

UNITED STATES  
v.  
EDWARD N. O'LEARY

IBLA 90-290

Decided February 11, 1993

Appeal from a decision by District Chief Administrative Law Judge John R. Rampton, Jr., dismissing a Government contest against Alaska Native Allotment application F-16644, Parcel B.

Affirmed.

1. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Native Allotments -- Contests and Protests: Government Contests

An Administrative Law Judge's conclusion that a Native allotment applicant commenced qualifying use and occupancy of the claimed land prior to the effective date of a withdrawal of the land will be upheld on appeal where the conclusion is based upon a review of all the evidence presented at a hearing and the Judge's resolution of disputed facts is necessarily influenced by his consideration of the credibility of the witnesses testifying at the hearing.

2. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Native Allotments -- Contests and Protests: Government Contests

A Government contest of a Native allotment application based on a charge of failure to use and occupy the land to the potential exclusion of others is properly dismissed where the Native shows by a preponderance of the evidence, presented through his testimony and that of numerous witnesses, that his use and occupancy of various improvements on the site for fall hunting purposes were, in fact, at least potentially exclusive of others.

APPEARANCES: Roger L. Hudson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management; William E. Caldwell, Esq., Alaska Legal Services Corporation, Fairbanks, Alaska, for Edward N. O'Leary.

## OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE BHAIRSON

The Bureau of Land Management (BLM) has appealed from the February 28, 1990, decision of District Chief Administrative Law Judge John R. Rampton, Jr., dismissing a Government contest against Edward N. O'Leary's Native allotment application F-16644, Parcel B, and ordering, all else being regular, the issuance of the allotment.

In a Native Allotment application dated June 15, 1971, O'Leary claimed 80 acres in sec. 2, T. 6 N., R. 25 E., Fairbanks Meridian (Parcel B). <sup>1/</sup> He described the land as being "on Yukon River 80 miles up river from Circle on south side across Yukon River from mouth of the Kandik River" (Exh. C). Parcel B is within the Yukon-Charley Rivers National Preserve, a unit of the National Park System created December 2, 1980, by section 201(10) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 410hh(10) (1988). <sup>2/</sup> Historically, the land was known as the "Ed Biederman Fish Camp" or the "Biederman Camp." O'Leary claimed use and occupancy commencing in September 1962.

In a contest complaint dated October 19, 1988, BLM charged that O'Leary "did not in fact, occupy and use the land specified by the application at least to the potential exclusion of others" (Contest Complaint at Item 8). <sup>3/</sup>

Judge Rampton held a hearing on the contest on September 11 and 12, 1989, in Arctic Circle Hot Springs, Alaska, and on September 13, 1989, in Fairbanks, Alaska. In its briefs to Judge Rampton, BLM asserted that O'Leary failed to establish by a preponderance of the evidence that he initiated qualifying use and occupancy which was at least potentially exclusive of others prior to January 17, 1969, the effective date of

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<sup>1/</sup> O'Leary also claimed 80 acres in secs. 26 and 27, T. 9 N., R. 14 E., Fairbanks Meridian, situated along the Steese Highway just outside Central, Alaska (Parcel A). That parcel is not at issue in this appeal.

<sup>2/</sup> Section 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1988), provided for legislative approval, subject to valid existing rights, of all Alaska Native allotment applications, with certain caveats. One of those caveats was that applications describing lands lying within the boundaries of a unit of the National Park System created on or before the effective date of the Act, Dec. 2, 1980, were not legislatively approved. 43 U.S.C. § 1634(a)(4) (1988). Since Parcel B is within the Yukon-Charley Rivers National Preserve, it was not legislatively approved, and it was properly adjudicated by BLM pursuant to the Alaska Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed effective Dec. 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1988), with a savings provision for applications pending on Dec. 18, 1971).

<sup>3/</sup> The complaint also related to 16 acres in Parcel A. BLM dropped the contest as to that acreage and indicated its intention to reconsider a contest of Parcel A (Tr. 6-7; Decision at 2).

Public Land Order No. (PLO) 4582 withdrawing the subject lands from appropriation under the public land laws. BLM asserted that O'Leary's qualifying activities on the parcel were commenced post-application. In his decision Judge Rampton concluded: "The clear weight of the evidence shows that Mr. O'Leary's use and occupancy of parcel B was potentially exclusive of all others and that his qualifying use began prior to the effective date of Public Land Order 4582" (Decision at 8).

In its statement of reasons (SOR), BLM asserts that Judge Rampton failed adequately to address whether O'Leary made satisfactory proof of substantial actual use and possession of the disputed parcel for a period of 5 years and erroneously interpreted the Department's practice of considering improvements on Native allotment claims to constitute evidence of potentially exclusive use when he applied them to the unique facts of this case. BLM again insists that O'Leary failed to establish by a preponderance of the evidence that he commenced substantial, actual use and possession of the claimed parcel prior to withdrawal of the parcel in January 1969. BLM also contends that O'Leary's purported activities on the parcel prior to January 1969 were only intermittent and not potentially exclusive of others.

Section 1 of the Alaska Native Allotment Act of May 17, 1906, authorized the Secretary of the Interior "in his discretion and under such rules as he may prescribe" to allot up to 160 acres of vacant, unappropriated, and unreserved non-mineral land to a Native Alaskan who is head of a family or 21 years of age. 43 U.S.C. § 270-1 (1970). The principal statutory prerequisite for proving entitlement to an allotment is that the applicant must submit satisfactory proof "of substantially continuous use and occupancy of the land for a period of five years." 43 U.S.C. § 270-3 (1970). As defined by the Department, such use and occupancy "contemplates the customary seasonality of use and occupancy \* \* \* of any land used by [the applicant]" but 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 CFR 2561.0-5(a).

A Native allotment applicant, no less than any other public land claimant, is required to establish compliance with the applicable laws and regulations and, thus, to bear the burden of establishing entitlement to an allotment. Ira Wassilie (On Reconsideration), 111 IBLA 53, 59 (1989). Where the Government contests a Native allotment claim, the Native allotment applicant is required to show entitlement by a preponderance of the evidence. United States v. Estabrook, 94 IBLA 38, 51-52 (1986). The amount of evidence necessary to sustain the burden is a matter of proof on a case-by-case basis. Id.

As the Board stated in Angeline Galbraith (On Reconsideration), 105 IBLA 333, 338 (1989):

The questions of substantiality and potential exclusivity, while related, actually involve differing considerations. Thus, the applicable regulation expressly notes, in defining the term

"substantially continuous use and occupancy," that the use and occupancy contemplated "must be substantial actual possession and use of the land." 43 CFR 2561.0-5(a). Certain uses, by their nature, would necessarily result in "substantial actual possession and use of the land." Thus, it is difficult to ascertain how land containing a house or cabin, or reindeer corrals or vegetable gardens or land used as a headquarters site could not be deemed to manifest the substantiality of use required by the regulations.

Other uses, however, including berrypicking, do not necessarily impart the element of substantiality. In these cases, the critical question is not whether the use occurred at all, but rather the quantum of use. Thus, in the Estabrook case, which involved hunting, we noted that the amount of use alleged therein (two visits per year, varying in duration from a few days to a week per visit) did not constitute substantial actual possession and use of the land but rather was properly characterized as "intermittent." Supra at 53-54.

Generally speaking, it can be seen that where a use is "intermittent," it will also not be potentially exclusive of others. But, it is also possible that the claimed use will be lacking in the requisite potential exclusivity even where the use is, itself, substantial. Thus, an individual Native could claim daily use of a trail. While the nature of this use is not one which necessarily gives rise to a finding of substantiality, the frequency of use manifested would certainly provide a sufficient quantum to support a finding of substantially continuous use and occupancy. If, however, the record also established that many Natives used this trail on the same basis as the applicant, the allotment application would be properly rejected. This rejection would not be based on a failure to show substantially continuous use and occupancy but rather on the inability of the applicant to show that the use alleged was, at least potentially, exclusive of others. [Emphasis in original.]

On appeal, counsel for O'Leary accurately recounts the following history of the Biederman Camp derived from the hearing transcript and exhibits:

Max Adolphus "Ed" Biederman (a non-Native) took over the Eagle-to-Circle mail route in 1912, after having carried mail by dog-sled for the Northern Commercial Company from Tanana and Rampart for two years. About four years after acquiring the mail contract, he started constructing his fish camp and stopover between Eagle and Circle, at a place that his descendants still refer to as Charley Creek, across the Yukon River from old Charley Village (which had been washed away in 1914) and Tom King's roadhouse. The site was advantageously located

for distributing dried fish (for dog food) up and down that trail that he travelled, as a midway point to change to a fresh dog team, and as a good fishing spot from which to feed the many dogs that he used and boarded. The fish camp/stopover gave Biederman an "integrated" operation economically, functioning as a fuel source-gas station. When the Biederman's lost the mail contract to airplanes in 1938, much of the reason for keeping a fish camp so far removed from home base in Eagle was lost with it, although his dog-boarding operation may have continued to serve the miners and trappers in the area.

Ed Biederman died in 1945 at age 83. The following year, his son Horace, as administrator of the Biederman estate, "sold" Biederman Camp to George and Nellie Beck (Nellie was one of Ed's daughters). George Beck (a non-Native) and his family continued to live there and trap in the winter (they lived in Eagle in the summers) until 1949 when the bottom fell out of the fur market; he then moved the family to Eagle and they never lived at Biederman Camp, although George Beck would go there sometimes in the summers while prospecting in the early 1950's. In 1955 George Beck started working construction at Barter Island on the North Slope which he continued to do until he retired in 1971. George and Nellie were divorced in 1956, and no mention of Biederman Camp was made in the divorce papers, which dealt with all their marital property. [Footnotes omitted.]

(Answer at 16-17).

Judge Rampton provides the following synopsis of the evidence presented at the hearing:

Mr. O'Leary asserts that he purchased the camp (the improvements) from George Beck in 1962 (Ex. 16) or at least "during the early '60's" (Tr. 351; see also Tr. 352-353).

A field examination was conducted on parcel B in 1976 (Ex. 6). The report notes erroneously that Mr. O'Leary purchased the cabin from Max Beck (Id. at 3). (Max is George and Nellie's son.) The purported purchase from Max Beck was disputed by Charlie Biederman (Id. at 3 and 5; see also Exhs. 4 and 5). Charlie Biederman is Ed Biederman's son, and Nellie Beck's brother. The report concludes:

\* \* \* According to Charlie Biederman, the cabin still belongs to George Beck \* \* \*. It appears that Mr. O'Leary does not own the cabin, that it is a commonly used place and that is [sic] may have historic significance. \* \* \* My conclusion is that Mr. O'Leary does not qualify due to lack of [sic] exclusive use \* \* \*.

Exhibit 6 at 6.

Because the cabin pre-dated Mr. O'Leary's use and occupancy, the National Park Service opined that "Parcel B was not vacant and unoccupied when the applicant [Mr. O'Leary] started using it" (Ex. 12). By notice dated October 21, 1987, Mr. O'Leary was asked to provide additional evidence of qualifying use and occupancy (Ex. 13). In particular, he was asked to supply notarized witness statements. Instead, he submitted his own affidavit asserting that he acquired the improvements from George Beck in 1962 (Exs. 16, 17).

The information in the file suggesting that George Beck still owned the improvements at the camp cast legitimate doubt on Mr. O'Leary's right to assert potentially exclusive use of the camp and was a sufficiently good reason for BLM to institute the present contest proceedings. Nevertheless, at the hearing BLM failed to establish a prima facie case.

Charlie Biederman's statements, to whatever extent they may be relevant to the question of Mr. O'Leary's acquisition of the improvements from George Beck, are rank hearsay. Being unsworn and unsubstantiated, they are entitled to no weight. Charlie Biederman did not testify at the hearing.

Max Beck testified that his father George denied selling the camp to Mr. O'Leary (Tr. 136-138). But there is no evidence that George Beck continued to use the parcel or assert any legal interest in it after 1960, or that he transferred his interest to anyone other than Mr. O'Leary.

Nellie Beck gave testimony that challenged the asserted date of purchase and the purchase price (Tr. 162-165), but she did not dispute the fact of a sale nor did she assert any interest in the camp. Neither did she assert either that George continued to use the camp or that he transferred his interest to anyone other than Mr. O'Leary.

Contestant's other witnesses provide no additional support. BLM Land Law Examiner Linda Butts has no personal knowledge of the claim. She merely provided the foundation for admitting contestant's exhibits as officially kept records. Paul Costello, the BLM Field Examiner who examined parcel B in 1976, did not recall why he made the adverse recommendation. He speculated that it was some fact he neglected to note in his report, but does not recall either what the fact may have been or why he would not have noted it (Tr. 119-124). John Nathaniel lacked any material knowledge of the Biederman camp.

Richard Hutchinson and Albert Carroll Sr. both knew of Mr. O'Leary's use of the parcel in the late 1960's (Tr. 23-24, 40, 42, 47). Mr. Hutchinson knows the parcel as Eddie's Hunting Camp (Tr. 20). Mr. Carroll testified that George

Beck told him of his interest sometime in the '50's or '60's and that later Mr. O'Leary told him that he (O'Leary) owned it (Tr. 45-46, 49).

Even Merrill Hakala testified that he was aware of Mr. O'Leary's claim to the camp perhaps as early as 1969 and that the camp was known as Eddie's in the 1970's (Tr. 461, 465, 479).

Use of the camp by "floaters" is of no consequence. Such casual use asserted no conflicting rights or interests. It was customary for "floaters" to use such camps with or without permission, whether or not attempts were made to keep them out (Tr. 119-120, 323-324, 412).

Although contestant failed to present a prima facie case, contestee nevertheless proceeded to present his case and his evidence must also be considered.

Don Young testified that he went to the parcel with Mr. O'Leary beginning in the middle 1960's and he knew it as Eddie's Camp (Tr. 187-188, 189, 207-208).

Mort Cass went hunting with Mr. O'Leary at the camp in 1962 and probably every year thereafter until 1969 or 1970 (Tr. 213). He always understood it to be Eddie's. He testified that Mr. O'Leary asserted ownership in 1964 or 1965 (Tr. 215), and he corroborated that Mr. O'Leary had performed repairs on the camp in the mid-60's (Tr. 216).

Jack Jackson went hunting with Mr. O'Leary at the parcel ("Eddie's cabin") in 1964 or 1965 (Tr. 218).

Frank Warren explained how "title" to such camps could change hands (Tr. 240-241). He asserted that the Biederman Fish Camp was abandoned and not owned by anyone in the early 1950's (Tr. 227, 228).

The rest of the evidence is merely cumulative on this point: George Beck ceased to assert an interest in the camp, and Eddie O'Leary began to assert a potentially exclusive interest in the camp prior to 1965. [Footnote omitted; emphasis in original.]

(Decision at 4-7).

Although Judge Rampton concluded that "at the hearing BLM failed to establish a prima facie case" (Decision at 6), he did not dismiss the contest on that basis. He stated that because O'Leary had proceeded and presented evidence, "his evidence must also be considered" (Decision at 7). He went on to analyze all the evidence presented in the case, and on that basis, he concluded that O'Leary had shown that his use and occupancy of

Parcel B was potentially exclusive of others and that such qualifying use commenced prior to the 1969 withdrawal.

Prima facie means that the case is adequate to support the Government's contest of the claim and that no further proof is needed to nullify the claim. United States v. Estabrook, 94 IBLA at 43. Our review of the evidence indicates that the question of whether or not a prima facie case was presented is a close one; however, it is not a question we need decide because of Judge Rampton's ultimate conclusion, based on all the evidence presented, with which we agree.

BLM's appeal raises two principal objections to Judge Rampton's decision. First, BLM claims that Judge Rampton failed to address the issue of whether O'Leary satisfied his burden of proving substantially continuous use and occupancy of Parcel B prior to January 17, 1969. Second, BLM argues that Judge Rampton erred in concluding that O'Leary's use and occupancy was at least potentially exclusive of others.

[1] In support of the first objection, BLM directs attention to Judge Rampton's statement on page 3 of the decision: "As noted above, contestant does not charge that Mr. O'Leary's use was not substantially continuous for a period of 5 years; it alleges only that his use was not potentially exclusive." BLM relates:

To begin with, counsel for contestant in his September 11, 1989 opening statement unequivocally identified "the substantially continuous use and occupancy issue" as one to be addressed during the hearing (Transcript 9). Responding to that statement, the Administrative Law Judge orally acknowledged that he recognized that the "substantial continuous use issue" was raised in the complaint (Tr. 10), and Contestee's own counsel also acknowledged on the record that the ". . . complaint . . . addressed the use and occupancy issue" (Tr. 10).

(SOR at 3-4). BLM surmises that "this overly narrow view of the contest is based solely on the Administrative Law Judge's reading of the contest complaint" (SOR at 5). While the contest complaint does appear vague in whether it specifically asserts that O'Leary failed to establish the requisite use and occupancy to qualify for the allotment in question, the record is clear that the issue was joined at the hearing without objection from counsel for O'Leary.

However, BLM answers its own argument when it states that "[o]f course, it might also be argued that the decision below did effectively dispose of the substantially continuous use and occupancy question" [with] "a conclusory statement that contestee did make a showing that qualifying use and occupancy began prior to January 1969" (SOR at 6). While Judge Rampton's decision is subject to criticism for not acknowledging that the use and occupancy issue was raised at the hearing, it does dispose of the use and occupancy issue:

Contestant argues that Public Land Order 4582, 34 FR 1025 (January 22, 1969) requires Mr. O'Leary to demonstrate that qualifying use and occupancy commenced prior to its effective date. Contestee argues surprise. Contestee's argument is unavailing because publication in the Federal Register gives notice of the requirement. See Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 385 (1947). The evidence shows, however, that Mr. O'Leary did make such a showing.

(Decision at 8).

BLM criticizes that conclusion stating that it is unsatisfactory because it ignores questions of credibility and discrepancies and contradictions in the record. What BLM overlooks, however, is that Judge Rampton's conclusion is supported by his analysis of the evidence in the case. Review of his summary of the evidence, as set forth above, clearly illustrates that Judge Rampton identified and resolved use and occupancy concerns.

BLM asks the Board to independently conclude, regardless of whether the Judge Rampton implicitly held that the O'Leary satisfied the use and occupancy requirements, that the facts do not support the application in this matter. BLM insists that the Board has full authority to determine the facts in this case, whether acting as the initial fact finder or by de novo review. The Board indeed has full authority to review and even reverse findings of fact made by an Administrative Law Judge. See Yankee Gulch Joint Venture v. BLM, 113 IBLA 106, 136 (1990). However, when the resolution of disputed facts is influenced by the Judge's findings of credibility, which are in turn based upon the Judge's reaction to the demeanor of the witnesses, and such findings are supported by substantial evidence, they ordinarily will not be disturbed by the Board. The basis for this deference is the fact that the Judge who presides over a hearing has the opportunity to observe the witnesses and is in the best position to judge the weight to be given to conflicting testimony. Id., and cases cited.

BLM asserts that there is abundant evidence that O'Leary failed to establish qualifying use and occupancy. It disputes the credibility of O'Leary and his witnesses, noting that other disinterested witnesses provided differing, contrary evidence regarding the improvements made to Biederman Camp and sightings of O'Leary at the camp or in the vicinity during the 1960's.

While BLM challenges Judge Rampton's conclusion on use and occupancy, its arguments have not demonstrated substantive error in the decision but have merely shown disagreement over the weight given the evidence and Judge Rampton's resolution of conflicting testimony, which is necessarily dependent upon his consideration of their credibility. As explained by Judge Rampton, witnesses at the hearing corroborated claimant's asserted use and occupancy in a qualifying manner beginning in 1962 and continuing almost every year thereafter. Indeed, their testimony substantiates use and occupancy by O'Leary commencing at least in 1962 and continuing yearly

thereafter except for brief, explained absences. One witness vividly remembers going to O'Leary's camp yearly from 1962 through 1969 (Tr. 212-15). Another witness recalls his trips there with O'Leary from 1965 to the present (Tr. 218-19). Another had pictures from hunting trips with O'Leary to the camp taken in 1968, 1969, and 1973 (Tr. 186-98). Collectively, such testimony shows use and occupancy of at least 5 years beginning prior to 1969. <sup>4/</sup>

We concur with Judge Rampton's evaluation of the evidence as outlined above, including his resolution of conflicting testimony, and we affirm Judge Rampton's determination regarding use and occupancy of the land by O'Leary.

[2] We turn now to BLM's challenge to Judge Rampton's conclusion on potential exclusivity. To qualify for a Native allotment, the applicant must also establish that the asserted use and occupancy was at least "potentially exclusive of others." See 43 CFR 2561.0-5. BLM contends that Judge Rampton erred in finding that prior improvements in this instance satisfied this burden for O'Leary. BLM argues that there were no physical signs conveying notice that the improvements were occupied and used by someone in a potentially exclusive manner. This issue was addressed by Judge Rampton as follows:

Contestant argues that because the cabin predated Mr. O'Leary's use of the camp, he must be held to a higher standard of proof to show his use of the cabin and parcel proclaimed to the public at large: "This cabin and parcel is Eddie O'Leary's." Such is not the law. The cabin already proclaims to all: "This land is claimed by someone." Only the person(s) who built it or acquired the interest from the "owner" can reasonably assert a priority interest. (There is no evidence that the cabin ever appeared to be abandoned by Mr. O'Leary.)

(Decision at 7).

There is no dispute concerning the existence of the improvements on the land in question. Rather, BLM contends that Parcel B "was a well-known, extensively developed historic site, generally familiar to the

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<sup>4/</sup> The facts regarding use and occupancy are distinguishable from those in *United States v. Estabrook*, supra, a case upon which BLM places great reliance. In *Estabrook*, which also involved hunting, we noted that the amount of use alleged therein by the Estabrook brothers (two visits per year, varying in duration from a few days to a week per visit) did not constitute substantial actual possession and use of the land but was properly characterized as "intermittent." 94 IBLA at 53-54. The evidence in this case shows greater and consistently regular use by O'Leary. Beginning in the early 1960's, he traveled every fall to Biederman Camp for hunting trips lasting from several weeks to several months. He also used the land and improvements at other times of the year for hunting, in contrast to the intermittent use of the Estabrook brothers.

local populace" (SOR at 12). BLM suggests that in light of the widely known fact that the Biederman Camp was built, occupied, and abandoned by the Biederman family, O'Leary must show more than a continued existence of the improvements by demonstrating his own potentially exclusive use of the site. This O'Leary has done.

We do not believe that Judge Rampton relied only on the existence of the improvements on the land to conclude that O'Leary's use and occupancy of the land was potentially exclusive of others. In Angeline Galbraith (On Reconsideration), 105 IBLA at 335, the Board stated:

[t]he presence of physical evidence goes to the question of potential exclusivity. Just as a visual sighting of a Native using a parcel would serve to apprise other individuals that the land was under occupancy, physical evidence of such use would be equally effective in alerting third parties to the existence of an outstanding claim to the land even when the Native was not present.

However, the discussion in that decision introduced concerns over Native uses which do not leave permanent physical evidence, such as berry-picking or tent sites where the tent has been taken down during non-use periods. The Board expressed the following caveat: "Admittedly, where the question is potential exclusivity rather than substantiality of use, witness statements may be very relevant" (105 IBLA at 339), and noted:

The relevance of witness statements to the question of exclusivity of use was recognized in the final Horton guidelines [Memorandum from Assistant Secretary Horton to Director, BLM, dated October 18, 1973, "Adjudication of Pending Alaska Native Allotment Applications"]. Thus, under "Native Community Use," the guidelines provided: "Allotment filings that are in conflict with areas of prior Native community use must be denied. The determination of whether an individual applicant's use was exclusive is a factual one which should be answered by soliciting affidavits and testimony from village inhabitants and others with knowledge of the situation."

105 IBLA at 339, n.3. The Board opined that if the testimony gathered establishes that others used the subject lands on the same basis as the applicant, the application would be properly rejected for failure to show that use was, at least potentially, exclusive of others. 105 IBLA at 339.

Here, Judge Rampton reviewed the testimony of those with knowledge of the situation and, after assessing their credibility, concluded that the clear weight of the evidence supported the conclusion that O'Leary's use of the parcel had been potentially exclusive of all others. With that conclusion, we agree. 5/

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5/ No evidence of conflicting community use was found during the course of BLM's field investigation (Exh. 6 at 4). See, e.g., Kootznoowoo v.

We find nothing in BLM's appeal to cause us to overturn Judge Rampton's determination regarding the validity of O'Leary's application. To the extent arguments by BLM have not been expressly addressed in this decision, they have been considered and rejected.

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 is affirmed.

Bruce R. Harris  
Deputy Chief Administrative Judge

I concur:

C. Randall Grant, Jr.,  
Administrative Judge

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fn. 5 (continued)

Heirs of Jimmie Johnson, 109 IBLA 128, 135 (1989) (lack of evidence to establish that Native community use was contrary to applicant's wishes; permission was implicit). Judge Rampton properly discounted use of the parcel by individuals floating the Yukon River or others seeking shelter for the night as casual use, not in conflict with O'Leary's claim to the parcel. The hearing record clearly showed that it was customary for any cabin in that area of the Yukon River to be open to any individual in need of shelter.

