

INTERIOR BOARD OF LAND APPEALS

Jules Wright

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JULES WRIGHT

IBLA 93-378

Decided January 8, 1997

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying the amendment of Native allotment application F-18277, Parcel A.

Set aside and referred to the Hearings Division.

1. Administrative Authority: Generally--Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Rules of Practice: Appeals: Standing to Appeal

Under sec. 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(c) (1994), a Native allotment applicant may amend the land description contained in the application if the description designates land other than that which the applicant intended to claim and the new description describes the land originally intended to be claimed. When BLM denies such an amendment, the Native allotment applicant is adversely affected by such a determination and may file an appeal with the Board of Land Appeals. If the Board determines that there are material facts in dispute, it will refer the case to the Hearings Division, Office of Hearings and Appeals, for a hearing on the matter pursuant to 43 CFR 4.415.

APPEARANCES: Kathy J. Keck, Esq., Alaska Legal Services Corporation, Fairbanks, Alaska, for appellant; Carlene Faithful, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management; Nancy J. Nolan, Esq., Assistant Attorney General, Office of the Attorney General, State of Alaska, Anchorage, Alaska, for the State of Alaska.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

On April 14, 1972, the Bureau of Indian Affairs (BIA) filed with the Bureau of Land Management (BLM) the Native allotment application of Jules

Wright, F-18277, which he had signed on February 5, 1971. <sup>1/</sup> That application described a parcel of land in secs. 5 and 6, T. 2 S., R. 2 W., Fairbanks Meridian, later designated as Parcel A. <sup>2/</sup>

In a request for a field report of Parcel A, dated February 28, 1974, a BLM employee noted: "Land is in conflict with patented land. There appears to be some confusion as to where applicant intended land to be and where BIA plotted it—check with applicant in field."

In June 1983, BLM contacted Wright concerning the land description for Parcel A. Wright then visited the BLM office in Fairbanks and confirmed that the land he desired had been misdescribed on the application and that his land was "further downstream [on the Tanana River] in T. 2 S., R. 3 W., Section 14, FM" (Memorandum to File, dated June 14, 1983). BLM informed Wright that the land in sec. 14 was also patented land. BLM also stated: "Will field examine in late July by boat when Mr. Wright returns to Fairbanks." Id.

On March 22, 1984, a BLM realty specialist, accompanied by Wright, conducted an examination of Parcel A and prepared a field report dated March 26, 1984. The realty specialist examined land in secs. 20 and 29, T. 2 S., R. 3 W., Fairbanks Meridian. Nothing in the field report indicates why the realty specialist examined the land in secs. 20 and 29, other than his statement that "[a]pplicant intended to apply for lands other than those described on the original application by B.I.A." (Field Report at 2). <sup>3/</sup> The realty specialist found that Wright's knowledge of "the location and past use [of the land] was good." Id. at 4. He concluded that Wright had met the requirements of the Native Allotment Act.

On April 11, 1986, BLM sent Wright a notice styled "Survey Plat Filed," informing him that it would consider its survey of his Parcel A lands in secs. 20 and 29, containing 78.30 acres, to be correctly described in the absence of an objection from him. Wright filed no objection.

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<sup>1/</sup> That application was filed pursuant to the Alaska Native Allotment Act of 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed on Dec. 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1994), subject to applications pending before the Department on that date).

<sup>2/</sup> In a memorandum dated May 16, 1972, BIA notified BLM that it had "found a parcel B which was not included in the application we completed and filed with you." It requested that BLM include Parcel B as part of Wright's application. Parcel B is not at issue in this appeal.

<sup>3/</sup> In an affidavit filed with this Board on Jan. 3, 1994, Wright stated: "In 1983, I told BLM where the land I originally intended to apply for was located. They did not tell me that I had to submit any information showing that I had originally intended to apply there. They arranged for me to go on a field examination in 1984. When we went on the field exam, it was the first time that I was able to show a BLM or BIA employee where my land was on the ground, instead of on a map."

On September 14, 1990, BLM received a memorandum from an allotment specialist with the Tanana Chiefs Conference, Inc., stating, in part, as follows: "Enclosed please find an original witness statement from Mr. Wright regarding his parcels A and B. He has reviewed the Master Title Plats for both parcels and stated the locations are correct." <sup>4/</sup>

On September 24, 1990, BLM sent a letter to Wright and the State of Alaska stating that it had reviewed Wright's allotment application for Parcel A in secs. 20 and 29 and had "determined that the application requires adjudication under the Stipulated Procedures for implementation of Order in Aguilar v. United States, 474 Fed. Supp. 840 (D. Alaska 1979) \* \* \*." It stated that although claimed use and occupancy predated a State selection application (F-027416) for the land, the land had been patented to the State on July 30, 1963.

In the letter BLM invited "all parties who have an interest in the above-described land," within 90 days of receipt of the letter, to submit additional evidence or comments supporting or disputing Wright's claim to the land. BLM registered no concern over the description of the land claimed.

In response to the letter, on October 29, 1990, Wright filed two witness statements with BLM stating that he commenced use of the land in question in 1955. On January 9, 1991, following an extension of time to respond, the State filed a letter with BLM stating that a third-party interest in the land had been created in 1967 through issuance of a lease to the United States Forest Service (USFS). With the letter the State also submitted the statements of eight individuals disputing Wright's claim to the land. Based on those statements, the State asserted that Wright's use of the land, if any, was not potentially exclusive of others. The State also claimed that the land in question had been withdrawn on November 4, 1954, by Public Land Order No. 1028 for forest management purposes and that Wright could not have initiated a Native allotment after that date. The State proposed the following procedure:

If Mr. Wright's use and occupancy does not predate PLO 1028 the application should be rejected pursuant to Step 1 of the Aguilar procedures. Otherwise a hearing pursuant to Step 6 of the Aguilar Procedures may be necessary to determine if he is entitled to any of the claimed area and to establish the USFS's status as a bona fide purchaser. This will also provide the state with an opportunity to cross-examine witnesses to determine the exact level of use, periods of use, and areas of use, where witness statements in the file are deficient.

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<sup>4/</sup> In the accompanying witness statement, Wright claimed, for the first time, that he began using the Parcel A land in 1953. In his original application, he stated that he began using the land on July 1, 1955.

On March 21, 1991, Wright submitted an affidavit to BLM claiming use and occupancy of the land commencing in 1953 and responding to the eight statements submitted by the State.

On October 30, 1991, BLM issued to Wright and the State a notice styled "Native Allotment Application Relocation." Therein, BLM stated that it was providing notice that the land description on Wright's application F-18277, Parcel A, was proposed to be amended from the original description to the land in secs. 20 and 29. It provided a 60-day period for protest or comment and stated that "[a]fter the 60-day comment/protest period, we will process the application." <sup>5/</sup> In a letter dated January 6, 1992, BLM stated that the State of Alaska had requested an extension of time on December 12, 1991, to respond to the October 30, 1991, notice. BLM granted an extension until January 30, 1992. In a notice dated January 6, 1992, and styled the same as the October 30, 1991, notice, BLM granted USFS the opportunity within 60 days to protest or comment on the amended land description for Parcel A of F-18277.

On February 28, 1992, USFS filed a letter with BLM protesting the relocation of Wright's allotment, Parcel A, to the lands in secs. 20 and 29 and challenging his use and occupancy of the land. On the same date BLM received a letter from the State also protesting the relocation and contesting his use and occupancy.

In a decision dated April 2, 1993, BLM denied "relocation" of Wright's allotment application, Parcel A. That denial was, in essence, a denial of the amendment of his application to include the lands in secs. 20 and 29. In its decision, BLM stated:

The case file for Native allotment application F-18277, Parcel A, does not contain any evidence to indicate that Jules Wright had originally intended to apply for lands described in the relocation notices. To the contrary, there is substantial evidence submitted by individuals who have extensive knowledge of the area, that Mr. Wright did not use or occupy the lands in the amended location. Therefore, in view of the above, the relocation of Native allotment application F-18277, Parcel A[,] must be and hereby is denied.

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<sup>5/</sup> On the same day, BLM sent a letter to USFS very similar to the Sept. 24, 1990, letter to Wright and the State offering USFS 90 days within which to comment on Wright's claim to the lands in secs. 20 and 29. BLM stated therein that at the end of the 90-day period, it would review the case file and "if there are disputed issues of fact, Jules Wright will be offered an opportunity for an oral hearing before further action is taken on the case." In a letter dated Jan. 6, 1992, BLM informed USFS to disregard its Oct. 30, 1991, letter because "[t]he proposed relocation of the Parcel A must first be decided."

Wright filed a timely appeal of that decision.

Section 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(c) (1994), provides that "[a]n allotment applicant may amend the land description contained in his or her application if said description designates land other than that which the applicant intended to claim at the time of application and if the description as amended describes the land originally intended to be claimed." In Angeline Galbraith, 97 IBLA 132, 147, 94 LD. 151, 159 (1987), the Board identified the following factors as being relevant to the question of intent:

[T]he geographic positions of the land described in the original application and the proposed amendment, the relation of the parcels to each other and to any landmarks or improvements, the history of the legal status of the parcels, and the reasons why the original application did not correctly describe the intended land. See Pedro Bay Corp., [78 IBLA 196, 201 (1984)]. Moreover, an applicant should show how his or her activities since filing the application have been consistent with the present claim that other land was intended. Such factors should clearly indicate a reasonable likelihood that the land described by the amendment was the land intended to be claimed at the time of the original application.

On appeal, Wright argues that BLM never requested that he submit any evidence about whether or not he originally intended to apply for this land prior to issuance of its decision. <sup>6/</sup> He points out that in its decision BLM does not specify why it determined that he had not intended to apply for the land contained in his amended description. He claims that BLM's decision discusses only the issue of use and occupancy which he charges is conceptually distinct from the issue of his intent to apply for a parcel of land. He asserts that evidence of use and occupancy may or may not be probative of the question of intent. He lists the reasons why he has complied with the Galbraith standards.

Wright contends that in the past when the record in a case has presented disputed facts concerning whether a Native allotment applicant's new description describes the land originally intended to be claimed, the Board has referred the case to the Hearings Division, pursuant to 43 CFR 4.415, for a hearing on the matter, citing State of Alaska, 119 IBLA 260 (1991), and Daniel Roehl, 103 IBLA 96 (1988). Wright contends that this is such a case and that BLM cannot deny him an amendment without providing him a hearing.

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<sup>6/</sup> In its decision, BLM stated that action on the application would "be suspended for 60 days from the date of receipt of this notice to allow time to submit evidence in support of the claim" (Decision at 3). However, it obviously considered its decision on relocation to be final because it provided notice that the decision was immediately appealable to this Board.

In its answer, BLM disputes Wright's claim that he has satisfied the Galbraith standards and thereby demonstrated his original intent to claim the land in secs. 20 and 29. BLM argues that his request for a hearing should be denied because no material facts are in dispute. BLM contends that Wright's actions alone, without reference to the statements filed by the State, justify denial of an amendment.

In the alternative, BLM asserts that Wright's appeal must be dismissed because there is no final BLM decision in the case. BLM states that the Department no longer has title to the land in question and, thus, has no jurisdiction over it and cannot adjudicate title to it. BLM states that this is an appropriate case for application of the Aguilar stipulated procedures. Under those procedures, BLM argues, its decision to reject or refer the claim to the Solicitor's office for title recovery is final for the Department. Such a decision, it states, has not been made. BLM points to our decisions in State of Alaska (Balashoff), 127 IBLA 276 (1993), and Bay View, Inc., 126 IBLA 281 (1993), as controlling in this case because in those cases the Board dismissed appeals of BLM decisions accepting amendments of Native allotment applications for patented lands on the basis that such decisions were not a final determination of rights to the land. BLM contends that its decision under appeal "is not a rejection of Wright's application and is not a determination of the merits of his application" and that Wright's appeal must be dismissed (Answer at 13). The State provides arguments similar to those of BLM.

In a reply, Wright contends that Balashoff and Bay View are clearly distinguishable from the present case and that, while the Board may not adjudicate title to the land at issue, it clearly has jurisdiction to determine what land is at issue. Wright denies that his appeal is premature and repeats his request for a hearing on his original intent.

Wright's appeal is not premature and we deny BLM's and the State's requests to dismiss it as such. The facts in Bay View are easily distinguishable from the facts in this case. In that case BLM approved the amendment of a Native allotment application to include land that had been transferred by interim conveyance to Bay View, Inc. The Board concluded that the appeal was premature because BLM was not adjudicating title to the land and, thus, Bay View's interests were not adversely affected by the amendment decision. <sup>7/</sup>

In this case BLM denied the amendment of a Native allotment application. That fact alone distinguishes the case from Bay View. Our Bay View case turned on the effect of the decision on the interest of the appellant.

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<sup>7/</sup> Balashoff involved similar facts. BLM approved an amendment to embrace land transferred by interim conveyance to a village corporation and the State appealed. Although it is not clear from the decision what interest the State claimed in the lands, the Board determined the appeal to be premature.

We concluded there was no direct and immediate effect on Bay View's rights and interest. The appellant in this case is the Native allotment applicant. His interest has been adversely affected because BLM has told him that he has not established that the land in secs. 20 and 29 is the land for which he originally intended to apply. Thus, even if BLM were to provide him a hearing under the Aguilar procedures to show use and occupancy, he would be precluded from showing such use and occupancy for the land for which he asserts he originally intended to apply. 8/ He is adversely affected by BLM's decision.

In Bay View, the Board stated that the Secretary's special fiduciary responsibility to Native Americans "properly extends to ascertaining the proper description of the lands for which an Alaskan Native intended to apply" (126 IBLA at 287). This is precisely what Wright is seeking by the filing of this appeal. He is asking that this appeal be referred for a hearing on the issue of the proper description of the land for which he originally intended to apply.

Finally, we note that BLM's Aguilar and Title Recovery Handbook for Native Allotments states at page 4: "The adjudication of all other issues involving a Native allotment case file should be completed prior to beginning the Aguilar process. These other issues would include notice of a proposed relocation or reinstatement \* \* \* and subsequent decision accepting or rejecting the proposed relocation or reinstatement. These decisions are appealable to IBLA" (Exh. 3 at 2, Reply to Answers of State and BLM). Thus, the issue of the exact location of the land for which a Native is seeking an allotment is not properly an issue for an Aguilar proceeding and it should be resolved prior to commencement of any such proceeding.

Where a BLM decision denies the amendment of a Native allotment application, the applicant has the right to appeal to this Board and the appeal will not be dismissed as premature.

We turn to the question of whether Wright is entitled to a hearing on the issue of his original intent. We conclude that he is. Material facts are in dispute. In such a case, the Board will refer the case to the Hearings Division under 43 CFR 4.415 for a hearing. Daniel Roehl, supra. The Administrative Law Judge assigned to the case shall issue a decision which will be final for the Department in the absence of a timely appeal to this Board. 9/

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8/ The question of when Wright commenced use and occupancy of the tract is not directly at issue in the present dispute, which concerns only whether he may be allowed to amend his Native allotment application. Instead, that question should be addressed in the context of any Aguilar proceeding that may be convened.

9/ Should the parties be able to resolve the issue of original intent by stipulation, the hearing before an Administrative Law Judge could be avoided and Aguilar proceedings could commence.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is referred to the Hearings Division.

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Bruce R. Harris  
Deputy Chief Administrative Judge

We concur.

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James L. Burski  
Administrative Judge

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Gail M. Frazier  
Administrative Judge

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C. Randall Grant, Jr.  
Administrative Judge

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David L. Hughes  
Administrative Judge

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Will A. Irwin  
Administrative Judge

## ADMINISTRATIVE JUDGE KELLY DISSENTING:

I respectfully dissent. Prior to the issuance of today's decision, there was no Board of Land Appeals precedent for dealing with an appeal of the Bureau of Land Management's (BLM) rejection of an amendment to lands selected as a Native allotment but patented to a third party. Today, the majority establishes a regrettable precedent which needlessly complicates and delays future disposition of such amendments.

The majority finds that Wright is entitled to a hearing under 43 CFR 4.415 as to the issue of his intent because "[m]aterial facts are in dispute." I disagree. The undisputed material facts in this case are that Wright changed the location of his allotment three times, that his final amendment claimed lands located approximately 7 miles downstream from the original location, that his final selection was on patented lands withdrawn from entry in 1954, and that he subsequently amended his application to change his commencement of use and occupancy from 1955 to 1953. Wright cannot create an issue of fact by simply contradicting his own previous statements. See Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1410 (9th Cir. 1987).

Moreover, the majority's decision will most likely result in Wright receiving at least two hearings; one under 43 CFR 4.415 to determine which land he originally intended to apply for, and the other under the Aguilar stipulations to determine use and occupancy for purposes of entitlement. Further, if Wright is not satisfied with the determination of the Administrative Law Judge as to his amendment, he can file another appeal to this Board, which could order yet another hearing.

Recently, the Ninth Circuit Court of Appeals in Silas v. Babbitt, 96 F.3d 355 (9th Cir. 1996) clearly indicated that there is a limit in providing rights to a Native allotment applicant, observing that "the Constitution requires due process of law; it does not require an endless number of opportunities for one to assert his rights." Id. at 368. In this case, the majority has exceeded that limit.

Accordingly, I would affirm BLM's decision.

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John H. Kelly  
Administrative Judge

We concur:

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James L. Byrnes  
Chief Administrative Judge

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Franklin D. Amess  
Administrative Judge

## ADMINISTRATIVE JUDGE MULLEN DISSENTING:

On April 2, 1993, the Bureau of Land Management (BLM) issued a decision denying what it described as the "relocation" of the tract of land subject to Jules Wright's application under the Alaska Native Allotment Act of 1906. 1/

For a long time prior to this appeal the land administrators in the Department of the Interior have been able to recognize the obvious when attempting to determine the exact location of a specific land tract being claimed under a statute governing the disposition of Federal lands. The most reliable means of finding what land is being claimed is to have the person claiming the land go to the parcel being claimed, stand on it, and identify it as the tract he or she wants. The reliability of this method, when compared to using a map or legal description, is obvious.

In February 1971, the legal description in Wright's Alaskan Native Allotment application was the best evidence of what Wright claimed under the Alaska Native Allotment Act. However, the record shows that in February 1974, an employee of BLM recognized that there was some confusion regarding the true location of the tract Wright intended to claim. Wright was notified and, in June 1974, he responded by acknowledging that his application did not describe what he considered to be his allotment. In keeping with its past practice, BLM decided that the best way to determine what land Wright intended to claim was to have Wright go with a BLM realty specialist and identify the parcel on the ground.

On March 22, 1984, a BLM realty specialist and Wright went to the land that Wright intended to claim. As noted in the majority opinion, nothing in the BLM realty specialist's field report of that investigation indicated why the realty specialist examined the tract in secs. 20 and 29 (as opposed to some other parcel of land in the State of Alaska), other than the statement that "[Wright] intended to apply for lands other than those described on the original application by B.I.A." (Field Report at 2). The realty specialist did not find it necessary to state the obvious. 2/

On April 11, 1986, BLM informed Wright of its decision to consider its survey of the parcel he had identified on the ground in secs. 20 and 29 to be the tract Wright had applied for. Wright did not object

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1/ See footnote 1 in the majority opinion.

2/ If any question remained, Wright's Jan. 3, 1994, affidavit in which he says that "when we went on the field exam, it was the first time that I was able to show a BLM or BIA employee where my land was on the ground, instead of on a map" should have resolved the issue. I draw two conclusions from the record: (1) When the BLM realty specialist asked him to do so, Wright took the realty specialist to the tract he intended to claim; and (2) Wright has some difficulty reading a map.

or attempt to appeal that decision. In fact, a memorandum submitted to the Board by a third party on September 14, 1990, also states that Wright deemed the tract in secs. 20 and 29 to be the tract he had intended to acquire.

There is no reason to comment on the evidence regarding when Wright commenced occupancy of the tract in secs. 20 and 29, other than to note that this matter will eventually be addressed in an Aguilar hearing. What is important is that there is absolutely no evidence that the realty specialist erred when describing the land he and Wright physically inspected on March 22, 1984, and there is no evidence supporting BLM's April 2, 1993, decision to reverse its April 11, 1986, decision that the parcel Wright intended to claim was in secs. 20 and 29.

The proper course of action for this Board to take at this time is to vacate the April 2, 1993, decision. This will reinstate the decision identifying the tract in secs. 20 and 29 as the one Wright applied for. The case file should then be remanded to BLM and BLM should institute an Aguilar hearing. There is no need to have an Administrative Law Judge hearing to determine what tract of land Wright intended to claim.

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R. W. Mullen  
Administrative Judge