

INTERIOR BOARD OF LAND APPEALS

City of Skagway and State of Alaska

136 IBLA 3 (June 12, 1996)

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CITY OF SKAGWAY
STATE OF ALASKA

IBLA 93! 628, 94! 37

Decided June 12, 1996

Appeals from a decision of the Alaska State Office, Bureau of Land Management, approving in part Native allotment application AA! 6528, Parcel A, and rejecting in part State selection application A! 061057.

Set aside and remanded to BLM for initiation of Government contest.

1. Alaska: Native Allotments! ! Alaska National Interest Lands Conservation Act: Native Allotments! ! Alaska National Interest Lands Conservation Act: State Selections

When, at the time of tentative approval of various lands to the State, the official public land records reflected the location of a Native allotment claim, such land did not pass to the State under sec. 906(c)(1) of ANILCA, 43 U.S.C. § 1635(c)(1) (1994), where BLM's tentative approval expressly excluded the claim by its serial number and parcel designation.

2. Alaska: Native Allotments

Under 43 CFR 2561.0-8(b), BLM may allot land to a Native allotment applicant in the amount of 40! acre legal subdivisions and survey lots where it is demonstrated that he or she engaged in qualifying use and occupancy on a significant portion of such smallest legal subdivision. However, that regulation may be employed only where the rectangular survey pattern is appropriate and where there are no conflicting claims to the land.

3. Alaska: Native Allotments

The Board will order the initiation of a Government contest to adjudicate whether a Native allotment applicant commenced qualifying use and occupancy of his claimed land prior to its withdrawal, and otherwise complied with the requirements of the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270! 1 through

270! 3 (1970), and its implementing regulations, where the evidence of record demonstrates that there are substantial factual questions whether this occurred.

APPEARANCES: Julia B. Bockmon, Esq., Anchorage, Alaska, and D. Elizabeth Cuadra, Esq., Juneau, Alaska, for the City of Skagway; John T. Baker, Esq., Office of the Attorney General, State of Alaska, Anchorage, Alaska, for the State of Alaska; Regina L. Sleater, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

The City of Skagway (City) and the State of Alaska (State) have each appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated July 26, 1993. 1/ In that decision, BLM approved in part Harlan L. Mahle's Native allotment application, AA! 6528, Parcel A, for certain land described in the decision as Lots 3 and 4, U.S. Survey No. 5110, Alaska, "[t]he piece of land between Lots 3 and 4, U.S. Survey No. 5110, Alaska (the [Skagway-Dyea] road right-of-way)", which is a part of Lot 5, U.S. Survey No. 5110, Alaska, and Lot 42, Tract E, U.S. Survey No. 3312, Alaska, situated in protracted sec. 11, T. 28 S., R. 59 E., Copper River Meridian, Alaska. 2/ In the same decision, BLM rejected the State's selection application (A! 061057) as to Lots 3 and 4 and the road right-of-way. 3/

Mahle, who was born July 1, 1930, prepared two separate Native allotment applications, each dated June 14, 1971, claiming different parcels of land. Each contained a handwritten description of a different 80-acre parcel of land. When the Bureau of Indian Affairs (BIA) filed the application at issue with BLM on October 7, 1971, pursuant to the Act of May 17,

1/ By order dated Mar. 24, 1994, the Board consolidated the City's appeal, docketed as IBLA 93-628, with the State's appeal, docketed as IBLA 94-37. In addition, the heirs of Harlan L. Mahle also filed an appeal from BLM's decision, which the Board docketed as IBLA 93-651. However, they subsequently withdrew that appeal and the Board dismissed it by order dated Dec. 10, 1993. The heirs have made no appearance in the consolidated appeals.

2/ Lots 3 and 4 contain 2.59 and 1.15 acres of land, respectively. The part of Lot 5 at issue, based on its dimensions on the survey plat (2.22 chains (or 146.52 feet) wide and 1.51 chains (or 99.66 feet), is approximately 0.34 acres. Lot 42 contains 1.33 acres.

3/ By order dated Sept. 28, 1993, the Board, at the request of the City, stayed the effect of BLM's July 1993 decision. In its stay petition, the City stated that, believing that it owned Lots 3 and 4, U.S. Survey No. 5110, Alaska, the City had, in 1991, "started work" on placing a municipal landfill on adjacent land, using part of the land now in dispute as a "buffer zone" (Petition for Stay, dated Aug. 25, 1993, at 5).

1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), ^{4/} a typewritten description prepared by BIA had been stapled to the application over Mahle's handwritten description. ^{5/} That typewritten description, termed "Tract #1" (later denoted, and hereinafter referred to as "Parcel A"), utilized both a metes and bounds description and an aliquot part description for 40 acres in protracted sec. 11. ^{6/} Although Mahle had sketched the approximate location of his claim on the back of the application showing it between the Skagway-Dyea Road, which was constructed in 1943, and Nahku (Long) Bay to the west, the metes and bounds typewritten description included lands east of the Skagway-Dyea Road. Nothing else on his application had been changed. The application showed that he claimed occupancy of the land commencing in 1961 and that his use was for "summer use small garden built cabin 14x14."

BLM entered the Parcel A description on an "Official Status Plat," dated October 21, 1971, showing the allotment encompassing lands both east and west of the Skagway-Dyea Road. ^{7/} According to that plat, the allotment included part of Lot 37, later surveyed as Lot 42, and Lots 38 and 39, all part of Tract E, U.S. Survey No. 3312, Alaska, and an unsurveyed area, which ran from Lot 39 west to the bay, later surveyed as U.S. Survey No. 5107A, Alaska. ^{8/} The plat also showed lands directly north and directly south of these lands to be part of the allotment. The lands to the south were a portion of U.S. Survey No. 1499, Alaska, and the lands to the north were a portion of U.S. Survey No. 5110, Alaska, later surveyed as Lots 3, 4, and part of Lot 5.

On October 21, 1952, the land in protracted sec. 11 was withdrawn, subject to valid existing rights, from all forms of appropriation under the

^{4/} The Act of May 17, 1906, was repealed by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1994), effective Dec. 18, 1971, subject to applications pending on that date.

^{5/} Mahle's handwritten description was:

"[F]rom turn of road (at point where it turns north into long Bay at base of A.B. mountain post #1 below road ! north ! thence west 440 yards to post #2 thence south 880 yards to post #3 thence east to post no. 4, 440 yards ! thence north 880 yards back to post #1[.]"

^{6/} The other application, for Tract #2, also known as Parcel B, is not at issue in this case.

^{7/} In its answer on page 5 footnote 2, BLM explained that such a plat, known as a district sheet, was the precursor of the master title plat (MTP), and that notations were made on the district sheet as changes to the land status occurred. It stated: "An MTP was not created for this particular area of southeast Alaska until 1977."

^{8/} According to the record, the Skagway! Dyea Road runs west across Lot 37 into Lot 38, where it turns north and follows the common boundary between Lot 38 and Lot 39 north into U.S. Survey No. 5110. Thus, all of Lot 39 and the land surveyed as U.S. Survey No. 5107A lie west of the road.

public land laws by Public Land Order No. (PLO) 868 (17 FR 9603 (Oct. 23, 1952)). The Department revoked that withdrawal on March 30, 1961, pursuant to PLO 2317 (23 FR 2825 (Apr. 5, 1961)), and afforded the State a preferred right to select any of the affected lands. On June 23, 1961, the State filed selection application A! 061057, including therein the lands presently at issue.

Due to the withdrawal and the State selection application, BLM sought, by memorandum dated November 17, 1971, to elicit from BIA the exact date of occupation of Parcel A. In that memorandum, BLM explained that Parcel A was in partial conflict with U.S. Survey No. 1499, patented on October 30, 1931 (Patent No. 1052080), and in total conflict with Lot 38 of Tract E of U.S. Survey 3312, patented on October 20, 1951 (Patent No. 1200428). It further stated that Parcel A conflicted with the State selection application. The file contains no response to that memorandum.

A BLM realty specialist conducted a field examination of Parcel A on July 23, 1972. In a Field Report, dated February 23, 1974, the examiner stated that Mahle did not accompany him on the exam, but that he had interviewed Mahle at his home in Skagway. The examiner also stated at page 1:

The only evidence of use found on this land was a blazed tree adjacent to the [Skagway!]Dyea Road. There were no other evidences of use on the land which could be attributed to the applicant. The applicant claims to have marked other corners but the examiner did not find these corners. An old cabin was found on this tract of land but it appears to have been abandoned for many years. The applicant did not claim to own this cabin or to have ever used it.

With respect to the location of the claim on the ground, the examiner stated at page 4:

The request for an exclusion survey was submitted to the Division of Cadastral Engineering in August of 1972. The land has since been surveyed and [Parcel A] has been identified as Lot 39, U.S. Survey 3312 and as U.S. Survey 5107A. * * * [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. [9/]

^{9/} Thus, the examiner determined that the parcel actually encompassed only 12.62 acres, the amount of acreage included in Lot 39 and U.S. Survey No. 5107A. This description for Parcel A is platted on MTP's for T. 28 S., R. 59 E., Copper River Meridian, Alaska, dated Sept. 4, 1979, July 21, 1981, and Aug. 8, 1983.

The examiner concluded that Mahle had not shown substantial use and occupancy of the land for a period of 5 years, as required by the 1906 Act, as amended, and its implementing regulations (43 CFR Subpart 2561).

On June 25, 1974, BLM rejected State selection application A-061057 as to Lots 37, 38, and 39 and gave tentative approval (TA) for the remainder of the lands, expressly excluding Mahle's allotment application for Parcel A from the TA by referencing the application number and parcel designation.

By letter dated April 18, 1975, BLM notified Mahle that, on the basis of the February 1974 Field Report, it had concluded that he was not qualified for an allotment, and that it would take "adverse action" on the allotment application, unless, within 60 days from receipt of the letter, he filed additional information in support of his claim. The letter indicates that a copy of the February 1974 Field Report was enclosed. The record shows that Mahle received the letter, but there is no evidence that he filed a response. However, BLM took no action on the application. Mahle died on January 22, 1977.

In 1979, Jerry Mahle, Harlan Mahle's son, submitted to BLM the statements of three individuals, including Mahle's ex-wife, attesting to Harlan Mahle's use of Parcel A.

On July 26, 1980, the State approved for conveyance to the City various lands, including land in U.S. Survey No. 5110 immediately north of the tract of land made up of U.S. Survey No. 5107A, Alaska, part of Lots 37, 38, and 39. The State's approval did not expressly exclude Mahle's allotment claim, but it was made subject to valid existing rights.

In 1982, Jerry Mahle and Alaska Legal Services Corporation, on behalf of Doug Mahle, Harlan Mahle's other son, each contacted BLM regarding the allotment. BLM informed both that it needed information regarding Harlan Mahle's actual date of occupancy of the land.

On May 7, 1984, BLM received affidavits from Mahle's brothers, Fred O. Mahle and Andrew C. Mahle, asserting that Harlan Mahle had commenced use and occupancy of his allotment claim in the "late 1940's," rather than in 1961. ^{10/} They stated that Mahle used the land initially for hunting and trapping, building a cabin there in the late 1950's. Andrew Mahle stated:

My brother separated from his wife in the late 1950's, and began to regularly stay on his land at Long Bay Point. He would stay in a cabin that he built with the help of my older brother, Fred O. Mahle. However, after my brother's death this cabin

^{10/} In a supplemental affidavit, dated June 6, 1985, Fred Mahle stated that his brother began using the land in 1946 for hunting and berry picking.

was torn down by his sons. Since then his sons have constructed a new cabin on Harlan's land.

* * * 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 to stay. He did this up until the day he died.

(Affidavit of Andrew C. Mahle, dated Apr. 24, 1984, at 1).

Apparently based on these filings, BLM thereafter replatted Mahle's allotment claim, showing it encompassing land surveyed as part of Lots 37, 38, and 39, and part of U.S. Survey Nos. 1499 and 5110, Alaska (MTP, dated May 29, 1984).

By memorandum dated July 9, 1984, the Chief, Native Allotment Section, Alaska State Office, requested a field report of Mahle's allotment to ascertain a "[m]ore specific date of use and occupancy" and a "[b]etter definition of boundaries."

BLM conducted an examination of the claim on September 16, 1987. The BLM field examiner was accompanied by Fred Mahle, Jerry Mahle, John Brower, Realty Officer for the Central Council, Tlingit and Haida Indian Tribes of Alaska, an agency which, under contract with the BIA, assisted Native allotment applicants in Southeast Alaska in acquiring title to their allotments, and a representative of the State of Alaska. In her Land Report, dated November 18, 1987, the examiner stated at page 2 that she found the remains of a cabin on Lot 39 next to a new cabin built by Doug Mahle in the 1970's. The existing cabin was accessed by a driveway running west off the Skagway! Dyea Road. Id. at 3. The examiner found no other evidence of Harlan Mahle's use and occupancy. Id. at 4.

The examiner was unable to confirm what land was encompassed by Mahle's claim, given the conflict in the acreage between the handwritten and typewritten descriptions originally filed in 1971. She also noted that the sketch map on the application placed the claim entirely west of the Skagway! Dyea Road, while the typewritten description indicated that it straddled the road. Id. at 1A. She reported that Jerry Mahle stated that "his father had talked about his '40 acres' west of the road (Skagway to Dyea) never mentioning land to the east of the road[.]" Id. She also recounted that Fred Mahle stated that his brother claimed land on "the west side of the road only and not any land to the east of the road" and that Fred Mahle considered "USS 5107A and USS 3312 Tr E lot 39 his correct claim, a total of (8.6 + 4.02) 12.62 acres." Id. The examiner recommended that BLM determine the correct description of the claim and then the availability of the land for allotment.

On December 10, 1987, BLM received a letter from Brower which stated as follows:

I have spoken at length about this matter with the heirs to the Harl[a]n Mahle Estate. Sole heirs to the claim are Harlan Mahle's two (2) sons: Douglas and Jerry Mahle. Both heirs are in strong agreement and have little doubt about it, that the correct acreage as Harl[a]n 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.
[Emphasis in original.]

Attached to the December 1987 letter was a copy of the sketch map from the original 1974 Field Report on which Brower stated he had drawn "the approximate 40[!] acre boundary in which the heirs believe their father originally intended to apply for." 11/ Id.

By memorandum dated June 1, 1988, BLM requested a survey of the metes and bounds typewritten description of Parcel A included in Mahle's allotment application filed in October 1971. The memorandum stated that the portion extending south into U.S. Survey No. 1499 did not need to be surveyed out but that "its area does need to be considered as part of the total 40 acres allowed." It continued by stating that the portion extending north into U.S. Survey No. 5110 did need to be surveyed out into two lots, one on either side of the Skagway-Dyea Road right-of-way. Also, it requested subdivision of Lot 37 so that the portion extending into that lot could be separately identified. In response thereto, BLM officially filed two plats of survey on March 22, 1990.

By decision dated June 9, 1988, BLM undertook its first adjudication of Parcel A. It determined that, despite the narrative in the 1987 Land Report regarding the claim being located west of the road and the drawing submitted by Brower, the metes and bounds typewritten description of Parcel A included with the application represented the proper description of the claim. 12/ BLM depicted the claim on a "Composite Drawing," attached to the decision. 13/ BLM rejected the southernmost portion of Parcel A because it conflicted with U.S. Survey No. 1499, which had been patented to

11/ The tract outlined by Brower was a rectangular parcel located west of the Skagway-Dyea Road and, according to the scale on that map (1 inch = 10 chains), it measured approximately 17.5 chains north! south and 12.5 chains east! west. Thus, it encompassed not 40, but about 22 acres.

12/ 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).

13/ The claim depicted on the "Composite Drawing" is essentially the same as that shown on the Oct. 21, 1971, "Official Status Plat."

the City of Skagway in 1931. It directed that the status of Lot 38 be adjudicated pursuant to the stipulated procedures adopted, with the approval of the district court, by the United States and other parties to Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), because of the allegations by Harlan Mahle's brothers that he commenced use and occupancy of the land in the 1940's, which would have predated Osborne Selmer's application for a homesite for such land on January 12, 1953, and his receipt of patent for Lot 38 on October 20, 1959. ^{14/}

BLM approved the allotment for Lot 39 and conveyed that lot, containing 4.02 acres, to Harlan Mahle's heirs on December 13, 1988.

With respect to the remainder of the land described in the typewritten metes and bounds description, U.S. Survey No. 5107A, part of Lot 37, and part of U.S. Survey No. 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 or segregated from appropriation under the 1906 Act, as amended. Assuming prior use and occupancy, BLM stated that the preference right, which arose when Mahle filed his allotment application on October 7, 1971, would relate back to the date of initiation, and thus take precedence over the intervening State selection application.

After discussing the evidence of record, BLM concluded: "[T]here 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" (1988 Decision at 13). Therefore, it provided Mahle's representative 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." (Emphasis in original.) Id. It further provided that if no evidence was submitted within the time allowed, or, if the evidence was insufficient, it would initiate a Government contest of that portion of the allotment.

Finally, BLM notified Mahle's heirs that it would survey the unsurveyed portion of his claim 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" (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

^{14/} In a decision dated Nov. 16, 1990, following a hearing in accordance with the Aguilar procedures, a BLM hearing officer rejected Mahle's claim to Lot 38 because Mahle's heirs failed to establish that Harlan Mahle had a valid claim to the land that predated initiation of Selmer's claim on Jan. 12, 1953.

for amendment," citing section 905(c) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(c) (1994) (1988 Decision at 15). The record shows receipt of the decision by BIA and Mahle's heirs. Neither filed any objection.
15/

Brower, on behalf of Mahle's heirs, submitted additional evidence in support of Mahle's allotment claim on July 18, 1988. That evidence consisted of affidavits executed by Doug Mahle, Jerry Mahle, and Brower. In an accompanying 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 USS 5107A and Lot 39. This is the contention of Fred Mahle, Sr., as he stated during the September, 1987 field examination.

By decision dated November 30, 1988, BLM approved Mahle's allotment application, and rejected State selection application A! 061057, as to the land in U.S. Survey No. 5107A, Alaska. BLM conveyed that land, containing 8.6 acres, to Mahle's heirs on June 16, 1989.

On March 22, 1990, BLM officially filed two plats of survey for the remaining unsurveyed land subject to Mahle's allotment claim. One survey designated the land north of the parcel of land made up of U.S. Survey No. 5107A and part of Lots 37, 38, and 39, as Lots 3 and 4, U.S. Survey No. 5110, Alaska, and the area in between those two lots, containing the Skagway! Dyea Road right! of! way, as part of Lot 5, U.S. Survey No. 5110, Alaska. The other survey designated land east of Lot 38, which was originally part of Lot 37, as Lot 42, Tract E, U.S. Survey No. 3312, Alaska.

On July 22, 1991, BLM initiated a contest, charging that Mahle had failed to comply with the use and occupancy requirements of the 1906 Act, as amended, and thus was not entitled to an allotment of the remaining land. Since BLM had failed to notify the City of the contest proceeding, Administrative Law Judge Harvey C. Sweitzer, by order dated July 7, 1992, dismissed the complaint, without prejudice to its refiling.

15/ Thus, the heirs were thereafter precluded from amending the description. Silas Solomon, 133 IBLA 41, 47! 48 (1995).

BLM did not reinstitute a contest. Instead, it issued its July 1993 decision. Therein, it initially held 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," citing section 905(c) of ANILCA (1993 Decision at 3). However, it also noted the existence of the 1990 surveys, and while it considered them to be correct, it allowed the heirs a specific period of time in which to object to those surveys. The heirs filed no objection.

Next, BLM quoted 43 CFR 2561.0-8(b), which provides:

In areas where the rectangular survey pattern is appropriate, an allotment may be in terms of 40¹ acre legal subdivisions and survey lots on the basis that substantially continuous use and occupancy of a significant portion of such smallest legal subdivision shall normally entitle the applicant to the full subdivision, absent conflicting claims.

It then stated:

Native allotment adjudication policy states:

Reduced Acreage. In the early 1960's many allotments were reduced to 5¹ acre tracts that surrounded the applicant's improvements. During the late 1960's, this practice was changed to bring it in line with the regulations so that 40 acres of surveyed land (smallest legal subdivision) became the smallest area to which an allotment could be reduced. As a matter of policy, this practice applies to unsurveyed lands as well. However, allowable acreage is always dependent on land availability.

It also states:

Allotment applications which require 1906 adjudication may be contested for reduced acreage based on lack of use and occupancy.

1. Continue to utilize the 40¹ acre practice, where appropriate (i.e. without conflicting claims), as the smallest area to which an allotment may be reduced, whether surveyed or unsurveyed.

Taken from the Native Allotment Handbook, BLM Alaska, 1991, page III¹ 15. [Emphasis in original.]

(1993 Decision at 5).

BLM noted that it had rejected Mahle's claim only as to about 4 acres in Lot 38 and approved it as to about 12 acres based upon favorable evidence of use and occupancy in the case file. Without further explanation, it approved Mahle's allotment application with respect to the land described as Lots 3 and 4, the road right of way, and Lot 42, "[a]ccording to BLM policy" (1993 Decision at 6). ^{16/} Presumably, the policy referred to was that expressed in the quoted regulation and the Native Allotment Handbook.

[1] The City and the State filed timely appeals of BLM's decision. The State's principal argument is that BLM cannot approve the lands in question for allotment to Mahle's heirs because those lands were tentatively approved to the State in 1974 and, thus, they are beyond the jurisdiction of the Department by virtue of section 906(c)(1) of ANILCA, 43 U.S.C. § 1635(c)(1) (1994). ^{17/} The State argues that "the Mahle claim was amended to claim lands in addition to those of record on the date that the TA passed title to the State" (Reply of the State of Alaska at 8, n.4 (emphasis in original)). Accordingly, the State concludes that BLM must make a preliminary determination whether the application warrants the initiation of title recovery proceedings in accordance with Aguilar v. United States, *supra*. The City agrees that if the lands were tentatively approved to the State, "the Aguilar * * * procedures are appropriate" (City's Statement of Reasons at 34).

In its decision, BLM admitted that there had "been some confusion about the size and plotting of this claim" (Decision at 2, n.1). While that may be considered an understatement, the changing boundaries of this claim were never the result of an amendment filed by Mahle or his heirs. Rather, they resulted from BLM's repeated attempts to reconcile the allotment description provided by BIA with Mahle's hand-drawn sketch of this claim on his allotment application. When BLM tentatively approved lands to the State in June 1974, it expressly excepted from that TA, by serial number and parcel designation, Parcel A of Mahle's allotment application.

^{16/} BLM also rejected the State's selection application in part as to Lots 3 and 4 and the road right of way. Rejection was based on the fact that Mahle had initiated a valid claim to the land prior to the State's June 1961 selection. Nonetheless, BLM stated that an easement for the Skagway Dyea Road would be reserved in the certificate of allotment issued to Mahle's heirs. Regarding Lot 42, BLM noted the State selection application had been rejected as to the land therein in June 1974 when that land was part of Lot 37.

^{17/} 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."

The State admits that express exception exists. However, its position, as based on an August 19, 1986, agreement between BLM and the State, entitled "Agreement Regarding Conveyances to the State of Alaska" (Exh. 1 attached to Reply), is that "BLM's July 26, 1993, decision seeks to materially alter the size and location of the allotment, without obtaining the State's concurrence," as required by the agreement (Reply at 4). The State asserts that, under the agreement, BLM has been required to obtain the concurrence of the State before conforming to survey a claim excluded from the TA. While it acknowledges that concurrence has not been required "where the exclusion did not move from one section to another within the township," it contends that concurrence has been required regardless of whether there is a move from section to section when the exclusion moves into conflict with a third-party right created by the State (Reply at 4, n.1). The State contends that "BLM's July 26, 1993, decision has effectively moved the Mahle allotment into an actual conflict with a third-party right created by the State: the City's patent" (Reply at 4-5, n.1).

The agreement cited by the State is not controlling in this case. BLM's 1993 decision did not move Mahle's allotment into conflict with the City's third-party rights.

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. Neither the State nor the City has provided any evidence that BLM's official records showed any different on June 25, 1974. Thus, the State knew or should have known at the time of the TA that Mahle's allotment included lands in U.S. Survey No. 5110. Neither BLM's 1988 decision nor its 1993 decision shifted Mahle's allotment to encompass such lands.

Accordingly, we hold 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.

[2] In its 1988 decision, BLM correctly concluded that the Department was required to adjudicate Mahle's allotment application under the use and occupancy requirements of the 1906 Act, as amended, and its implementing regulations. However, it did not do so in its 1993 decision. Instead, it approved the remainder of the allotment based on "BLM policy." The City asserts that BLM misapplied that BLM policy in this case. For the reasons stated below, we agree.

Under the express language of 43 CFR 2561.0-8(b), the policy of allotting 40-acre legal subdivisions on the basis of substantially continuous use and occupancy of a significant portion of the subdivision may only be employed in the absence of conflicting claims. The portion of the Native Allotment Handbook, quoted in BLM's decision, also directs utilization of the "40-acre practice, where appropriate (i.e. without conflicting claims)." That is not the case here. Since June 23, 1961, State selection A! 061057 has included the land embraced by Lots 3 and 4, and the intervening road right! of! way. In addition, while BLM rejected the selection as to Lot 37 in its June 1974 decision, the State later reasserted and amended its selection to include as selected lands all available unpatented lands in T. 28 S., R. 59 E., Copper River Meridian (Aug. 17, 1981, Letter from Deputy Commissioner, Department of Natural Resources, State of Alaska, to BLM). Thus, BLM's 40-acre policy is not applicable.

[3] Since BLM's 40-acre policy is not relevant to Mahle's allotment, the question is whether the record shows that he used and occupied the lands in question in accordance with the 1906 Act, as amended, and its implementing regulations. It does not.

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-Dyea 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. ^{18/} 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. 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.

^{18/} Those 12.62 acres, represented by Lot 39 and U.S. Survey No. 5107A, have now been patented to Mahle's heirs under the 1906 Act.

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, as amended, and that it continued for the requisite 5 years. ^{19/} 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, as amended, 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. See State of Alaska, 113 IBLA 80, 84 (1990). The City and the State shall be served with a copy of the complaint.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside, and the case is remanded to BLM for initiation of a Government contest.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur.

John H. Kelly
Administrative Judge

^{19/} Absent such initiation, Mahle's claim must fail for that reason alone. United States v. Jim, 134 IBLA 294, 296 (1995).