rabbits, goats and grouse “all over,” “above and below the road” and on both sides of Skyline Trail. Tr. 317.³⁵ But Logan testified that this activity was common. Asked whether Harlan was familiar with the area around Skyline Trail, he stated: “Well, yeah. Certainly. Yes. *It was quite, I mean, it was used enough that everybody was quite familiar with it.*” Tr. 318 (emphasis added). Asked whether Harlan camped there, he repeated its accessibility to the public: “No. He may have went there later years with his family, but usually it’s so accessible and such a short little area to get to, you know, you just walk over there in a few minutes.” Tr. 321. The following occurred on cross-examination:

Q. . . . Would the, the area where you were hunting, was that commonly known in Skagway, among the folks in Skagway as, as, as a good area for grouse and rabbits?

A. Oh, yes. Yeah, you could get them all over the hillsides there. You could – It sounds like a, a war zone when you get the grouse in the springtime, you know.

Q. So, so you and Mr. Mahle weren’t the only folks in Skagway that, that hunted that area for those?

A. No. No, of course not.

Tr. 329. Trapping was a different story. “There wasn’t many people trapping, really.” *Id.* But this is apparently because he and Mahle were trapping in the City park. Logan clarified that his trapping activity with Mahle did not extend beyond the park area until after Mahle returned from the military and got a vehicle. Asked if he conducted these activities from 1947-50, he said: “Oh, no. No, no. No, we didn’t go in the Dyea Valley, huh-uh. In fact, I’m not sure. In fact, in them years, if Harlan had any wheels at all, and, of course, I was too young, so we trapped *along the river and that point because that was about the only place we could get to . . .* Yes. This was the only area we could trap. We probably didn’t have that many traps in them days, you know, and both just kids getting started.” Tr. 328-29 (emphasis added).

Logan had no idea Harlan had applied for a Native allotment. Tr. 324. He was unaware of any cabin, dock or sauna. Tr. 330. He stated that he helped Mahle build “from scrap” a “lean-to over there . . . On The Point.” Tr. 330-31. When

³⁵ As for hunting goats, he said that “you could make AB Mountain in a day and usually use the next day to hunt.” Tr. 327. AB Mountain is depicted to the northeast of the disputed land on Exs. 15-16. It is clear, however, from the Skagway Quadrangle map (Ex. 3), that the mountain is several miles northeast of Skagway and similarly distant from the disputed lands.

questioned whether he ever “[saw] a shack that Mr. Mahle had any trapping implements in above the road,” he said, “[n]ot above the road.” Tr. 332. He denied cutting wood with Mahle at the “Skyline area.” “No, that there was inaccessible.” Tr. 332. He said that he picked berries at the Skyline area at “[a]lmost the base of the mountain,” in common with many City residents. “Usually there were, you know, large-growing blueberries at the base of the mountain, and everybody just headed right straight there. We didn’t waste no time.” *Id.*

Logan was questioned as to his references to the “Point.” “[Y]ou were talking about south of Smuggler’s Cove?” He replied: “Yeah, it was going along the river there and then along the other side of it.” Tr. 325. When questioned whether he was aware of the City park, he replied, “No, I wasn’t. I know there was something there dealing with Smuggler’s Cove, but I, I’m not sure whether that was the, the City had claimed it as a, as a public campground area or what was going on there. A lot of that happened later years.” Tr. 325-26.

Stanley E. Reddekopp testified, by telephone, that he worked in Skagway at the White Pass Dock between 1964-65, at which time he met the Mahle brothers. Harlan was working for the City. Tr. 337. He and Harlan would hunt and fish at Dyea and visited Black Lake. Tr. 354.³⁶ He said that Harlan took him to a trapping shed “a couple of hundred yards” up a private trail at a “wide spot” on the “right side” of Dyea Road “against the mountain.” Tr. 339-40. He described that location as “where the road goes around The Point and headed down towards Long Bay.” Tr. 342.³⁷ He said that the shed was invisible from the road, and that a casual observer could not have seen it. Tr. 343, 347. “John Q. Citizen passing by, they would have never observed it.” Tr. 347. He said Harlan treated the “portion where his shack was as his property.” Tr. 351. He stated that Mahle “didn’t post anything to alert people of the presence of his shed,” stating “it wasn’t like blazes, you know, or any other landmark other than what we knew.” Tr. 353. He testified that Mahle told him he trapped “all over the, that side hill” or the “footlands of A-B Mountain.” Tr. 344. Reddekopp denied ever having been on the “Skyline Trail,” stating that “we always accessed A-B Mountain from the Dyea side.” Tr. 341.³⁸

³⁶ Black Lake appears to be to the east of Skagway and irrelevant to either Parcel A or B. Tr. 354. No “Black Lake” is named on the Skagway Quadrangle Map. Ex. 3.

³⁷ At one point, Reddekopp was shown Ex. 52, the map attached to Nudelman’s affidavit, which clearly identifies, by color, the areas in dispute. Reddekopp denied knowing where the shed was but assured it was in either the “green or yellow” areas clearly depicted on the map as lands claimed by the Heirs. Tr. 346. Reddekopp never specifically identified the shed’s location on Ex. 52, or on any map of the area.

³⁸ Larry Jacquot later testified that Skagway “kids” used to hike to Dyea from AB

(continued...)

Paul Morreno claimed to attend the Mission school between 1934 and 1948, and to be friends with the older Mahle brothers. Tr. 357-58. The school was located on the town side of the Skagway River. Tr. 360. Two footbridges over the river led Mission students to Smuggler's Cove and Long Bay, and he recounted that students regularly crossed the bridges to hunt, fish, camp, or pick berries. Tr. 360-61. "[A]ll of us kids, as we grew up, and even through high school, we would always go over there dancing, camping, and over there camping and hunt rabbits and all that sort of thing." Tr. 361. He stated that during his tenure at the school, he and Harlan hunted and berry-picked in the "whole area, all the way up through Long Bay." Tr. 366. He testified that they used the food they collected at the Mission. Tr. 368. "Everybody, you know, got their supply of berries, cranberries." He left Skagway, returning around 1954, when Harlan was working on the Dyea Road. Tr. 362.

When provided the map in Ex. 52, attached to Nudelman's affidavit, Morreno claimed the variously colored parcels looked familiar to him, because "when [he] was going to school from there we went on the road all the way up to Lockbow when Sullivan had a [cabin] there." Tr. 365. Asked on cross-examination, however, to pinpoint locations on the map, he could not do so and seemed confused as to where on that map "Long Bay was." "I don't know how, how far that the colored area extends. It doesn't seem like it extends all the way to Long Bay. This map is kind of deceiving. . . . I can better visualize it." He denied knowing of cabins in the area "unless that [map] includes Long Bay area. It doesn't look like it." Tr. 372.³⁹

When asked to testify as to Harlan Mahle's uses of land, he insisted it was not just Harlan. His testimony is as follows:

Q. . . . When you said you went over there from the school, –
 . . . and Harlan Mahle went over into that area, did–

A. We all, we all went, yes. . . . All the teenage boys.

Q. Oh, all the teenage boys?

A. Senior boys, yes.

³⁸ (...continued)

Mountain and "you'd eliminate all the road and you'd be right over there in a few minutes." Tr. 528. Ex. 3 suggests that such a route from Dyea northeast up the mountain would altogether bypass the peninsula on which Parcel A is found.

³⁹ The colored areas on the map are along Nahku Bay, which is also Long Bay. We do not understand what Morreno thought he was looking at, or whether he was confused by the depiction of Long Bay on that Map as the single word "Nahku."

....

Q. Uh-huh. Did other people from town go to that area to hunt or trap or pick berries?

A. I imagine they did.

Tr. 374. Morreno reinforced that he was testifying to uses “[a]s a school.” *Id.* “[W]e used that whole area, that whole area. We was there as kids, you know. We didn’t have nothing else to do. And we would walk. We climbed. And every place we went was by foot. We did a lot of camping in that area, yes.” *Id.* “[M]e and Harlan and all of us, we went in that area. We hunted in that area, worked in that area.” *Id.* at 378. He also explained that students from the Mission were accompanied by adults. Tr. 383. He acknowledged using the white area on Ex. 52, which corresponds to the City park. Tr. 385. He testified that other people picked berries “up Long Bay” and “over the, on the mountain” Tr. 383. Specifically asked about Harlan’s independent use he said, “Oh, I, I, I don’t know. I imagine he did.” Tr. 380. He stated: “I knew that he was, Harlan was out there in that area someplace.” Tr. 377.

Morreno volunteered that Harlan likely knew how to use a compass, as he would have learned that skill in the Army. Tr. 382. Apparently unaware that ALSC was contending that Mahle did not know directions, he proffered that at the Mission school “we all knew north, south, east and west, you know. . . . We knew Long Bay, and we, we pretty much knew the country . . . as every kid in Skagway did.” Tr. 382.

Desiree Welch testified as to her various positions as employee of the Tlingit Council, most recently regarding review of Native allotment applications. Tr. 388-89. She testified that the Tlingit Council file contained no evidence that Mahle or his heirs had relinquished any part of Parcel A. Tr. 399. She testified she had never been involved with either allotment amendments or relinquishments. Tr. 397, 401.

Grenelda Edmiston also worked for the Tlingit Council and ALSC and testified as to her work involving Native allotments. She testified as to her participation in the 1987 field examination of Parcel A. As best we can ascertain, this was her first field examination, and she had little recollection of much except getting separated from her group. She did not remember if Fred Mahle was there, but “he may have been.” Tr. 436. She remembered being on a trail “a few times,” but she was not sure whether it was Skyline Trail. Tr. 437-38. She saw consistent marks on trees on the field examination. Tr. 440. Between transcript pages 441-45, she responded variously: “I wasn’t that familiar.” “[I]t could have been used quite a bit. It could have just been that it was worn by use from people. I don’t know if it was actually maintained.” “I don’t know how far off.” “I don’t remember which one it was. I wasn’t aware of them, and I just can’t remember exactly how far off the road it was.”

“You know, we walked on a couple of different, seemed like a couple of different trails.” “I’m not a geologist or anything else. I can’t say how old they were.” “I’m trying to picture it in my mind. It doesn’t seem like it was that far.” “You know, I just really don’t recall for sure.” “Well, it was, let’s see, quite, quite a ways. I don’t know for sure because we, we didn’t want to go into any . . . gullies.” “I really don’t recall how far they went.” See Tr. 464 (“I don’t know that [the trail] did [have a name]. I think part of it, I mean, I think we went up and it was a main trail that went for, you know, a few miles. . . . One of the, you know, one of the trails. But that a, I’ve learned that later, I’ve, I didn’t know it at the time.”); Tr. 489 (“I’m not positive but that’s my recollection. . . . I don’t know exactly.”) Finally, she stated that they found rusted metal stove parts, it began to rain, and she returned to the car.

The thrust of Edmiston’s testimony was to undermine the 1972 field examination of Parcel A. Ex. 19. Edmiston claimed to have met Bronzyk in 1994 while attending an unrelated hearing on behalf of the Tlingit Council. She testified that Bronzyk described at the hearing his drinking with Native allotment applicants. The record contains no transcript of such a hearing. She stated:

A. . . . I think I also talked with him about Harlan Mahle.

Q. And what, do you remember what your discussion with him about Mr. Mahle, specifically what the discussion was about?

A. About drinking with him. . . . That he did buy Mr. Mahle alcohol, and that he was drinking that, drinking with Mis-, that, you know, he liked to be friendly with the Allottees . . . Before the field exam evidence come up. And it was the day before the field exam.

Tr. 452-53. Edmiston testified that she had “heard before that [Bronzyk] would, that sometimes he would drink with people, or that he wouldn’t conduct field exams; that maybe they like to fly over, over and just look at it, and he wouldn’t actually go on the land.” Tr. 454. We understand Edmiston to have contended that it was Bronzyk who “told Mr. Mahle that he had 40 acres of land.” Tr. 454 (Sanders’ question to which Edmiston responded “yes”). Edmiston could not remember whether the hearing at which she met Bronzyk was an *Aguilar* hearing, or who the hearing officer was. Tr. 455. She concluded, in response to being questioned whether Bronzyk had been on the land: “I don’t know if he actually went on it, and especially I wouldn’t think that he went, went on the upper side of the road.” Tr. 456. Finally, Edmiston testified as to her own February 10, 1994, letter from the Tlingit Council to BLM requesting adjudication on behalf of the Heirs of an 80-acre parcel. Ex. 49.

On cross-examination, Edmiston testified that she did not know who marked the trees she saw in 1987 or who owned the metal stove, that she did not recall

seeing survey markers, and that she “can’t remember particularly what description there was” of Parcel A in the Mahle file. Tr. 474. Though she wrote a letter demanding 80 acres (Ex. 49), she could not remember Mahle’s handwritten application. Tr. 475 (“it’s been a long time since I saw it.” “I remember a line or two on it, but I don’t recall what they were.”); *see also* Tr. 476 (“I don’t remember if it was, in what file it was in, or if it was from talking with Mr. Fleurant . . . I can’t remember for sure, but that he intended to, to have 80 acres. I remember that.”)

Jacquot testified that he moved to Skagway in the late 1940s at approximately 10-11 years of age, and became a close friend of Andrew Mahle’s. Tr. 492-95. He was unsure whether Harlan was there or had gone to the Army by then. Tr. 496. Jacquot described the establishment of a dump and rifle range in the late 1960s or early 1970s. *See* Ex. 16 (writing showing dump and rifle range within City park). His point was that Harlan Mahle knew the location of the park by 1971, and would not have claimed land there.⁴⁰ He testified that he had an allotment and that Bronzyk had scheduled a field examination, but did not show up. Tr. 510. He speculated that Bronzyk “was in the bar scene” Tr. 511. He testified as to having seen the Mahle brothers over in Dyea, where his own allotment was located, and as to having seen Harlan’s parcel with a “sauna down on part of USS or 5107” and as to having later purchased that parcel. Tr. 520-23. Asked by the Heirs’ counsel whether he hunted with Harlan, he stated that Andrew told him things about Harlan’s hunting, but that “I’ve never gone up there with Harlan.” Tr. 525.

When counsel tried to pin Jacquot down about Harlan Mahle’s use of the disputed land, he would not commit. Asked whether Harlan went to the area above the road, he said “Aah, now you’re going to get me to guess.” Tr. 525. “You know, it was, say, [sic] any specific land. But, you know, I’d say he definitely used land on A-B Mountain. There was other places. It would all depend on what they were doing.” Tr. 530. He told a story about burying a dead dog, and asking Fred Mahle if he could park his truck on Harlan’s land. Shown Ex. 52 and asked to point out where Harlan used the land, the best the Heirs’ counsel achieved was Jacquot’s statement that he once saw Harlan and Fred “flagging” “probably could have been ‘65, ‘66.” Tr. 531-32. As to earlier times he stated, “I don’t really know who was trapping” in Dyea but understood that “Sullivan and Harlan did some trapping.” Tr. 536. Asked by the Heirs’ counsel whether Mahle used the land shown on Ex. 16, he demurred:

A. Well, that’s, that’s a very difficult, difficult question for me because, see, there was an interim period there when I was gone. You know, I seen them there when him and Fred was blazing.

⁴⁰ Jacquot’s placement of the dump and rifle range, however, is southeast of Selmer’s property and east of the location Nudelman conceded would properly depict the handwritten description of Parcel A on Ex. 17.

And I know that, you know, as growing up he was quite an, an accomplished outdoors person or woodsman, however you want, you want to describe him. So, and I know he was down in there where I testified earlier, that he had cabin.

So, you know, I'd gone down to there on a couple of occasions.

Q. But did you have an understanding from Andrew about how often Harlan used this land, or from Fred?

A. Not specifically, no.

Tr. 541. His logic was that if people did not cut down trees, they must know the land belonged to somebody. Jacquot reasoned that there was a location that had trees; therefore it could have belonged to Harlan. Tr. 541-42. This testimony was at best confused and, at every point counsel attempted to get a specific answer from Jacquot regarding Harlan, he would demur again: "Not really. My best guess would be either Fred or Harlan, you know, or Andy. Anybody, you know." Tr. 543.

On cross-examination by Sleater, Jacquot placed a red X on the spot where he described parking on Mahle land. Tr. 544. In red, someone has written "pickup" on Ex. 16 south of the Skagway Dyea Road, in the "additional lands" area. A red X appears on the northern boundary of the certificated lands. Elsewhere, a blue circle appears next to the word "dog." Even if we could sort out what Jacquot meant to mark, on cross-examination, he denied having ever been with Mahle on any land north of the land certificated to the Heirs (which he has subsequently purchased):

A. I testified that I'd been down to his cabin on, on a couple of occasions with him. And I don't think I was above any of the land, if that's what your question is.

Q. "Above the property," are you talking about that you were never above the property they owned today?

A. I've been above it --

Q. Okay.

A. But not with Mr. Mahle.

Q. Okay.

A. At least not Harlan.

Tr. 548-49. He testified that in the 1950s and 1960s the park boundaries were not marked; thus, everyone used Smuggler's Cove and "the City subsequently, they, they blocked off and put a cape up over it so people wouldn't go down there." Tr. 550.

Jerry Mahle testified that the first time he saw the handwritten application was in the early 1990s. Tr. 557. He testified as to having visited land with Nudelman in 1997 and confirmed Nudelman's stories; he referred to the land they walked as "Dad's land," "Dad's boundaries," "Dad's property." Tr. 574-629. He testified that Harlan worked on roads for the City as a grader operator, and that the Mahles all knew the City park boundaries well. Tr. 632. He testified to berry-picking and grouse hunting with his father, when he was 3-4 years of age. Tr. 635. The family would go to Skyline Trail, as did most of the people in Skagway (Tr. 639, 642), and then veer off towards his "father's land." He testified that the "whole base [of AB Mountain] was just like a huge berry deal," and the people of Skagway all picked there. Tr. 643. He depicted in sky blue a creek bed on Ex. 16 and stated that "[t]here was a guy that built a house out there" and they had to "kick him off." Tr. 645-47.⁴¹ He testified that he did not trap with his father because it was inconvenient for Harlan to take the children. Tr. 650-51. His mother told him Harlan kept a trapping shed. Tr. 654. He testified that he had never been to the shed, *id.*, but nonetheless marked it on Ex. 16 in Lot 4.⁴² He testified that the shed was not visible, and that his father meant to hide his traps in it. Tr. 672. He drew the Selmers' cabin to the east of Lot 38 and Lot 39, though it was adjudicated to be within Lot 38 at the *Aguilar* proceeding Jerry attended. He testified that they cut wood on his father's property, and that the land above the road was generally recognized as belonging to his father. Tr. 662.

Jerry testified that Harlan started drinking in the late 1960s, and that after 1968 or 1969, Harlan would go to his land "but it would be only for, you know, to drink or special occasions." He testified that the divorce "destroyed" Harlan, and his land use dropped after that. Tr. 666-67. As to why his father might have written the description he wrote, he speculated that his father was "in a hurry to get it done" and "just scribbled as quick as he could." Tr. 683. He testified that he heard from his mother that Bronzyk got drunk. Tr. 684.

Jerry was not cooperative on cross-examination. When Sleater asked whether the Mahles received certification of the part of Parcel A including the sauna and cabin, Jerry repeatedly refused to answer, finally asserting "Ma'am, I know what you're trying to do." "[Y]ou can't piecemeal this. This is not right." Tr. 695-96. When Bockmon asked whether surveyors were on lands above the Road because the

⁴¹ This may or may not be the same as the Jacobson cabin on Brower's map (Ex. 36); it is in a different location than depicted by Brower. See Ex. 16.

⁴² Jerry claims to have marked the shed on Ex. 15, but we do not find that marking.

City had been conveyed lands subject to USS 5110, Jerry challenged: “How can you go up there? How can you do that when my dad was up there even way before you were a state, way before the City was even up there, and now you’re saying you want this property? That’s not right. There’s nothing fair in that?” Tr. 701-02. Mahle apparently became upset then, and again during Baker’s attempted cross. Counsel attempted unsuccessfully on cross-examination to get Jerry to describe marks he had placed on exhibits on direct examination. Tr. 714. On redirect, a calmed Jerry testified that he was “Operational Supervisor at Juneau International Airport.”

Finally, in her 1999 telephonic deposition (Exs. D and 55, Telephonic Deposition Transcript (TD)), Billie Barry testified that she started dating Harlan in the summer of 1953.⁴³ They would pick berries and check traps “on the Point.” TD 14. She stated that this included “Smuggler’s Cove,” and land “above the road and below the road.” *Id.* She testified that from Dyea Road “there’s a little turn off down to Smuggler’s Cove and “if you keep going on that road you’ll come to the Point.” TD 16.⁴⁴ In 1953, Harlan took her to a place near the fork in the road, where they parked along the road and walked up a steep trail about two city blocks while he checked traps and she picked berries. TD 25. She witnessed a shed full of traps above the road, about “eight-by-eight.” TD 27. It is unclear how far up the trail the shed was, but neither the trail to it nor the shack was visible from the road. TD 97. She went to the shed only once, and did not know whether Harlan continued to use it, but assumed so. TD 29-30. It was overgrown with moss and bushes. TD 55. She said the traps were off the trail but she never went further than two city blocks. After they married in 1954, they went to the traps, at which time Harlan blazed the trail with a hatchet, spray paint and a plastic-type wrap. TD 31. She stated that this happened when they went over to Dyea, which would be a reference to Parcel B. *Id.* Then she stated the trap lines were “by the Point.” TD 32. She testified that over the years, she joined Harlan only three or four times. TD 33.⁴⁵

Having testified earlier as to Harlan’s trapping above the road, she then

⁴³ Barry testified that Harlan returned from the Army in 1952, but could not recall a time of year or whether he visited his mother in Kodiak before returning to Skagway. She was asked to submit discharge papers; we find none in the record.

⁴⁴ Smuggler’s Cove is not off Dyea Road; another road or trail from Dyea Road must be taken to get there. Exs. 15-18. To the extent the Heirs interpret her testimony as meaning that “the Point” is all of the area between Long Bay and the Skagway River (TD 23), such a construction does not comport with the testimony quoted in the text, that they went from Dyea Road to Smuggler’s Cove, continuing down to “the Point.”

⁴⁵ Regarding the Selmer cabin, Billie stated that “everybody goes over there to drink” and that the “people of Skagway” used it. TD 36-37. She said that “Ockey’s” cabin was on the water side of the road, as opposed to the mountain side. TD 79.

testified that the trap line “ran off either side of the trail.” TD 85. We do not know whether she meant this trail to refer to Skyline Trail, or the short trail to the shack. She claimed that a handful of other people trapped there on a regular basis and that trappers knew where others’ traps were and “you didn’t set yours there.” TD 34.

Barry both confirmed and denied that Harlan had a cabin below the road in 1953. TD 38. She stated that Harlan had a cabin on the upside of the road, but she was unaware of any cabin on the downside. TD 83. She then testified that she never went down to the cabin, but she did have an understanding that there “was an older cabin there.” TD 83. She seemed to contradict herself on these points. TD 83-84 (“you never went down to that cabin? A. No. . . . [I]t just looked old to me . . . where Doug had built his new cabin, that that other little cabin was there.” Harlan “would stay at the cabin.”). Later she claimed that in 1953 she saw a cabin below the road that Harlan said was his. TD 94. This may have been the trap shed she was referring to because she claimed it was “six-by-six, something like that. Eight-by-eight.” TD 95. This is the same size as the shack, which she had testified was too small to sleep in. TD 84. It looked like army barracks material. TD 96.

She testified that Harlan could get to his land by the “swinging bridge over the river” and “you’d be at Smuggler’s Cove, once you got over there.” TD 39. Although Smuggler’s Cove is within the City park, she persisted in testifying that this is where they went. When the Heirs’ counsel asked whether she would use the trail across the swinging bridge to go “up” to the trapping place, she responded: “Yeah, sometimes. And we would picnic in Smuggler’s Cove. That was quite a – quite a place. They had yearly dances up there and everything at Smuggler’s Cove.” TD 42.

Barry was shown a map attached to her deposition as Exhibit 3, again identifying in green and yellow the disputed areas, and in white the City park. While the transcript reveals that attorneys attempted to assist her in pinpointing locations, she could not do so. For pages, the Heirs’ counsel persisted, but she answered: “I can’t tell, Vance. I really can’t.” TD 45; *see also* 47 (“I just – I can’t tell you.”).

Q. And there’s another red dotted line above that. See that?

A. That’s a trail.

Q. All right. Would Mr. Mahle – would – where you parked the car, you talked about earlier, would that be before that trail or after that trail, on the Dyea road?

A. Right close to that trail.

Q. Okay.

A. I believe that's a trail off (Unintelligible.)

Q. Oh.

A. Is it not?

Q. I have no – I don't know, Ma'am. (Reporter requested clarification.)

THE WITNESS: See, I'm trying to make this out, too. I don't know what that is either.

(BY MR. SANDERS) Q. But you think it would be – would it be in the green or the –

Ms. Sleater: The white?

(BY MR. SANDERS) Q. The white or the green or the gray or the – There's a lot of colors here, and I'm – we're just trying to get a sense of where that would have been you were talking about, the trail that you went on.

A. Let's see. I would say maybe in the green or the white. I'm not sure.

Q. Okay. If you don't know, that's fine.

A. No, I don't know.

Q. You've put it pretty close.

A. I could go over there and show you, but I can't make heads or tails of this map, very well.

TD 48-49; *see also* 47 (“I really didn't pay that much attention”; “I can't tell you.”)

Billie testified that Harlan hunted for and brought home wolves, wolverine, lynx, goat, moose, rabbits, and grouse. He hunted goat “at Black Lake and up by AB Mountain.” TD 54. Asked as to how he began to trap and hunt, her testimony was consistent with other witnesses that “all the kids” did this: “You know, it was something to do. Skagway, with 700 people, there was really nothing much for kids to do there, you know.” TD 56. She said that the family ate some of the animals, but they did not eat fox, lynx, wolverine or wolves. Harlan gave pelts to a friend who made things to sell to the tourists; he did not sell the pelts. TD 57. She testified that there was a picture of Harlan at his shed, but she could not find it. TD 59.

Billie testified that she separated from Harlan twice for some months in 1956 and again in 1961. TD 76. After their 1968 divorce, Barry and Harlan remained in touch and he brought SEACAP or BIA papers to her in 1971, along with a map which “showed him where he could and couldn’t file.” TD 61. She testified that he wanted 160 acres, some in Dyea and some “here.” She stated that someone “flew up to make sure that Harlan had marked these trees and everything” and “he was drunk.” TD 63.⁴⁶ She stated that the 80-acre Parcel A was “on the Point” “up the road and down the road, toward the water and up the mountain.” TD 65. “Just the Point and Dyea, that’s all he mentioned.” She denied any involvement in drawing the sketch of Parcel A. “I couldn’t help him on the diagram, because I’m terrible when it comes to maps.” TD 88. She was unaware what he had drawn on the map, that he had put 1961 as his date of beginning use, and that he wrote that he had a garden. TD 90.

The City’s Case. The City objected at the hearing to the conduct of an *Aguilar* proceeding with respect to the additional lands added to what had previously been surveyed as Harlan’s 40-acre Parcel A. The City contended it was BLM’s burden first to decide whether the Heirs could amend the application. The City asserted that if BLM performed this legal obligation, no hearing could be held because no amendment was allowed, both because of the concept of finality and because amendment was prohibited by section 905(c) of ANILCA. The City did not object to a hearing as to the contested lands in Lots 3-5 and 42.

The City nonetheless presented evidence regarding all disputed lands, including the testimony of Irvin Fairbanks, Barbara Kalen, and Robert Ward. Fairbanks testified that he moved to Skagway with his family in 1946 at the age of 14, and came to know Harlan Mahle at the Catholic Mission School. Tr. 716-18. After Harlan went into the Army, Fairbanks went to college in Fairbanks, and Harlan would visit him there. Fairbanks testified that there were a number of people out trapping and hunting, not just the Mahles. Tr. 725.

Q. Did you ever hear anything that would lead you to believe that, that at that time, in the late 1940s, Harlan Mahle claimed any portion of the land out in the area we’re talking about on his own?

A. I don’t think so. The, the whole area out here was generally open to any and everybody that wanted to use it.

It was, you know, like myself, I, I used it. I think there was lots of people that use it out there. . . . I never really have heard of anybody,

⁴⁶ This testimony was vague; she stated that the alleged drunk person drank “before he got to our house.” In 1972, Harlan and Billie were not living at the same house. Later, she stated that the person arrived after the application was filed. TD 92-93.

anybody back in the 1940s laying any claim to any of that area.

Tr. 725-26. He testified that in the 1940s there was a bounty on coyotes, and that hides sold for \$30-35; this is why so many people were hunting. Tr. 727-28.

Yeatman's cross-examination was geared towards proving bias on the part of Fairbanks either against Natives generally, or against allotments in his later position on the City Council. In response to her questions, Fairbanks marked locations on Ex. 15 where he hunted. We cannot verify the locations of his "Xs," though Yeatman asserted that an X east of the Skyline Trail is his. Ex. 15 contains an X east of what is marked as "Trail," and Fairbanks testified that Skyline Trail leaves from the Dyea Road just a little beyond a Y in the road. Tr. 722. Though the Heirs' position was that the Mahles hunted all over north of the road, Yeatman now queried: "You can't just wander around shooting anywhere, can you?" Tr. 736. He answered: "We did in those days because there, there was no place up there. . . . There was no, there was no houses, no population there." Tr. 737.

Kalen testified that there were homesteaders at the base of AB Mountain in the 1940s and 1950s. Tr. 740. She said there were 40-acre homesteads and 5-acre homesites and "[a]ll you had to do was live on it." Tr. 741. She testified that she lived out near Dyea in 1946, at which time "there was no road or trail to our place until we built a road." Tr. 742. She stated that the "pull-out" area along the Skagway-Dyea Road was not Harlan's; rather, she called it "Governor's Point" and provided a brief history of how it came to be as the City and State developed the road. Tr. 769-70. She asserted that "the Point" was Yakutania Point and "everybody used it," that she regularly used both sides of Skyline Trail in the 1940s and 1950s for picnicking and to pick berries and pine seeds. Tr. 746-47. She testified that there was a shed beside Skyline Trail. Tr. 748. She testified that Harlan and her spouse were drinking buddies, that Harlan never discussed land claims and wasn't interested in them "until statehood," and never mentioned a "special place he went to." Tr. 749, 753. She testified that "everyone" knew where the park was. Tr. 763.

Bob Ward testified as City Manager for Skagway. He testified that a landfill was put in after 1988 and around 1992 in a public process, but that there had been no objections to it. Tr. 775, 785. This "landfill" is printed on Ex. 16 within the pink additional land area now claimed by the Heirs. With respect to the other dump drawn in by Jacquot, Ward stated that it was close to a pet cemetery to the east. He drew on Ex. 16 the location of the cemetery, with the word "pet" near the footbridge over the Skagway River east of any party's siting of Parcel A. Tr. 783.

The Government's Rebuttal Case. After the City presented its case, the Government recalled Lewis to refute Nudelman's suggestion that the "rock mound" was Harlan's. Through his testimony, the Government entered Ex. 62, which

comprises survey notes for USS 3312. Those notes depict the surveyors' placement of a post. Tr. 792. Lewis correctly noted that the picture of a rock mound with a post (Ex. BB), entered into evidence by Nudelman, contains a BLM marker. Tr. 795. He explained that, in the normal course, the surveyor would place the post, and then remove it and replace it with a more permanent monument. Tr. 795.

Contestee's Surrebutal. Finally, the contestees submitted the telephonic testimony of Patrick Boss, who lived in Skagway from 1956-74. He testified that he "helped Harlan Mahle run some lines for the land he applied for" in 1969, 1970, or 1971. Tr. 827. He testified that he did this "up by the Dyea Point there on the left side of Smuggler's Cove and below the Dyea Road down to the Bay." Tr. 828. He testified that there was no trail down to the water. Tr. 829. He stated that they continued above the road on the left side of Skyline Trail, 50-100 feet. Tr. 832. He stated that along the Bay they cut off the trees, but above the road, they chipped off the bark. Tr. 832. He said they marked a number of trees and headed left toward the Bay. He testified that he set traps for lynx above the road with Mahle, but that Mahle brought traps with him. Tr. 833.

ALJ Decision. Judge Sweitzer issued his decision on April 15, 2004. After considering all evidence, motions and briefs, he rejected the Heirs' claim to the contested land in Lots 3-5 and 42. He rejected their claim to any additional lands in Parcel A in USS 5110 north of the contested lands. ALJ Decision at 3. He denied their motion to dismiss, concluding that legislative approval was not in order under section 905(a) of ANILCA because the State had validly selected all of the lands at issue in 1961 prior to the filing of Harlan's application in 1971. He concluded that the original application plainly cannot be read to encompass the application as now described by the Heirs and concluded that the application did not cover those lands, as the only way to change the application to include the parcel now described was to amend it, and the deadline for amending the application expired long ago. Judge Sweitzer rejected the Heirs' contention that use and occupancy requirements did not apply to Harlan Mahle because his use and occupancy predated the 1956 amendment of the 1906 Act. Judge Sweitzer explained that even before 1956, to assert a preference right, the date of the beginning of occupancy had to be asserted and its continuous nature stated. Decision at 20 (citations omitted). He rejected the Heirs' argument that the Government did not present a prima facie case.

With respect to the evidence of use and occupancy he concluded:

Contestees presented numerous witnesses who testified as to the Applicant's use and occupancy of the land both east and west of the Skagway-Dyea Road, extending a substantial distance north of the contested land. However, nearly all of the testimony suffered from the

same deficiency that plagued the documentation of record: it referred to use and occupancy of Contestees' location generally, failing to pinpoint that the use and occupancy occurred within the contested land.

Evidence pinpointing activity within the contested land was limited to testimony from Jerry Mahle and Mrs. Barry. Jerry testified regarding the family's activities from the late 1950's to the mid-1960's (Tr. 649). He stated his father and family picked blueberries three or four times per month in the late summer on Lot 3, [USS] 5110, and Lot 42, Tract E, [USS] 3312, and that they wore a trail from the Skagway-Dyea Road through Lot 3 down to Long Bay (Tr. 633, 639-50; Ex. 16). His father's trapping activities extended into Lot 3 and he had a shed for storing his trapping equipment on Lot 4, [USS] 5110 (Tr. 587, 607-08, 655-56; Ex. 16). Others confirmed the existence and general location of the shed (Tr. 338-39, 343, 347; Ex. D, pp. 24-28). In particular, Mrs. Barry saw the shed in the summer of 1953 and described it as old and padlocked by the Applicant (Ex. D, pp. 28, 35).

None of this evidence describes use or occupancy prior to the crucial withdrawal date of October 21, 1952. Evidence of use or occupancy prior to that date is not specific as to location. George Logan, born in 1941, did testify that the Applicant was trapping "on the Point" from 1947 to 1950 (*see e.g.* Tr. 305, 310-12) and it might be assumed that [Mahle] used the same trap lines and shed which he used in 1953 and thereafter. However, Mr. Logan did not mention use of the shed and, in fact, stated that the Applicant brought trapping implements with him, packing the supplies in and out (Tr. 312). He also stated that much of his trapping activity occurred along Skagway River which lies south of the contested land (Tr. 312). Consequently, it may be that Applicant did not begin using the shed and trap lines further north in the contested land until 1953, after his return from military service in the Korean War.

While the Board has recognized that trapping activity can serve as an adequate basis for the grant of a Native allotment if that activity is substantially and potentially exclusive of others and if it began prior to the date of withdrawal of the land in question, . . . the trapping activity in this case does not meet the latter criterion. Contestees have not shown that the Applicant's use of the shed and other trapping activities within the contested land began prior to the October 21, 1952, withdrawal date. Therefore, Contestees have failed to show that qualifying use or occupancy of the contested land was initiated prior to the withdrawal date.

ALJ Decision at 22-23, *citing Heirs of Alec Dolchok*, 140 IBLA 45, 53-54 (1997).

ARGUMENTS ON APPEAL

The Heirs submitted a timely notice of appeal, alleging that the ALJ committed three errors: (1) Judge Sweitzer erred in denying the Heirs' motion for legislative approval of Parcel A because, they argue, it was excluded from the 1974 TA decision granting the State selection. (2) Alternatively, Judge Sweitzer erred in failing to find that Harlan Mahle used all of Parcel A, and individual contested lots, continuously for more than 5 years potentially exclusive of others prior to the withdrawal of the land. (3) The ALJ exceeded his authority by deciding the exact location of Parcel A when BLM has not yet made that determination. Alternatively, the Heirs assert that he erred by finding that the "eliminated 40 acre portion of Parcel A is not located north of lots 3, 4, 5 and 42" and within USS 5110. Statement of Reasons (SOR) at 70.

The Heirs ask us to reverse Judge Sweitzer's decision and declare Parcel A to be legislatively approved. Conceding the procedural difficulty in our doing so, given that an 80-acre Parcel A has never been defined, they ask only for a ruling that Parcel A is "subject to legislative approval" and for a remand to BLM to determine the precise boundaries of Parcel A. Thus, they ask us to presume that (a) Harlan Mahle intended to apply for 80 acres in Parcel A and never relinquished any portion of that acreage; and (b) the City, State, and BLM are wrong to contend that the Heirs are trying to amend Parcel A to add acreage to the 40-acre parcel previously addressed and plotted on plats of survey. Their argument regarding legislative approval assumes that resolution of these procedural hurdles falls in the Heirs' favor.

Alternatively, the Heirs ask the Board to reverse Judge Sweitzer's conclusion that Harlan Mahle's use of "all of Parcel A" was not qualifying use and occupancy, and contend that 43 C.F.R. § 2561.0-8 requires approval of the entire parcel, and that Judge Sweitzer erred in requiring them to prove Harlan's use of individual portions of Parcel A. They ask us to find that Mahle "used lots 3, 4, 5, 42 and the eliminated 40 acres in a qualifying manner." They aver that the "Board should either approve the remaining portions of Parcel A or remand to the BLM with instructions to determine the proper location of the eliminated 40 acres and then approve the entire remaining portions of Parcel A." SOR at 77.

With respect to the Heirs' request for relief, they argue that Judge Sweitzer allegedly "exceeded his authority" to rule on the additional lands they seek. In the event we do not agree that Parcel A was legislatively approved or that they proved use or occupancy, as we understand it, they nonetheless want the Board to reverse Judge Sweitzer because he did not have authority to make any decision with respect to the "eliminated 40-acre portion of Parcel A." SOR at 68. Accordingly, they ask us to remand "to BLM on the issue of the eliminated 40-acre portion of Parcel A with

instructions to make a determination as to its proper location.” *Id.* at 70. They claim entitlement to further adjudication after this ruling by IBLA (either a contest or an *Aguilar* proceeding) of the defined 80-acre parcel. Presumably, they seek this relief only in the event we might otherwise agree with Judge Sweitzer.

The City supports Judge Sweitzer’s rulings in all respects, as does BLM. The State submits its post-hearing brief and joins in the City’s Answer. The State avers that the Heirs’ effort to add 58 (or 40) acres to Parcel A is an untimely amendment of the original application. State Answer at 4-10. BLM points out that the portion of the case for the additional lands considered pursuant to the *Aguilar* Stipulated Procedures is final for the Department, and not subject to IBLA review. BLM Answer at 3 n.2. BLM contends, however, that if the Board agrees with the ALJ decision that there is insufficient evidence of qualifying use and occupancy, it is not necessary to make any determination regarding whether the United States owns any of the land. *Id.* at 3. BLM states that the procedural requirements of a contest and *Aguilar* hearing “were both satisfied and when the application is denied, the title to the land will be in the State unless it has been conveyed to the City of Skagway.” *Id.* BLM objects to the Heirs’ objections to proceeding to hearing before deciding the precise location of an alleged additional 40-acres, because BLM claims that the Heirs have obtained all the due process to which they are entitled and “this is not a[n] issue which should overturn the decision that was issued at the end of a long and involved evidentiary hearing.” *Id.* at 5. BLM points out that the Heirs’ request would simply duplicate procedure given and provide more process to which they are not entitled. BLM states: “BLM would issue a decision denying the heirs’ claim that the application encompassed land to the north of the area discussed in *City of Skagway*. This position can be seen from a reading of the contest Complaint. The Heirs’ attorney indicated that they would appeal” BLM Answer at 4 n.3. BLM asserts that even if the Heirs were to prevail, this would lead only to the result the Heirs have already achieved, which is a contest or *Aguilar* proceeding with fewer available witnesses. Accordingly, BLM opposes any suggestion of a remand prior to a ruling by the Board affirming Judge Sweitzer. *Id.* at 4-5.

ANALYSIS

Qualifying Use or Occupancy. We agree with BLM that the procedural issues (except legislative approval) fall by the wayside if we agree with Judge Sweitzer that the evidence is insufficient to demonstrate Harlan’s qualifying use and occupancy. We have therefore endeavored to present all evidence of record conceivably relevant to that topic because the question is hotly contested, especially by Jerry Mahle.

The following story emerges. Harlan Mahle was a trapper, a hunter, and a fisherman. He was an avid outdoorsman and sportsman. He was intimately familiar with a vast landscape outside the City of Skagway. He was competent at his

activities, and until his turn of health, spent decades from childhood in the 1940s to the 1960s, roaming a wide swath of land from Skagway to Dyea, Black Lake to AB Mountain to Yakutania Point. Harlan began these activities as a teenager at the Mission, and “all the kids” and “all the school” joined him. The record indicates that Father Gallant took his students out into the country including Dyea Valley. Harlan recreated, according to his sons and the record, with dozens of people. He was a soldier, a city employee, and a road crew worker. We will not patronize him to presume that he did not understand writing, directions, or his own compass legend, in the face of (a) testimony that the Mission students knew their directions, (b) an application with a drawing consistent with plat maps and a compass legend, and (c) decades of travels over the greater Skagway environs. He prepared his application with enough deliberation, rather than hurried scribbling, to consult with ex-wife Billie for her input. While Barry helped him with the initial SEACAP or BIA papers, she was ultimately unaware of the most basic elements of his filed application, including his use date, sketch map, and claimed activities. In later years, Harlan manifested alcoholism. He continued to use the cabin on land certificated to the Heirs in Lot 39 until his death. Billie and Jerry testified that he stopped using the land in later years of his life for much besides partying and drinking. He died at 47.

[1] With that background, we must decide whether the evidence of record, laboriously recounted, shows that he met the requirements of the 1906 Act as to specific lands at issue. We address the topic generally, because the evidence was rarely broken down by any particular witness into a discussion of “contested lands” versus “additional lands,” recognizing that we do not have jurisdiction to review a decision of the Department with respect to the “additional lands” under paragraph 6 of the *Aguilar Stipulated Proceures*. *Wassilie Roberts*, 163 IBLA 1, 4 (2000), citing *Order, Aguilar v. United States*, No. A76-271 (D. Alaska Feb. 9, 1983), at 3-4. We nonetheless consider the evidence as a whole because that is how it was presented.

The term *substantially continuous use and occupancy* contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

43 C.F.R. § 2561.0-5(a). Separate components of this rule must be shown: “substantial use and occupancy,” “potentially exclusive use,” and “continuity of use.” *United States v. Estabrook*, 95 IBLA at 45; *Linda L. Walker*, 23 IBLA 299 (1976).

We recently described the exclusivity requirement in *United States v. Heirs of Pat P. Pestrikoff*, 167 IBLA 361, 379 (2006).

In order to demonstrate that the land was used and occupied to the potential exclusion of others, prior to the filing of a Native allotment application, it must be shown that others knew or should have known that the applicant asserted a superior right to the land because he actually used or occupied the land and/or left behind physical evidence of such use or occupancy, sufficient to put others on notice of the assertion of such a right, or because others acknowledged that assertion in some way. . . .

(Citations omitted). Use and occupancy which leaves no actual physical evidence of use can be sufficient to establish entitlement to an allotment, but the applicant must demonstrate that use was substantial and potentially exclusive of others. *United States v. Heirs of David F. Berry*, 127 IBLA 196, 207-08 (1993), citing *Angeline Galbraith (On Reconsideration)*, 105 IBLA 333 (1988). In *United States v. Heirs of Jake Yaquam*, 139 IBLA 376, 384 (1997), we held that an applicant’s “use must be shown to have been potentially exclusive of others, meaning that his use has (or should have) resulted in a public awareness and acknowledgment of his superior right to the land, even in circumstances where others used it.” “[A] claimant must show that the nature of the use was such that under normal circumstances, any person on the land knew or should have known it was subject to a prior claim.” *Angeline Galbraith*, 97 IBLA 132, 169, 94 I.D. 151, 171 (1987).

Turning to the evidence of record, the land was withdrawn from appropriation by PLO 868 in 1952 and thereafter by State selection. Thus, the evidence must show that Harlan’s initiation of use and occupancy predated the withdrawal and, hence, his departure from Skagway for the Army in 1950 at which point he was 18 or 19 years old. Excluding from our holding any finding regarding Parcel B in Dyea Valley or the 12.62 acres already patented to the Heirs as Parcel A, we find no record evidence of substantial use and occupancy “potentially exclusive of others” before 1953.⁴⁷

⁴⁷ We do not seriously consider the Heirs’ suggestion that we reverse the ALJ’s holding that the Government presented a prima facie case. This Board’s 1996 decision in *City of Skagway* held that the evidence of record in existence at that time contained insufficient evidence of Harlan’s use and occupancy. In *United States v. Angeline Galbraith*, 134 IBLA 75, 102 I.D. 75 (1995), we stated that “inasmuch as the Board expressly found that the facts of record failed to establish . . . the requisite use and occupancy of lot 5, admission of the case record at the hearing, without more, would necessarily establish a prima facie case” 134 IBLA at 101-103. All that is left for us to decide is whether the information of record, submitted to Judge Sweitzer as the case file in Ex. 1, undermined that prima facie case. What was added in support of the Heirs’ position was the 1999 telephonic deposition of Billy Barry (Ex. D, 55), the 2000 affidavits (Exs. 56-61), and the 1995 and 1997 affidavits of

(continued...)

To the contrary, having examined the affidavits and testimony, it is clear to us that Harlan was one of many young people who used a large area near Skagway for trapping, hunting, fishing, and sporting activities. Prior to the Heirs' attempt to obtain the contested lands and the additional lands, the record displays decades of effort on their part to obtain Harlan's Parcels A and B. Not once, as we pointed out in *City of Skagway*, did any witness aver that Harlan used any lands outside those patented 12.62 acres or the City park or outside those patented as Parcel B. Rather, during the early decades, witnesses testified that Harlan used lands in Dyea Valley and near Yakutania Point. No one contended that Harlan's use was north of the road; and even the 1985 Glenda Choate interviews revealed very little that was specific about Harlan's use. At the 1987 field examination, Jerry and Fred participated, fully aware that they were showing the field examiner the land Harlan used. They showed her the cabin, sauna, and cove on lands within the 12.62 acres, and denied that Harlan ever claimed to use land west (above) the road. Ex. 35. Later, provided yet another opportunity to verify Harlan's use, Doug claimed to have done "all the grunt work" for Harlan in blazing the "boundaries [Harlan] believed this allotment at the point to be." Ex. 40, July 10, 1988, Affidavit of Doug Mahle at 2. Doug's July 6, 1988, affidavit repeated that "the survey at present is what Harlan used and intended to apply for." Fred's July 11, 1988, affidavit agreed that the survey reflected Harlan's "original intended location." These witnesses have never refuted their affidavits, which purported to be definitive at the time.

It is only after Jerry began to pursue the additional lands that the Heirs attempted to find witnesses to expand the boundaries beyond those described in material submitted between 1977 and 1990. We accept these statements as true to the extent they verify Harlan's sporting activities through a wide region. But they do not support use at a qualifying level under the 1906 Act on any particular lands beyond those already conveyed. The testimony of witnesses Logan, Reddekopp, and Morreno all discussed common use of lands by "all the kids," "as a school," escorted by adults in broad areas far afield up to AB Mountain and elsewhere beyond the land in question. They denied knowing where Harlan might have engaged in independent use or that Harlan's use conveyed a superior right to land they testified was openly used by the residents of Skagway. Even Barry recognized that kids at the Mission went out together, asserting that there was little else for them to do, and that Harlan was "out all over." 1989 Tr. 46-47.

Obviously, Harlan could not have laid claim to the entire environs surrounding Skagway simply by conducting activities there. The testimony had to prove that at

⁴⁷ (...continued)

Nudelman and Jerry Mahle. Exs. 49, 52, M. For reasons we articulate below, we do not find that this evidence either refutes the prima facie case or undermines it. To avoid duplicating the discussion, we do not consider it in a separate burdens analysis.

some point, Harlan's use of the wider region coalesced into potentially exclusive use of a narrower one. But we find no evidence that this happened before, at the earliest, 1953. Instead, Feero testified (Ex. 31) that he got permits to trap in Dyea Valley where Harlan trapped; witnesses testified, consistent with other evidence of record, as to homesteaders in relevant locations, refuting the notion of exclusive use; Logan testified to such homesteaders in the Skyline trail area and the fact that trapping by homesteading families led to "confrontations" in later years. Logan testified that so many people hunted it sounded like a "war zone." Though Jerry contends that he and Nudelman later discovered trees in a line and that he was sure that these trees were marked by Harlan, Fred and Doug had first-hand knowledge of Harlan's marking his parcel in the 15 acres around the cabin on Lot 39 (Exs. J, L, and 40), and never asserted any such story consistent with Jerry's new find in 1997. Their testimony is consistent with the notion that Harlan marked boundaries that, after a period of Harlan's open use all over the region, comprised the area he began to use exclusively and for which he could reasonably anticipate that marking would constitute a superior claim. And they are entirely consistent with what Jerry and Doug said, in 1988, that Harlan told them.⁴⁸

The dozens of references in the record to berrypicking, even where tied to a particular location, compete with as many testimonials (even Jerry's) that the Mission students and town residents openly berry-picked together. While the record contains considerable evidence that Mahle engaged in trapping, even to the extent he did so on disputed lands, there was no testimony as to a particular location where there was "a public awareness and acknowledgment of his superior right to the land." At most, Jacquot testified to requesting permission from Fred to park on Harlan's land, but this testimony is at best vague and he nonetheless denied any personal knowledge of how Harlan used this land. Tr. 541. While Nudelman and Jerry testified as to finding a trap during their travels, neither could tie the trap to Harlan. We decline to find as fact that it belonged to Harlan in the face of multiple statements in the record that other people trapped in the same general area. In fact, at the 1989 *Aguilar* hearing, Brooke Selmer testified that Osborne had a "trapline up AB trail" and that others did as well. (1989 Tr. 57.) Even Barry asserted that a handful of trappers used the area and that their custom was to avoid each others' traps. TD 34.

⁴⁸ Nudelman conceded that he had no idea who had marked the trees, and even whether two of them were marked by humans (Ex. 52); he made no effort to verify whether the surveyors' marks he saw in 1997 might be consistent with marks on the only four trees he identified. In his 1989 testimony, Jerry asserted that trees on Selmer's property were marked consistently with his dad's trees. But Doug helped his father mark trees and provided no support for such a claim even while testifying at the same hearing. We find Jerry's hearing testimony regarding marks on trees he did not make no more persuasive than did Hearing Officer Carew in 1990. Ex. 46.

Thus, even if we could tie the evidence to any particular portion of the land at issue prior to the 1952 withdrawal, the description of Harlan's use is so entwined with the same activities by others in the same place that we have no basis for concluding that anyone, prior to 1953, presumed any land was "subject to a prior claim" by Harlan. The record documents many instances of other persons (one of the Sullivans, an unnamed person, and Jacobson) placing their own cabins or homesteads in the vicinity of the lands claimed by Jerry now. Others received hunting or trapping permits; the residents came out seemingly in force to hunt and berry-pick in the same places. See 1989 Tr. 59 (John Selmer stated that everybody used the area for hunting and fishing). Jerry testified that Harlan conducted his activities with 30 or so people. While it is reasonable for those laying claim to land to bring guests to it, there is some manner of use by a number of people with an applicant that crosses a threshold between showing they were invitees and showing that they engaged in independent, common use. We do not establish that line here, but conclude that the weight of testimony shows only that a large number of Skagway and Mission residents used the environs prior to 1953 and most were seemingly oblivious to the view, propounded 47 years later, that the land they were using outside of the 12.62 acres of land patented to the Heirs (and including Harlan's cabin, sauna, cove, and fishing dock) was claimed by Harlan Mahle.

The strongest evidence of Harlan's potentially exclusive use in any disputed area is the testimony regarding the trapping shed. But this same testimony defeats the requirement that a use be notorious enough that it evinces a superior right. "In the absence of use and occupancy that was open and notorious, the land would properly be considered vacant and unappropriated." *State of Alaska*, 133 IBLA 281, 288 (1995); *United States v. Angeline Galbraith*, 166 IBLA 84, 107 (2005). Every person who testified about the shed claimed it was hidden to avoid public notice. Tr. 672 (Jerry's testimony that it was not visible). They stated that it was not visible or noticeable, it was not marked, and "John Q. Citizen" would not know it was there when passing by. Tr. 347, 353 (Reddekopp); TD 97 (Barry).

Further, nothing in this record dates Harlan's use of the shed before 1953, when Billie and Harlan first dated. Reddekopp saw it in the mid-1960s. The Heirs' answer for this is that Barry described it as "old"; thus, they insist it must have been constructed before 1950 when Harlan left for the Army. SOR at 17. We would have several difficulties in reversing the ALJ based on this construction of events. First, it required him (or us) to supply factual evidence that the Heirs were not able to provide themselves. Second, from the earliest affidavits relating to Harlan's activities in constructing his cabin found on Lot 39, his brothers testified that he used material discarded from old, abandoned buildings. Fred described building the cabin "from wood that was abandoned from the U.S. Army Elliot Barracks and the old T. B. Sanit[arium]." Ex. L, 1984 Fred Mahle Affidavit. Barry stated that the shed looked like "Army barracks" material. Ex. D, TD 96. We cannot determine how long it

would take for a shack made out of abandoned U.S. Army barracks to look “old.” Nor can we guess whether such barrack boards would be covered with moss, or whether Harlan ensured a shack he was attempting to hide from view was in bush. Third, no evidence confirms that Harlan even built the shed; Barry testified that she did not ask Harlan if he did so because “I just took it for granted, because it was his. You know, he had marked it and padlocked it.” TD 35. Finally, other evidence refutes the notion that Harlan used the shed prior to 1953. Logan testified that he and Harlan trapped in the late 1940s in Dyea Valley and the “Point” south of Smuggler’s Cove, providing a reasonable explanation as to why this is true. He stated that Harlan constructed a “lean-to” in that location, but never saw anything above the road. Tr. 330-32. Further, he and Harlan “packed the supplies in and out.” Tr. 312.

The evidence also calls into question whether Harlan’s activities qualified as “evidence of traditional Native use.” *United States v. Estabrook*, 94 IBLA at 55. The activity must constitute use of a parcel for the applicant’s “livelihood and well-being and that of his family.” 43 C.F.R. § 2561.0-5(a). The Heirs did not ever submit evidence of Harlan’s traditional Native use. He was not local to the area, and instead initiated activities taught him at a Catholic Mission school in common with the other students there. We would not reject use learned at the school simply for that reason, if it was carried out for his own and his family’s livelihood. In fact, however, Harlan engaged in pursuits better categorized as recreation. Barry testified that he hunted or trapped fox, lynx, wolverine or wolves for sport, not for family subsistence or livelihood. He gave the pelts away. TD 57-59. Sport-hunting has not qualified as subsistence use consistent with 43 C.F.R. § 2561.0-5. The evidence of subsistence use is entwined with recreation; it is not up to the ALJ or this Board to verify the extent to which any particular lands were used for qualifying subsistence use or for something else. Likewise, evidence demonstrates that Harlan used his allotment even in the certificated 12.62 acres for partying and drinking and little else, after his divorce. The transcript of the 1989 *Aguilar* hearing focuses in large part on these topics. Most of the people discussing his use prior to the contest proceedings conceded that after Harlan moved to “Pumpkin Patch,” he worked in Skagway and his use dropped off. His brothers said only that he would return to his cabin on weekends. Exs. J and L, 1984 Affidavits of Andrew and Fred Mahle. Jerry testified that after the divorce “pretty much destroyed” Harlan, he began drinking more. Tr. 666-67. Thus, it is left to us to pinpoint a story of clear traditional Native use in a specific location pre-dating the withdrawal. Even if we were able to parse out the uses testified to, and determine where Harlan hunted or trapped animals for subsistence, the lack of focus on traditional use makes it impossible to verify whether his qualifying use and occupancy, for whatever time period, of any of the lands was anything but intermittent. 43 C.F.R. § 2561.0-5(a). Significantly, with regard to any particular land, it was Jerry, Doug and Fred who explained Harlan’s subsistence use of lands in USS 5107A and Lot 39 in 1987, and who stated then that they could not

prove more. Exs. 35-41; *see also* Ex. 39 (Doug more familiar with the land than Jerry).

Nor do we find a clear picture that the allegations in the record pertain to any particular location, as between the contested and additional lands. Jerry asserted that Harlan had a trail traveling through Lot 3, USS 5110, the narrow strip of land due north of USS 5107A, and he drew this trail on Exs. 15 and 16. Tr. 648. We find this assertion of a trail running the width of a narrow lot to be too convenient, in the absence of any other evidence of record suggesting its existence. In his 1988 affidavits, Jerry denied ever having been to the sauna, cove or dock on USS 5107A, or the trail between those sites and the Lot 39 cabin, until he went there to look at them with Brower on July 10, 1988. We find his claims now to know of a trail to the north that does not even lead to those use areas that Harlan created to be inherently self-serving and incredible. *Silas v. Babbitt*, 96 F.3d 355, 358 (9th Cir. 1996) (“One cannot create an issue of fact by simply contradicting one’s own previous statement”). In their SOR, the Heirs object to Judge Sweitzer’s placement of the shed on Lot 4, asserting a number of times that Barry and Boss testified as to the trail to the shed and the shed being located on Lot 42. SOR at 63-64. These SOR assertions seriously misrepresent the testimony of both Barry and Boss. Neither witness made any assertion about Lot 42 and, more disturbingly, Sanders attempted repeatedly to get Barry to place the shed on the map, and she repeatedly stated she could not. TD 40-49. Boss was never asked by counsel to identify any location. Tr. 827-end.⁴⁹

For all of the foregoing reasons, we sustain Judge Sweitzer’s conclusions about qualifying use or occupancy. The Heirs, however, claim that the ALJ improperly held the Heirs to a “standard akin to clea[r] and convincing.” Reply at 3. They correctly note that the contest should be rejected if their evidence prevails over the Government’s *prima facie* case by a “preponderance of the evidence,” which requires evidence sufficient to show that something is more likely than not. SOR at 49. The Heirs argue that “IBLA will uphold the granting of the allotment even if there is only

⁴⁹ The Heirs criticize the ALJ for failing to mention Boss’s testimony. We suspect his decision to avoid Boss’s testimony derives from the fact that its probative value was low. Not once in the 30-year record had anyone mentioned Boss. Yet, he claimed that he and Harlan marked lands down to the Bay, to Smuggler’s Cove, “by the Dyea Point,” and 50-100 feet up above the road on the left side of Skyline Trail. Tr. 827-832. While the Heirs may have proffered this testimony to support Jerry’s conclusion regarding the four trees he and Nudelman testified to, the story Boss presented regarding marking trees in City park locations does not square with evidence presented by any other witness. In the absence of corroborating evidence, even by Boss in identifying a location, we share Judge Sweitzer’s inability to place it in context with any other evidence. This is particularly true given that Boss’s comments undermined the contention that Harlan had a shed above the road. Tr. 833.

‘meager’ evidence of qualifying use.” Reply at 3, citing *United States v. Heirs of David Berry*, 127 IBLA at 210 (1993). The difficulty with the Heirs’ position is that the meager evidence they rely on does not convince us that it is more likely than not that Harlan used any particular land prior to the withdrawal for subsistence use in a manner potentially exclusive of others. They request that we infer use and occupancy prior to the withdrawal based on use and occupancy afterwards, in the face of conflicting evidence in the record. In *United States v. Galbraith*, 166 IBLA at 106, we reversed an ALJ for supplying evidence of use and occupancy that was not in the record. We will not reverse Judge Sweitzer now, and assert that he applied the wrong standard. Accordingly, we affirm his conclusions as to the contested lands, which is the only aspect of the use and occupancy issue within our jurisdiction.

[2] *Legislative Approval*. Having thus affirmed Judge Sweitzer with regard to the evidence of Harlan’s use and occupancy, the only way for the Heirs to obtain any further certification to a portion of Parcel A is to convince us that it should have been legislatively approved under ANILCA without adjudication of use or occupancy. The Heirs correctly note that the 1974 TA decision approving State selection A-061057 (Ex. U) excluded AA-6528 Parcel A. Because it was excluded from the TA, the Heirs reason that lands subject to Parcel A were never validly selected and section 905(a) of ANILCA requires legislative approval of an 80-acre parcel. They assert that the TA decision could not have conveyed that acreage to the State because the United States eschewed the authority to do so when it excluded Parcel A from the TA, and assert that “all of parcel A should have been legislatively approved instead of going to a hearing.” SOR at 43-44.

The Heirs misunderstand the legislative approval provisions of ANILCA. Section 905(a)(1) provided that, effective 1981, all applications pending on the December 18, 1971, date of ANCSA’s repeal of the 1906 Act and describing land unreserved on December 13, 1968, would be legislatively approved, with exceptions provided in subsections 905(a)(3-6). 43 U.S.C. § 1634(a)(1) (2000). But section 905(a)(4) provides:

Where an allotment application describes land which . . . on or before December 18, 1971, was *validly selected by or tentatively approved or confirmed* to the State of Alaska pursuant to the Alaska Statehood Act . . . paragraph (1) of this subsection . . . shall not apply and the application shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended, [ANCSA], and other applicable law.

43 U.S.C. § 1634(a)(4) (2000) (emphasis added). Thus, land either “validly selected by or tentatively approved or confirmed to” to the State must be adjudicated. Judge Sweitzer held that all disputed land had been “validly selected” by the State in 1961 and therefore could only be adjudicated.

Even if the land in dispute was validly selected in 1961, the Heirs claim that the 1974 TA decision somehow rendered the valid selection invalid except as to land conveyed. SOR at 46. The Heirs reason that “the only logical explanation for use of the words ‘or tentatively approved’ is that if a tentative approval has been granted by the BLM, then it trumps the state’s selection. The word ‘or’ is used for situations where a tentative approval has not been granted and only a state selection exists.” *Id.* Thus they contend that the valid section in 1961 is no longer factually relevant to section 905(a)(4), once the 1974 TA decision replaced it. SOR at 46-47.

We disagree. “Or” is nothing more or less than the disjunctive that it is. If land is either validly selected, *or* if it is tentatively approved, *or* confirmed, then the land was not “unreserved” on the critical date in 1968 and must be adjudicated. Notwithstanding whether we agree with the Heirs’ argument that none of the land was “tentatively approved” because it was all swept up in an ill-defined definition of Parcel A, in this case all of the land in dispute was validly selected in 1961. Therefore, we agree with and affirm Judge Sweitzer as to all land at issue.

The Heirs argue, though, that none of the disputed lands could have been validly selected by the State because subsection 6(b) of the Alaska Statehood Act granted the State a right to select only public lands “which were vacant, unappropriated, and unreserved at the time of their selection.” Given that Harlan’s claimed use on his Native allotment application began in the summer of 1961, the Heirs claim that his use constituted an appropriation or reservation that made the State’s 1961 selection invalid. SOR at 47-48.

Again, the Heirs’ logic is incomplete.⁵⁰ The State complains: “If Contestees’ legal theory were correct, it would never be possible to adjudicate any allotment application under the 1906 Act, because all applications would be legislatively approved.” State Answer Ex. 1 (Post-Hearing Brief) at 3. This is correct. Under the Heirs’ theory, even allotment applications filed after a State selection application would constitute an inchoate valid existing claim under section 6(b) of the Alaska Statehood Act that prevents the State from “validly” selecting the lands even if the State is unaware of the claim. We have rejected the notion that inchoate rights established by Native occupancy prevent disposition of land in Alaska in the absence of the filing of an allotment application. We recently explained:

The Supreme Court and lower Federal courts, as well as this Board, have all recognized that the possessory interests of Alaska Natives are not property interests that prevent the United States from reserving or

⁵⁰ This argument is not entirely clear given that the land withdrawal began in 1952. Moreover, with the exception of a day or two, the “summer” largely post-dates the State’s June 23, 1961, selection.

otherwise disposing of public land. See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278-80, 285 (1955); *Akootchook v. United States*, 747 F.2d 1316, 1320 (9th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985); *United States v. Flynn*, 53 IBLA [208,] 225, 88 I.D. [373,] 382 [(1981)]; *Myrtle M. Jensen Shanigan*, 29 IBLA 255, 257 (1977); *Louis P. Simpson*, 20 IBLA 387, 392-94 (1975); *Terza Hopson*, 3 IBLA 134, 143 (1971).

....

In order to convert the inchoate preference right protections of Native use and occupancy into a vested property right for a particular tract of land, the Alaska Native had to couple qualifying use and occupancy with the actual filing of a Native allotment application. *United States v. Flynn*, 53 IBLA at 234, 88 I.D. at 387

Larry Evanoff, 162 IBLA 62, 68-69 (2004) (footnote omitted). Accordingly, in the absence of a duly filed Native allotment application, Harlan had no inchoate right of appropriation that prevented the State from validly selecting lands in 1961 such that when Mahle applied for lands 10 years later, the State's valid selection became invalid. The point of the application is to convert what was inchoate into a legal right. Where the allotment application is filed *after* the competing State selection, a subsequent Native allotment application must be adjudicated under the exception in section 905(a)(4). See *Heirs of George Titus*, 124 IBLA 1, 5-6 (1992).

The Heirs' reliance on *State of Alaska*, 116 IBLA 301, 302-03 (1990), and *State of Alaska*, 109 IBLA 339, 340 (1989), for their argument is misplaced. In both cases, the State selection at issue was filed after the Native allotment application. We held in *State of Alaska*, 116 IBLA at 303, that it is the *filing* of the prior Native allotment application that acts to segregate the land against a later State selection, and to trigger the exclusionary provisions of section 6(b) of the Alaska Statehood Act.⁵¹ These facts do not pertain here.

This conclusion pertains to all of the disputed lands. But the Heirs are also in error to assume that none of the disputed lands were tentatively approved by the 1974 TA decision. That decision separates by *exclusion from TA* the contested land (Lots 3-5, USS 5110, and Lot 42, Tract E, USS 3312) from the *TA* of other land which was conveyed to the State (and later from the State to the City). As to the latter, the

⁵¹ The State correctly points out in its Answer Ex. 1 at 3, that BLM's Native Allotment Handbook (1991) contemplates legislative approval of a *prior* Native allotment application: "Allotment applications *filed* prior to State selections . . . qualified for legislative approval, all else being regular, since the application segregates the lands and they cannot be validly selected by the State." *Id.* at II-27, *citing State of Alaska*, 109 IBLA 339, and *State of Alaska*, 116 IBLA 301 (emphasis in original).

Heirs' position presumes that even after conveyance of public lands outside of Federal ownership, there remains an amorphous right of Native allotment applicants to revise their applications in a manner that causes a conveyance to be "undone."

To the contrary, where public land has been conveyed to the State, the only manner to recover title is through the Stipulated Procedures of *Aguilar*. The Heirs cannot evade this result by claiming something else should have happened besides the conveyance. Rather, the purpose of the Stipulated Procedures is to determine whether a parcel should not have been conveyed and to recover it in that case.

The City and State are also correct to note that this Board has already distinguished between what we have described as the contested lands and lands subject to the TA. In *City of Skagway* we rejected the State's contention that Parcel A included only the 12.62 acres certificated to the Mahle Heirs and that all other lands approved for AA-6528 by BLM in the 1993 decision had been tentatively approved to the State. We explained that the portions of Parcel A excluded from the 1974 TA decision were defined by existing plats of survey. "In fact, the record contains an 'Official Status Plat', dated May 8, 1974, which depicts the parcel as encompassing the same land as the October 21, 1971, plat, including part of Lot 37 and part of U.S. Survey No. 5110, later surveyed into Lots 3, 4, and part of Lot 5." *City of Skagway*, 136 IBLA at 14. Accordingly, both the land subject to TA and also the land excluded as a part of Parcel A were defined by "the official BLM public land records at the time of the TA." *Id.* With respect to the lands other than those identified on the plat maps as AA-6528, we expressly noted that they were subject to the City's third-party rights and, due to the operation of ANILCA section 906(c)(1), such lands were deemed to have vested in the State of Alaska as of the date of tentative approval. 136 IBLA at 14, *citing* 43 U.S.C. § 1635(c)(1) (2000).

Nothing has changed since our 1996 decision except that the Heirs want more land than they had identified at the time of the 1988 and 1993 BLM decisions. The "official BLM public land records at the time of the TA" remain the same. Lot 39 and U.S. Survey No. 5107A have been conveyed to the Heirs. Lots 3, 4, and part of Lot 5, USS 5110, and Lot 42, USS 3312, were validly selected but not tentatively approved and thus require adjudication under section 905(a)(4). Any other lands were tentatively approved and conveyed under ANILCA section 906(c)(1), and recovery of title required a hearing pursuant to the Stipulated Procedures of *Aguilar*.

Relinquishment. The Heirs apparently understand that lands conveyed out of Federal ownership cannot be swept into a legislative approval effective 25 years ago, if they were tentatively approved under sections 905(a)(1) and 906(c). They attempt to avoid this conundrum by asserting that Harlan never relinquished any of the 80 acres applied for in Harlan's handwriting, when BIA typed a description of land reducing the rectangle to 40 acres, and that reinstatement of the 40 acres

improperly relinquished by BIA is in order. As we understand it, they claim that reinstatement would be effective prior to ANILCA's 1980 passage, such that acres to be reinstated would be excluded from any tentative approval decision in 1974. Thus, they presume that lands unwittingly relinquished fall in the same category as lands excluded from a TA and can therefore be reinstated from lands tentatively approved and even conveyed without an *Aguilar* hearing. This is a rehash of the view that the conveyance should not have happened. The only way to "undo" a conveyance of title to the State is through the *Aguilar* Stipulated Procedures; there is no other provision for turning back the clock. Even if we turned the dial back to 1980, any legislative approval would have been for lands then defined as Parcel A. Parcel A did not encompass land tentatively approved in the 1974 TA decision as discussed above, whether or not the Heirs now claim they should be reinstated.

But we address this argument under separate heading to explain both that the Heirs have received any process that they could obtain to accomplish reinstatement of lands improperly relinquished and also that what the Heirs call relinquishment is in reality a request to amend the application. To the extent the Heirs are accepting, by their relinquishment argument, that the most they may be able to claim at this point is an additional 40 acres (instead of the 58- or 60-acre yellow area presented at the hearing on Ex. 52), the appropriate solution, where an applicant did not intentionally relinquish land excluded from an application, would be to consider the entire application as if the land were not relinquished. Over objection of the City and State, this is the procedure followed by the ALJ here. The 80-acre parcel, sketched and handwritten by Harlan, was plotted and identified in a like location by both Nudelman for the Heirs and Lewis for the Government. Harlan's calls in his description of the rectangle and his own sketch map place Parcel A on sites unavailable to the Heirs either by geography (the Bay or Inlet) or by land ownership (Selmer's Lot 38 and the City park). Ex. 17. Thus, Judge Sweitzer took evidence regarding this topic; the problem for the Heirs was not that he did so but that much of the 80-acre handwritten description described places unavailable for allotment.

Amendment. The only way for the Heirs to avoid the handwritten description of Parcel A is to construct a different land description for Harlan. This they do by reversing the north/south calls on the handwritten application and flipping the parcel Harlan sketched as south of the road to the north of it. This is amendment, not reinstatement, of the parcel Harlan described. Accordingly, we find that the Heirs seek to amend the land description. This effort is untimely.⁵²

⁵² It also calls into question whether the Heirs believe they received patents for land Harlan never intended to apply for. In any event, Mahle family members repeatedly asserted in the 1980s that Harlan told his sons and brothers that he wanted only 15 acres around the cabin. These averments as to Harlan's intent remain in the

(continued...)

This is true for two reasons: First, the identification of Parcel A was administratively final (at several junctures) and, second, a plat of survey was filed for it in 1990. As for finality, BLM declared the description of Parcel A in 1988. The Heirs did not appeal, though not only were they fully aware of the description and decision by virtue of their own and their attorneys' receipt of service, but also it was a description they expressly requested in the context of the 1987 land examination and their 1988 affidavits (Exs. 38-42, 1 File 3). *See City of Skagway*, 136 IBLA at 15. Even if that set of facts were found in some manner to be insufficient for administrative finality, the same description again became final by virtue of the 1993 decision, for which the Heirs submitted an appeal and then withdrew it. The Heirs were bound, if they did not agree with the description, to appeal that decision at the latest. They chose to avoid the Board's review by withdrawing their appeal and then requesting BLM to act when it did not have jurisdiction.

[3] In any event, their rights to change the description terminated when BLM conformed to survey the 1988 description in 1990. ANILCA section 905(c), 43 U.S.C. § 1634(c) (2000), establishes the terms under which an applicant may amend a Native allotment application. It contains the following proviso: "*Provided further, That no allotment application may be amended for location following adoption of a final plan of survey which includes the location of the allotment as described in the application or its location as desired by amendment.*" (Emphasis added.) This proviso would plainly prevent the Heirs from amending AA-6528 from the description made final in 1988 because BLM adopted final plats of survey for it in 1990. In *Silas Solomon*, 133 IBLA 41, 46 (1995), we explained: "[I]n *Angeline Galbraith*, 97 IBLA [at 146-47], we concluded that the right to amend provided by section 905(c) of ANILCA terminated . . . by the adoption, after December 2, 1980, of a plan of survey for either the originally described or the newly described land." *See also Heirs of Alice Byayuk*, 136 IBLA 132, 138 (1996). The proviso extends protection both to the allotment applicant and to the Government.

The purpose of notice and opportunity to object is to allow the Secretary to finalize the amendment process and to allow the Native to clarify any errors in the record. Otherwise, the Secretary is at the whim of the Native who continually shifts land descriptions and the Native might be bound by an erroneous conclusion by BLM regarding desired acreage. Notice protects both parties.

⁵² (...continued)

record unchallenged. Given our disposition, we need not separately decide whether the evidence shows that he intended to relinquish any land, claimed now by his Heirs, for which he disclaimed any interest to those heirs while alive.

133 IBLA at 47 (emphasis added). Notably, this Board has already explained this. In *City of Skagway*, we held that the 1988 Decision stated that the location of Harlan Mahle's claim could not be changed "after survey instructions have been written or expiration of the 60 days allowed for amendment." 136 IBLA at 9-10, *citing* section 905(c) of the ANILCA, 43 U.S.C. § 1634(c) (2000). Because the Heirs and BIA had received the 1988 decision and filed no objection, we stated expressly that "the heirs were thereafter precluded from amending the description." 136 IBLA at 10 n.15, *citing Silas Solomon*, 133 IBLA at 47-48.

The Heirs attempt to evade the weight of case history by arguing that they do not amend the application, but rather only seek to obtain what Harlan applied for. But the description of Parcel A that was adjudicated was identified at the latest in the 1988 decision. To the extent they think this is the wrong one, this is the argument they were required to make in 1988, or at the latest 1990, if they believed the plat of survey was wrong. There is no question that the 80 acres the Heirs now seek is an amendment of what was finally declared to be Parcel A in 1988. Moreover, there is no question that the Parcel A the Heirs now seek is an amendment even of Harlan's handwritten description, which they claim to want. As noted above, it is only by reversing the north and south calls set forth in Harlan's handwriting and on his sketch that the Heirs flip the rectangle to the north. This would plainly constitute an amendment of his handwriting; for the same reason that amendment of the 1988 land description is untimely, so is amendment of Mahle's handwritten application.⁵³

The Heirs argue relinquishment and reinstatement, because amendment of the Parcel A description to include the lands they now identify occurred in 1997 and is manifestly untimely. They cannot now change the description of lands to a definition proffered for the first time in 1997, effective at the time of a legislative approval decision under ANILCA. Therefore, legislative approval is not appropriate.

In one respect, we agree with the Heirs' view that their request is not one for amendment as defined in ANICLA section 905(c). But this is only because the record reveals that the Parcel identified in 1997 is not land for which Harlan intended to

⁵³ We reject the suggestion that the Heirs had no basis for knowing Harlan's intent until the 1990s. Jerry testified that he saw his father's Native allotment application in 1972 when he was 16. Tr. 553-54, 561. He says he first saw the handwritten version in 1991-92 and claims that this was when he first realized Harlan sought 160 acres. SOR at 30-31; Tr. 554-56, 559, Ex. FF. But the handwritten 80-acre application was discussed in detail in field examination documents sent to Jerry in 1987. Exs. 35, 36. Any refusal on Jerry's part to familiarize himself with information provided him amounts to sitting on his rights, not an expansion of them. In any event, ALSA raised the issue in 1992. Ex. 47. Either way, the Heirs had ample reason to appeal either the 1988 or 1993 BLM decision if they thought more acreage was at stake.

apply. This effort is not achieved either by reinstatement or amendment, or any other provision in law. The adjudicated description may be changed only to amend the application to designate the land which the applicant “intended to claim at the time of application.” 43 U.S.C. § 1634(c) (2000); *Estate of Stan Paukan*, 146 IBLA 204, 208 (1998). To justify an amendment,

the evidence should clearly evince a reasonable likelihood that the land described by the amendment was the land the applicant actually intended to claim when the original application was filed. *Heirs of Setuck Harry*, 155 IBLA 373, 378 (2001). It is not enough that the land described in the proposed amended application is land the applicant would have desired to select.

[S]ection 905(c) of ANILCA is only intended to permit . . . 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.

United States v. Galbraith, 166 IBLA at 103, quoting *State of Alaska (Helen M. Austerman)*, 119 IBLA 260, 266 (1991).

We extend this holding to the Heirs who are plainly seeking “new or additional land.” That this is true here is revealed by the fact that their 1997 claim to an additional 58 acres is a simple mathematical exercise of subtraction from 80 acres.⁵⁴ As noted above, the Department has in some manner adjudicated 36.63 acres for Parcel A. The Heirs present demand appears to flow from the belief that because Native applicants were allowed to apply for 160 acres of land and Mahle engaged in

⁵⁴ As best we can tell, the 58 acres, approximately, is derived by subtracting the 12.62 acres already received, the contested acreage (5.57 acres), and the 4.31 acres already adjudicated as a part of Selmer’s land. ($58 + 12.62 + 5.57 + 4.31 = 80.5$.) Admittedly, it is not possible to tell what the position of the Heirs is at present with respect to the boundaries of Parcel A, because the SOR appears to discuss only the “relinquished 40 acres.” But their position going into the hearing was that they were entitled to an additional 58 acres in Parcel A, based on the 1997 letters from Sanders. Further, the map provided their witnesses (Ex. 52) was that created by Nudelman and this map contained an additional 60.56 acres. Accordingly, we construe this as an admission that they seek an additional acreage that would ultimately provide the Heirs with 160 acres.

potentially qualifying activities all around the Skagway area, his Heirs are entitled to continuous adjudication until a total of 160 acres is certificated.

The Heirs misunderstand the rights given by the 1906 Act and taken away by ANCSA. The 1906 Act gave Mahle a right to apply for land he used and occupied in a qualifying manner potentially exclusive of others. After December 18, 1971, ANCSA terminated such rights. Once Harlan made his choice of land to apply for, in the absence of a claim to different land by that date, it is only the 1971 application that may be considered on his behalf. Even if Mahle had engaged in qualifying use and occupancy of other land than the 160 acres he applied for, ANCSA terminated any right to substitute other land after December 18, 1971. The Native allotment application he timely filed was not and is not a ticket or scrip for other land for the Heirs even if it turns out the land Harlan applied for was unavailable. An application for 160 acres is not a floating right to 160 acres in a location Harlan might have used.

This conclusion is consistent with repeated holdings of this Board. In *Mitchell Allen*, 117 IBLA 330, 337 (1991), we held:

Allen has consistently contended that Parcel B, as originally applied for, contained 80 acres, and his 1984 affidavit specifically stated that his original intent was to apply for two distinct 80-acre parcels: Parcel A consisting of 80 acres on the Tanana River, and Parcel B encompassing 80 acres on the Kantishna River. Allen is not now claiming that he misdescribed the land in Parcel B; rather, he seeks to add 40 acres to compensate for the 40 acres of Parcel A rejected by BLM in 1984, to make his total allotment 160 acres. This he cannot do.

See Heirs of Edward Peter, 122 IBLA 109, 117 (1992) (44.7 added acres rejected).

Any authority BLM may have under [ANILCA] is confined to bringing a Native allotment claim, as marked on the ground, in line with the intent of the allotment applicant when the application was made. 17/ . . . The statute does not permit either the applicant or BLM to alter the claim by amending a land description to encompass new or additional land, even if the intent is to compensate the claimant for loss of land due to erosion.

17/ Nor is there any other statutory provision which permits BLM to change the location of a claim for purposes other than to conform it to the applicant's original intent.

Hermann T. Kroener, 124 IBLA 57, 64-65 (1992) (citations omitted, emphasis added); *Roselyn Isaac*, 147 IBLA 178, 182 (1999).

We cannot accept the Heirs' assertion that they are seeking to obtain land Harlan originally intended to apply for, in light of their attempt to obtain ultimate adjudication of more than 80 acres for Parcel A. This is neither a proper amendment nor a reinstatement. They received adjudication either under ANILCA and ANCSA and the 1906 Act or under the Stipulated Procedures of *Aguilar* to over 36 acres already. Their attempt now to obtain an additional 58 acres underscores our holding that legislative approval was not in order for the additional lands the Heirs now describe as substituting for lands described in the original application, because lands the Heirs would substitute are lands not available to Harlan.

[4] *Authority of the ALJ to Conduct Hearing.* Finally, we address briefly the Heirs' alternative argument that the ALJ exceeded his authority to determine the location of the land that passed out the federal ownership. They argue that the *Aguilar* Stipulated Procedures require decisions as to the location of the applied-for land to be determined by BLM, subject to appeal to this Board before initiation of any *Aguilar* hearing. There is no question that this Board lacks jurisdiction to review the ALJ's decision with respect to the additional lands, to the extent they were subject to an *Aguilar* hearing. This case, however, is not the first time the Board has had the opportunity to deal with an appeal involving both a combined contest and *Aguilar* proceeding where the ALJ acts as the BLM factfinder. In *United States v. Hobson*, 142 IBLA 7, 10 (1997), we stated:

Where all the land described in a Native allotment application has been patented, the *Aguilar* procedures make no provision for a contest hearing before an administrative law judge, whose decision would be subject to appeal to this Board. Instead, the procedures require a hearing before a BLM hearing officer, whose decision, when issued, is final for the Department and not appealable to this Board. However, in cases such as this, where the parcel in part describes lands conveyed out of U.S. ownership and a hearing on the entire parcel is required, government contest proceedings are to be used. (*Aguilar and Title Recovery Handbook for Native Allotments*] at 11.) *Despite the overlap of issues in such contest proceedings, the fundamental character of the proceedings with respect to the patented land is no more than investigatory, and the decision of an administrative law judge affecting the patented land is the functional equivalent of a BLM hearing officer in cases where all of the land claimed by the Native has been patented.*

142 IBLA at 10 (emphasis added). As we stated in *Hobson*, because the *Aguilar* procedures make no provision for review of such a determination by this Board, we must dismiss the Heirs' appeal from that portion of the ALJ decision. *Id.* Consequently, we dismiss all the parties' claims concerning lands conveyed out of federal ownership covered by the *Aguilar* stipulations.

Therefore, 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 of Judge Sweitzer is affirmed in part and the appeal is dismissed in part. Having considered all of the arguments of the parties, we enter the following relief: We affirm the ALJ decision finding that the Heirs did not establish by a preponderance of the evidence use and occupancy of the contested lands before the October 21, 1952, withdrawal date. We reject their claim that the application was subject to legislative approval as to all of the disputed lands and therefore not subject to adjudication. Finally, we dismiss any challenge to the ALJ findings concerning lands conveyed out of federal ownership covered by the *Aguilar* Stipulated Procedures.

_____/s/_____
Lisa Hemmer
Administrative Judge

I concur:

_____/s/_____
David L. Hughes
Administrative Judge