

UNITED STATES
v.
DEIRDRE HIGGINS

IBLA 93-654

Decided January 19, 1996

Appeal from a decision of Administrative Law Judge Ramon M. Child, approving Alaska homesite claim AA-58918 and dismissing the contest complaint against the claim.

Affirmed.

1. Alaska: Homesites—Contests and Protests: Government Contests

Where the Government contests a homesite claim on the basis that the claimant failed to meet the residency requirements of 43 U.S.C. § 687a (1982), the applicant is required to make satisfactory proof, by a preponderance of the evidence, that she occupied her claim in a habitable house for the required length of time, i.e., 5 months a year for 3 years.

2. Evidence: Generally—Evidence: Sufficiency—Evidence:
Weight—Rules of Practice: Evidence

The Board has full authority to reverse findings of fact made by an Administrative Law Judge. However, when the resolution of disputed facts is clearly premised upon a 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 demeanor of the witnesses and is in the best position to judge the weight to be given to conflicting testimony.

APPEARANCES: James R. Mothershead, 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 Bureau of Land Management (BLM) has appealed from a July 28, 1993, decision by Administrative Law Judge Ramon M. Child, approving for purchase Deirdre Higgins' homestead claim AA-58918 and dismissing BLM's contest complaint against the claim. For the reasons stated below, we affirm.

On June 16, 1986, pursuant to the Act of April 29, 1950, 43 U.S.C. § 687a-1 (1982) (repealed effective October 21, 1986, subject to valid existing rights, by section 703(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, 90 Stat. 2790 (1976)), Higgins filed with BLM a Notice of Location of Settlement or Occupancy for her homestead claim (AA-58918). Under the Act of May 26, 1934, which amended the Trade and Manufacturing Site Act of May 14, 1898, 43 U.S.C. § 687a (1982) (also repealed):

[A]ny citizen * * * after occupying land of the character described as a homestead * * * in a habitable house, not less than five months each year for three years, may purchase such tract, not exceeding five acres, in a reasonable compact form * * * upon payment of \$2.50 per acre, under rules and regulations to be prescribed by the Secretary of the Interior * * *.

In her notice, Higgins described her 5-acre claim as being located in sec. 25, T. 11 N., R. 8 E., Copper River Meridian, and listed June 6, 1986, as the date of her settlement or occupancy. 1/ Under the Act of April 29, 1950, 43 U.S.C. § 687a-1 (1982), Higgins had 5 years from the filing of her notice within which to file an application to purchase the claim, accompanied by the required proof or showing. 2/

On December 14, 1989, prior to the expiration of that 5-year period, Higgins filed an application to purchase her homestead. Therein, she stated that on June 1, 1987, she had constructed a single room frame house with a loft on the site, and that the house had become habitable on July 1, 1987. She also stated that she had resided on the land during three separate periods: June 1, 1987, through December 31, 1987; April 1, 1988, through September 1, 1988; and July 1, 1989, through November 30, 1989. The application contained the signatures of two witnesses attesting to the truth of the statements made therein.

1/ Higgins' claim is more particularly described as sec. 25, S $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$.

2/ The regulation at 43 CFR 2563.2-1(e) requires that a homestead application show a number of facts, including: "(3) A description of the habitable house on the land, the date when it was placed on the land, and the dates each year from which to which the applicant has resided in such house."

On April 12, 1990, BLM issued a decision (Exh. G-25) rejecting her application, without prejudice to refile, on the ground that she had occupied her homesite for only 3 months, June 1, 1988, to September 1, 1988, of the required 5 months during the second residency year. BLM's decision stated that "the first date of residency does not begin until June 1, 1987, when [Higgins'] house became habitable and she moved into it." ^{3/} The decision further stated that in "the second year, 1988, Ms. Higgins arrived at the homesite on April 1, 1988, but her residency for the second year does not count until June 1, 1988, therefore she spent three months of her second residency year at the homesite."

On June 27, 1990, Higgins went to the BLM office and changed the ending date of her second-year residency period from September 1, 1988, to December 1, 1988 (Tr. 424-28).

On August 8, 1990, BLM realty specialists David Mushovic and Mike McGinty conducted a field investigation of Higgins' homesite claim. In his April 22, 1991, field report (Exh. G-33), Mushovic described Higgins' improvements, including a 26- by 16-foot frame house, an outhouse, a washstand, and a 28- by 24-foot foundation for a garage under construction, stating that "[t]he general condition of the claim during the field examination appears to support the applicant's claimed occupancy." *Id.* at 3. He also found that Higgins had "obviously put in a great deal of effort constructing and furnishing the house." *Id.* However, he stated that her claimed use and occupancy was contradicted in part by two factors: "verbal statements made [by] neighboring claimants Urban Cachelin and Quinton Stanley" and "by the personal experience of the examiner." *Id.* at 2-3.

According to the report, Cachelin told Mushovic that

she had originally lived in a neighboring cabin owned by Arne Luoma. [Cachelin] stated that the two of them abandoned this cabin after Mr. Luoma had proven up, and that Ms. Higgins had been living in the cabin on her claim for the last 1 1/2 years [indicating] that [Higgins] did not move into her cabin until sometime in the late summer or fall of 1988.

Id. at 3. Mushovic reported that Stanley told him that Higgins was hauling building materials to the site in the spring of 1988 and that her house was not complete until the summer of 1988.

^{3/} In *Cook v. Buren*, 106 IBLA 294, 298-99 (1989), this Board held that the beginning of successive residency years is established by the anniversary date of the first year. Noting the discrepancy in the residency dates as between Higgins' application (July 1, 1987) and the Apr. 12, 1990, decision (June 1, 1987), BLM asserts in its statement of reasons (SOR), that for purposes of the appeal it would use the June 1, 1987 date since the "one month difference * * * does not materially affect the outcome of this case" (SOR at 3).

With regard to his personal experience, Mushovic stated:

I have been working in the Slana Settlement Area since the summer of 1987. I regularly travel through the area, and the only time I have seen anyone staying at the applicant's claim, was during her field examination. On June 13, 1988, I conducted a field examination on Arne Luoma's homesite. At that time the applicant, Deirdre Higgins, appeared to be living with Mr. Luoma at his cabin. Mr. Luoma claimed residency from February 15, 1987, to April 1, 1988. According to a written statement made by Mr. Luoma's neighbor, Brenda Herington, and contained in his casefile, Mr. Luoma did not complete his cabin until June or July of 1987, at which time they [Luoma and Higgins] traveled outside, and did not return until March of 88.

Id. at 3.

Mushovic concluded his report stating that "it is apparent that [Higgins] did not reside in [her] dwelling prior to sometime late in 1988" and recommended that her application to purchase be rejected. Id. at 4.

In a July 22, 1991, notice to Higgins (Exh. G-29), BLM cited Mushovic's field report and requested Higgins to submit additional information to corroborate her claimed period of residency on the site from June 1, 1987, to December 31, 1987, or for any of her periods of residency.

In an August 10, 1991, response (Exh. G-30), Higgins took exception to various statements included in the field report and enclosed a separate undated statement signed by five "neighbors." It stated: "To the best of my knowledge Deirdre Higgins has lived on her home-site on the following dates-6/1/87 to 12/31/87; 4/1/88 to 12/1/88; 7/1/89 to 11/30/89." One of those "neighbors" whose signature appears on the statement is Urban Cachelin, presumably the same person that Mushovic had relied upon in his field report as providing a verbal statement which contradicted Higgins' claimed occupancy.

On April 20, 1992, Mushovic filed a supplemental field report (Exh. G-34). Therein, Mushovic stated that on March 19, 1992, he interviewed the owner of a nearby claim, John Phariss, who, although unsure of specific dates, represented to Mushovic that Higgins' house was not completed "until 2-1/2 to 3 years ago," which Mushovic took to mean "sometime during the winter of 1988-89" (Supplemental Report at 2). The report also refers to a March 26, 1992, letter to Mushovic from Herington, which contradicts the periods of occupancy claimed by Higgins. In that letter (Exh. G-12), Herington asserted:

[Higgins] built her cabin on this claim in April and May 1989. At the end of May she went to the East Coast with Richard Luoma. They came back to Alaska and her claim on September 14, 1989. She lived in her cabin until the middle of August 1990. At that

time she went back to the states and did not return to the cabin on her claim until May 1991.

Mushovic concluded that Higgins "did not reside in this dwelling prior to sometime in late 1988, or early 1989" (Supplemental Report at 2).

On December 3, 1992, BLM issued a contest complaint against Higgins' homesite claim asserting that Higgins failed to meet the requirements of 43 U.S.C. § 687(a) (1982) in that she had not resided on the claim for 5 months a year for 3 years. Higgins denied the allegations in the complaint. On April 12 and 13, 1993, Judge Child conducted a hearing on the contest in Anchorage, Alaska.

Mushovic stated at the hearing that since 1987 he had conducted between 200 and 300 field examinations in the Slana area, the majority being homesites and headquarters sites (Tr. 26, 62). He testified that he first visited Higgins' claim on March 29, 1988. At that time, "a cabin was in the initial stages of construction, there was some building material stored there" (Tr. 62). "It was not completed. It was under initial construction, where they were just starting to put things up" (Tr. 62). "It was not completely closed in by any means" (Tr. 166-67). He stated that no one was residing on the site at the time, and the cabin was not habitable (Tr. 63-64, 167).

On June 13, 1988, Mushovic examined Luoma's claim. A portion of the south boundary of Luoma's claim abuts a portion of the north boundary of Higgins' claim. Higgins was present at the time of the examination. Mushovic testified that during the examination Higgins "had indicated that she was living in Mr. Luoma's cabin, log cabin, at the time" (Tr. 79-80). According to Mushovic, Higgins asked him at that time if he "would like to go see her homesite cabin. She indicated, you know, it wasn't complete yet, but she wanted to know if I, you know, wanted to take a look at it while I was there" (Tr. 79). Mushovic testified that Luoma told him that Higgins' cabin, though "not finished," was habitable (Tr. 135). Mushovic did not visit Higgins' site on that occasion but he did return there either on July 7 (Tr. 65) or July 27, 1989 (Tr. 139). At that time he found that "the building was just newly completed" (Tr. 65). He stated that "it showed no signs of recent occupancy or use" (Tr. 139).

In his April 1992 supplemental field report, Mushovic described the claim as containing "obviously a habitable dwelling, very well-built, [showing] some signs of use and occupancy" (Tr. 67; see Exhs. G-5 through G-11).

Herington, who lives on a patented homesite claim located northwest of Higgins' claim, testified that she cannot see Higgins' house from her claim (Tr. 204; see Exh. G-4). She stated that she "wander[s] around the whole area all the time" and was thus able to keep track of activities (Tr. 207). In February of 1987, she saw Higgins and Luoma move coolers

or boxes to Luoma's claim (Tr. 218, 221, 246). She testified that in 1987 there was no cabin on Higgins' claim, that in "that first summer [1987] they were living in a motorhome both at Mr. Helmann's and then out on the airstrip" (Tr. 222, 223). ^{4/} However, Herington never saw the motorhome on Helmann's claim (Tr. 223-24). She testified that Higgins and Luoma were gone in mid-summer 1987 until they returned in March of 1988 (Tr. 224). In the spring of 1988 she observed Higgins and Luoma "putting an addition on his log cabin" (Tr. 229). In the summer of 1988 she saw that some clearing had been done on the Higgins' claim. She observed that there were a few trees down, and some "materials" stacked in the area, but she stated that "[t]here wasn't a full cabin over there in '88" (Tr. 229-30).

Herington was present at the field examination of the Luoma claim in June 1988. She testified that at that time Higgins was not living on her claim and that "the cabin [on Higgins' claim] wasn't completed" (Tr. 232). There is no evidence in the record, however, that Herington visited the Higgins' claim in June 1988. ^{5/} Herington did not visit Higgins' claim until June of 1989 when she observed that Higgins' house "was completed" (Tr. 232-34). Herington testified that Higgins finished her house in May 1989; that Higgins and Luoma left the area for the summer; and that they returned on September 14, 1989, and commenced living on the claim (Tr. 235-37, 240). When she was asked how she could be so specific as to dates and events concerning other settlers' residencies, Herington testified that she kept notes "because a lot of them were claiming their cabins and weren't living there, and I felt that if I had to do it, they did, too" (Tr. 249). At the time of the hearing, Herington no longer had her notes (Tr. 243).

In her March 26, 1992, letter to Mushovic (Exh. G-12), Herington wrote that Higgins built her "cabin in April and May 1989" and that at the end of May she left the area with Luoma and returned with him to her claim on September 14, 1989. According to the letter, Higgins lived in her cabin until the middle of August 1990. At that time she left and did not return until May 1991. Herington stated in the letter that "Higgins did not occupy her cabin for 5 months consecutively for three years." Herington summarized the periods of Higgins' occupancy as follows: Higgins lived in her house from September 14, 1989 through mid-August 1990; and from May 1991 through June 6, 1991.

Stanley, an area resident since 1986, testified that he did not know when Higgins constructed the house on her claim; the first time he saw it was in 1991 (Tr. 271-72, 281). However, on March 28, 1988, he had paid a contractor to bulldoze the access road so he could drive in and out, and

^{4/} Glen Helmann is a neighbor with a homesite patent to the south of Higgins (Exh. G-4).

^{5/} Luoma testified that his cabin was not visible from the Higgins' house, except that one could see his roof from the upstairs window of her house (Tr. 301-02). Thus, Higgins' house was not visible from his cabin.

on that occasion he saw Higgins and Luoma "hauling the [building] materials in" (Tr. 272-74). Stanley testified that Luoma's cabin was completed sometime in 1987 and that Luoma and Higgins occupied Luoma's cabin in the spring of 1987 (Tr. 284-85).

Luoma testified that in February 1987, while building his cabin, he and Higgins resided in a motorhome on Helmann's claim for 1 day and then because of the extreme cold and the fact that the generator in the motorhome "quit," for 4 or 5 days in Helmann's house (Tr. 333-34). Helmann confirmed that Luoma and Higgins only stayed with him for a period of about 4 days in February 1987 and then moved to Luoma's claim (Tr. 380-81). In March of 1987 Luoma helped Higgins bring materials to her claim (Tr. 334). Luoma testified that he left his claim and moved to Higgins' house "about the 15th of July" 1987 (Tr. 299; see Tr. 316, 318). He stated that Higgins' house was "habitable" on June 1 of that year (Tr. 300). By "habitable," Luoma indicated that the house had a roof, walls and a heater, that it was enclosed and had doors and windows, and that there were visqueen panels on the front door (Tr. 305-06). Luoma testified that in 1988 he and Higgins added a porch and a door for the porch, and in 1989, they built a covered walkway and a woodshed, moved the original door "over to the other side," and made part of the porch into the house (Tr. 307-08; see Tr. 347-49). He stated that after he began living with Higgins in her house he would periodically leave and return to his own cabin when he and Higgins had quarrelled (Tr. 316). Both left her claim on January 1, 1988, and were gone until about April 1, 1988 (Tr. 319). He stated that Higgins spent the summer of 1988 on her claim (Tr. 332).

In response to questions concerning the appearance of his cabin at the time of the June 1988 field examination, Luoma explained:

A I didn't have to –I did not have to live in my cabin beyond about, say, July 15th of 1987, because I have satisfied all requirements. [6/] I did not, from that point on, did not need to do anything. I could tear it down, anything.

Q I understand that, but you were obviously using the interior of the cabin –

A Yes.

Q –on your claim at the time of the examination, were you not?

6/ By virtue of a veteran's preference granted pursuant to section 1 of the Act of Sept. 27, 1944, as amended, 43 U.S.C. § 279 (1982) (repealed effective Oct. 21, 1986, subject to valid existing rights, by section 702 of FLPMA, P.L. 94-579, 90 Stat. 2787 (1976)), Luoma was entitled to a reduced occupancy requirement of 5 months in any one year.

A Yes.

Q Was that proper in order to make a proper showing to the BLM examiner?

A Well, it probably helped.

Q But you say you really didn't need to, right?

A No, because I was legally in the right, but naturally I want things to be smooth. I hadn't -- I had no idea did I think that anybody would dispute my word that I had not -- that I had -- had not done five months in my cabin, but naturally at the time of the -- of Dave [Mushovic] coming in there, naturally I wanted to look like, well, you know, everything is all fine and everything.

Q Like it was being lived in?

A I mean, if I'd just -- if I had moved everything out, then it would have probably -- naturally it would have made problems. He would have said, well, it doesn't look like you ever lived here or something, so naturally the house was all furnished * * *.

(Tr. 316-17).

Helmann testified that Higgins and Luoma stayed with him in his house early in February 1987 for about 4 days (Tr. 380). Thereafter, Higgins and Luoma moved to the Luoma cabin (Tr. 380-81). According to Helmann, Higgins began construction of her house "probably sometime in the summer of 1987," and the house was likely habitable "in a month" (Tr. 397). When asked whether Higgins had satisfied all the requirements for entitlement to a homesite patent, Helmann, who himself had received a homesite patent, responded: "Probably more so than anyone out there" (Tr. 396). When asked whether that conclusion was based on his observations as to what had been done on the claim, he stated: "I have watched that woman work like a slave for seven years and marveled at her" (Tr. 396).

Higgins, who was not represented by counsel at the hearing, testified that she believed that she had submitted sufficient evidence to verify her claim. She explained that she was absent from her claim from June 1986 to February 1987, from January to April 1988, and from December 1988 to July 1, 1989 (Tr. 416-20). During those periods, she and Luoma traveled to the lower 48 States and were engaged in temporary employment. While in Alaska, she resided on her claim during the periods of time set forth in her August 10, 1991, letter to BLM (Exh. G-30). Higgins presented pay slips dated May 31 and June 15, 1991, from several restaurants in Kennewick and Pasco, Washington, where she worked as a waitress, to show that she was

not on her claim during May and June of 1991, as Herington had alleged in her March 26, 1992, letter to Mushovic.

Judge Child found, based on the testimony of Luoma, Higgins, and Helmann, that Higgins' house was completed between March and June 1, 1987, on which day Higgins began residing in the house, and that Higgins resided in a habitable house on her claim for the requisite 5-month period in each of the years of 1987, 1988, and 1989.

Judge Child further found that the testimony of Stanley, to the effect that building materials were being hauled to Higgins' site during 1988, indicated that Higgins "made certain improvements to the already habitable house and her claim in 1988" (Decision at 4). The Judge noted that Stanley did not see Higgins' house until 1991. In any event, he found Luoma, who testified that he assisted Higgins in hauling materials, which were used to remodel the house and construct improvements on claim, to be a more credible witness than Stanley. Id.

Judge Child gave little weight to Herington's testimony for two reasons: First, because Higgins' house cannot be seen from Herington's homesite; and second, because Herington testified that Higgins was on her claim between May 10 and June 15, 1991, a period during which, as demonstrated by Higgins' pay stubs, she was not. He stated that Herington's "credibility was thus weakened and contestee and Mr. Luoma are found to have greater credibility as pertains to the facts of this case" (Decision at 5).

The Judge evaluated Mushovic's testimony as follows:

Mr. Mushovic, himself, testified that he first visited contestee's claim on March 29, 1988, and observed that the house was not completed, that the interior of her house was not completely enclosed, and that the house had no doors. His observations may be explained by the fact that the contestee and Mr. Luoma were still making improvements to the house, including adding an additional door. In general, the confusion of Mr. Mushovic and contestee's neighbors regarding her dates of occupancy and completion of the house is likely explained by the constant improvements being made to the house throughout 1988 and 1989, and the fact that Mr. Luoma occasionally retreated to his cabin when difficulties arose in his relationship with [Higgins]. [Transcript citations omitted.]

(Decision at 5).

On appeal, BLM asserts that a de novo review of the entire record will reveal that Judge Child erred in his determinations of witness credibility and that the testimony of Higgins' witnesses is less, not more credible than that of BLM's witnesses. BLM cites various discrepancies in the testimony and invites the Board to overturn Judge Child's decision.

[1] Where the Government challenges a homesite claim on the basis of a failure to comply with the residency requirements and provides evidence in support of that charge, the claimant must provide satisfactory proof, by a preponderance of the evidence, that she occupied her claim in a habitable house for the required length of time, *i.e.* 5 months a year for 3 years. See United States v. Braniff, 59 IBLA 337, 339 (1981).

[2] In a recent decision, Bureau of Land Management v. Carlo, 133 IBLA 206 (1995), this Board reviewed previous Board precedents on the subject of the deference accorded to findings of fact by administrative law judges. Therein, we stated at pages 211-12:

It is well established that the Board has full authority to reverse findings of fact made by an Administrative Law Judge. See, *e.g.*, United States v. Knoblock, 131 IBLA 48, 101 I.D. 123 (1994); United States v. Collord, 128 IBLA 266 (1994). At the same time, however, this Board has also noted that, where 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. See, *e.g.*, Yankee Gulch Joint Venture v. Bureau of Land Management, 113 IBLA 106, 136 (1990); United States v. Whittaker, 95 IBLA 271, 286 (1987); United States v. Ramsey, 84 IBLA 66, 68 (1984); United States v. Chartrand, 11 IBLA 194, 80 I.D. 408 (1973).

Admittedly, we have, on occasion, reversed an Administrative Law Judge's fact-finding even when it was implicitly based on credibility determinations (see *e.g.*, Lawrence E. Willmorth, 64 IBLA 159 (1982)). But, the predicate of our action in those cases was the existence of other facts of record which, to our mind, fatally compromised the testimony which the Administrative Law Judge found credible. Absent the existence of such evidence, we must exercise extreme caution in challenging findings of fact which are premised on the demeanor of the witnesses who testify before an Administrative Law Judge. See State Director for Utah v. Dunham, 3 IBLA 155, 78 I.D. 272 (1971).

We have reviewed the record in this case and BLM's SOR and we find no justification for substituting the Board's evaluation of the testimony for that of Judge Child. He weighed conflicting testimony on the pivotal question of the timing of the occupancy of the house on Higgins' homesite and concluded that she had satisfied the statutory requirement of residing on her claim for 5 months per year for 3 years. In arriving at that conclusion, he made findings of fact that he specifically stated were based on his observation of the demeanor of the witnesses and his own credibility

determinations. In the present appeal, we believe there is an adequate basis in the record to support the Judge's conclusions.

BLM argues that Judge Child mischaracterized Mushovic's testimony regarding his March 29, 1988, visit to the claim and erred in ignoring Mushovic's observations that "the house on the claim was in the initial stage of construction, and therefore not yet habitable as a dwelling in which the Appellee could have resided; and that generally nobody was living on the claim at such time" (SOR at 11; emphasis in original). We admit that such testimony by Mushovic is troublesome, and it is not completely resolved by Judge Child's explanation that construction on the house was ongoing.

Nevertheless, we note that despite the fact that Mushovic asserted that his recollection of his observations on March 29, 1988, and a subsequent visit in July 1989, were based on contemporaneous notes of his visits, those notes were not offered as exhibits at the hearing. More importantly, in his April 22, 1991, field report documenting his field examination of the claim, Mushovic expressly stated that "the applicant's claimed residency is contradicted in part by the personal experience of the examiner" (Report at 4). His recounted experience, however, was only regular travel in the Slana Settlement Area and a June 1988 field examination of Luoma's homesite. He made no mention of either a March 29, 1988, or July 1989 visit to Higgins' claim, both of which would have been highly relevant to the recommendation in his report that the claim be rejected.

BLM also assigns error to Judge Child's failure to accord any weight to testimony by Mushovic that on his July 1989 visit to Higgins' claim he found a newly constructed house that no one was living in. In addition to our concern that Mushovic made no mention of such a visit in his field report, in that report he expressly stated that "[t]he applicant lived in the house during the following approximate times: August 1, 1988, to December 30, 1988; January 1, 1989, to December 31, 1989; and March 1, 1990, to August 8, 1990" (Report at 4). Such a statement is in conflict with his subsequent testimony at the hearing.

In addition, Mushovic did not document either the March 1988 or July 1989 visit in his April 20, 1992, supplemental field report. Therein, relying on an oral statement from Phariss and Herington's March 26, 1992, letter to him, Mushovic concluded that Higgins did not reside in her house until "sometime in late 1988 or early 1989" (Supplemental Report at 2). However, Mushovic stated that Phariss "was not sure of the exact dates" (Exh. G-34), and Herington actually reported that the cabin was not built until April and May 1989, and that Higgins did not reside there until September 14, 1989.

BLM asserts that Judge Child erred in assigning greater credibility to the testimony of Higgins and Luoma than to that of Herington because Herington's testimony and statements "are consistent with the observations

of Mr. Mushovic, the BLM field examiner" (SOR at 21). BLM contends that neither Herington nor Mushovic

found a completed, habitable cabin or house on the Appellee's claim in their 1988 visits to the claims. Both witnesses first saw the completed, but unoccupied, house on such claim in the summer of 1989, before both the Appellee and Mr. Luoma moved into such house on September 14, 1989.

Id.

Clearly, BLM is incorrect that Herington's testimony and statements are consistent with Mushovic's "observations," at least to the extent those observations are recorded in his field report and its supplement. In the field report at 3, Mushovic states that "applicant lived in the house during the following approximate times: August 1, 1988, to December 30, 1988, January 1, 1989 to December 31, 1989, and March 1, 1990, to August 8, 1990." In his supplemental field report at 2, he credited Higgins with residency from "sometime in late 1988, or early 1989." Those "observations" are in conflict with Herington's testimony and statements and also in conflict with Mushovic's own testimony that he saw a newly completed, but unoccupied house on the claim in July of 1989.

We admit that Higgins' evidence in support of her occupancy is not free from contradictions. However, as set forth above, neither is the evidence presented by the Government. We find nothing in this record which would warrant reversing Judge Child's express findings of credibility. For that reason, we must affirm.

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 affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

David L. Hughes
Administrative Judge

