

UNITED STATES v. ANGELINE GALBRAITH

IBLA 2001-27

Decided June 24, 2005

Appeal from decision issued by Administrative Law Judge Harvey C. Sweitzer, approving amended Native Allotment application. FF-14780.

Reversed.

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

A BLM decision rejecting a request by a Native allotment applicant to amend her allotment application to describe other land pursuant to section 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(c) (2000), is properly affirmed when the preponderance of the evidence, adduced at a hearing on a Government contest, establishes that the amended description does not identify land that the applicant had originally intended to claim.

APPEARANCES: Harold J. Curran, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for Angeline Galbraith; F. Christopher Bockmon, Esq., and Kathryn Keenan, Esq., Office of the Regional Solicitor, Alaska Region, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

The Bureau of Land Management (BLM) has appealed a September 12, 2000, decision by Administrative Law Judge Harvey C. Sweitzer, approving the amended Native allotment application of Angeline Galbraith, submitted under provisions of the Native Allotment Act of May 17, 1906, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed with a savings provision by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (2000).^{1/} The facts and history of this matter

^{1/} The savings provision provides that “[n]otwithstanding the foregoing provisions (continued...)

have been addressed in several written decisions of this Board. United States v. Galbraith, 134 IBLA 75, 102 I.D. 75 (1995); Angeline Galbraith (On Reconsideration), 105 IBLA 333 (1988); Angeline Galbraith, 97 IBLA 132, 94 I.D. 151 (1987). What follows is a review of the procedural history of this case and a synopsis of the facts.

Galbraith initially submitted a Native allotment application to the Bureau of Indian Affairs (BIA) in Fairbanks, Alaska, on August 11, 1971, for land identified as Lot 3 of sec. 6, T. 2 S., R. 2 W., Fairbanks Meridian. Galbraith claimed seasonal use and occupancy for berry-picking and rabbit-snaring since 1955. At one place on the application she claimed use since 1953. Lot 3 is due east of Lot 4, which is the location of the allotment of Galbraith's cousin, Mary McLean.

Galbraith's application was certified by BIA on December 15, 1971, and received by BLM on December 16, 1971. In a November 22, 1972, decision, however, BLM denied Galbraith's application because office records showed that the tract applied for had been withdrawn from entry for, inter alia, Native allotment application.^{2/} On November 13, 1973, BLM received a second application from Galbraith, but for Lot 2 of sec. 6, T. 2 S., R. 2 W., Fairbanks Meridian. Lot 2 is due east and also runs to the south of Lot 3, which is in turn due east of Lot 4. Therefore, to get from McLean's allotment to the land Galbraith applied for, one must traverse Lot 3. BLM vacated its November 1972 decision on November 21, 1973.

On August 31, 1977, Galbraith and her husband accompanied a field examiner to Lot 2 for a field examination. Galbraith indicated at that time that Lot 2 was the land she intended to apply for and submitted three witness statements in support of her use of Lot 2. (Affidavits of Galbraith's ex-husband Carl Noble, Sept. 24, 1981; friend, Jean Mason, Sept. 24, 1981; and Mary McLean, July 16, 1981.) These witness statements corroborated Galbraith's use of that tract, and specifically drew pictures of the lot, depicting it as a ten-sided polygon with the perimeter in the shape of an inverse "C" with a crown. Each witness verified that it was this oddly shaped lot she had used. The witnesses all verified that the land was "off Chena Pump Road" and either "Rosie Creek" or "Rosemary" Road. Nonetheless, the field examiner stated

^{1/} (...continued)

[repealing the Act of 1906] any application for an allotment that is pending before the Department of the Interior on December 18, 1971, may, at the option of the applicant, be approved and a patent issued."

^{2/} The record indicates that due to a typographical error in the metes and bounds description of the land claimed by Galbraith, BIA plotted the land within a bombing and gunnery range.

that Galbraith “had little knowledge of the parcel location,” and that she “did not show the examiner any evidence of use or occupancy.”

Galbraith’s claim to Lot 2 later turned out to conflict with two other preceding Native allotment claims, applicants for which protested her application. At this juncture, Galbraith sought to amend her application, this time to apply for Lot 5 of sec. 6, T. 2 S., R. 2 W., Fairbanks Meridian. Lot 5 was the only vacant, unclaimed parcel in the section; it comprises approximately 30 acres and is shaped as a perfect square. Lot 5 is due south of Mary McLean’s allotment.

Galbraith attended a second field examination on June 6, 1983. See 1983 Field Report. At that time she identified Lot 5 as the land for which she had originally intended to apply. According to the field examiner “[n]o public access routes cross the allotment at any point” and “no man made improvements were claimed by applicant and none were found.” Id. at A.4 and B.3.a. He stated that no power lines crossed the property. Id. at C.2. He reported that Galbraith claimed

to have used the land for berry picking (high bush cranberries, salmon berries and blackberries), rabbit snaring, firewood gathering and picking punk on a seasonal basis. Occasionally hunting (Spruce Grouse) and trapping with her son, Harvey Noble. Applicant claims use of the land every year since July 1955 until 1968 when she moved to Anchorage.

Id. at B.1.

BLM sent a notice dated February 6, 1984, to previous protestants and other interested parties that Galbraith’s claim had been relocated to Lot 5. Three parties protested the relocation. Joyce and Claude A. Demoski protested, asserting that Galbraith had sought assistance from them in 1972 for finding survey markers and “didn’t even know the location of the land that they were making the applications for.” (July 15, 1983, Demoski protest letter.) Pete and Phyllis Haggland protested, reporting that Lot 5 was the site of an “already established airport runway” constructed in the 1950s which they had acquired and were then maintaining and improving as their own improvement. (Sept. 2, 1983, Haggland protest letter.) The State of Alaska filed a protest, pointing out that Lot 5 was subject to a 33-foot easement for a road along the east boundary. (Sept. 8, 1983, Alaska protest letter, as amended by letter dated Sept. 23, 1983.)

On January 13, 1984, the field examiner responsible for the 1983 field examination conducted a supplemental field examination to ascertain the status on Lot 5 of improvements which he apparently had not noticed in 1983. He discovered that the airstrip constructed in the late 1950s extended 250 feet into the southeast

portion of the allotment and was accompanied by a 300-foot access road. In addition, the Hagglands had installed a lighting system after their acquisition of the land in 1970. (Jan. 18, 1984, Field Report.) The field examiner also discovered a power transmission line across Lot 5, constructed in the 1950s, and in use to provide power to nearby landowners. A map attached depicts the "GVEA" (Golden Valley Electric Association) power line running in a northeast-southwest direction across the width of the southern third of Lot 5, north of the 300-foot access road connected to the 250-foot portion of the airstrip in the southeast portion of Lot 5. The field examiner recommended settling the matter with the Hagglands and dismissing their protest given that the airstrip and road were in trespass on Federal lands. The examiner gave no explanation for the fact that Galbraith was unaware of such improvements on the lot, or that he had not found them at the time of his field examination, nor did he express an opinion about the power line traversing the lot.^{3/}

By decision dated June 13, 1984, BLM dismissed the Demoski protest. It retained for consideration the Haggland and State of Alaska protests.

Galbraith subsequently submitted three affidavits in support of her amended application for Lot 5. Despite McLean's 1981 affidavit in support of Galbraith's use of Lot 2, verifying the odd shape of the lot and its location, McLean now stated that she "knew" Galbraith's application "should be Lot 5, not Lot 2." McLean provided no explanation regarding her contrary affidavit in 1981. (Affidavit of Mary McLean, Aug. 17, 1984.) McLean stated that she and Galbraith went to the allotment for berry-picking. Id.

Galbraith's ex-husband, Peter Galbraith, submitted an affidavit stating:

7. Angeline indicated that the land description which BIA gave her was not the land that she actually used and wanted to apply for. I believe that Angeline was told that the land she originally intended to apply for was not available.

8. A couple of days before the field examination in 1977 I went up to the land with Angeline and posted corner markers according to the legal description which she got from BIA.

^{3/} An undated map appears in the record at Govt. Ex. 13, page 9 of 10. This map shows an "abandoned homestead entry, cleared area" as located largely within Lot 4, but extending south into the northwestern portion of Lot 5. A document entitled "Homestead Entry Application" shows that a person named Phillip D. O'Brien submitted a homestead entry for Lots 4 and 5 on Oct. 17, 1960. It was allowed on Feb. 16, 1962, and the case was closed Apr. 14, 1967.

9. I went on the field exam and pointed out the corners which were marked. Neither Angeline nor I really said much to the examiner. At the time I understood that Angeline wanted to get the land but that the land she really used and wanted was not available.

(Affidavit of Peter Galbraith, July 18, 1984.)

Galbraith submitted her own affidavit at this juncture. (Affidavit of Angeline Galbraith, July 19, 1984.) She claimed that she “began using the land * * * in 1955” for picking berries, snaring rabbits, hunting spruce hen, and gathering punk. Id. at paragraph 4. She claimed never to have seen anyone else in the area except McLean. She stated: “I would go up to the land every summer and stay several days.” Id. She described the land as south of “Potter Creek Road, what is now called Rosie Creek Road.” Id. at paragraph 1. She stated that she “gave the BIA map” to Peter Galbraith so that he could post the corner markers in Lot 2, and gave the following explanation as to why she did not object to that Lot during the field examination:

9. A couple days later a fellow from BLM contacted me and said that he was going to examine the land. When we got up there, I realized that this was not the land that I used, but I was afraid to tell him that it was wrong because I thought that I would never get any land after all this trouble. There had been so much confusion already about the land that I did not want to risk losing my allotment.

She stated that when BLM contacted her in 1983 (or “last year”), she “said that [she] never wanted the land.” Id. at paragraph 10. She said that BLM corrected the location by placing the allotment in Lot 5, and that she showed the field examiner “where [she] picked berries and gathered food for many years.” Id.

In a decision dated December 7, 1984, BLM rejected Galbraith’s application. Galbraith appealed BLM’s rejection of her application to IBLA. In Angeline Galbraith, 97 IBLA 132 (1987), the Board presented an exhaustive analysis of the discrepancies in the record regarding Galbraith’s application, and concluded that the record did not substantiate that she originally intended to apply for Lot 5.

The conclusion most supportable by the record is that appellant sought to apply for the [McLean] parcel immediately east of lot 4; i.e. lot 3; that she was subsequently informed (correctly) that the land was not available since it was patented; that she agreed to move her claim further east to the E 1/2 lot 2 and lands immediately south, lands which were not shown to be unavailable; and that it was not until 1983 when she was approached by the field examiner who was clearly interested in settling the many conflicts in the area, that she became

aware of the fact that lot 5 was available and switched her intent from acquiring the land as described in the 1973 amendment to the land in lot 5.

97 IBLA at 164 (footnotes omitted).

The decision also pointed out that Galbraith's statements regarding her use of the land were not sufficient to comply with the 1906 Act. The Board noted:

Appellant's own affidavit states that she would "go on the land every summer and stay several days." ^{11/} As a matter of law, mere use of land for a few days each year, absent any physical improvements, does not constitute substantially continuous use and occupancy potentially exclusive of others. Indeed, in our recent decision styled United States v. Estabrook, 94 IBLA 38 (1986), the Board held that use of land as a base camp for hunting twice a year for periods of a few days to a week was not qualifying use "when the claimants failed to prove that their seasonal use of the land was undertaken so as to potentially exclude others who used the land for the same purpose." Id. at 53. Accord Jack Gosuk, 22 IBLA 392 (1975); Gregory Anelon, Sr., 21 IBLA 230 (1975). The use alleged in the instant case is clearly inferior to that shown in Estabrook and, thus, the District Office's finding of qualifying use and occupancy cannot be sustained.

^{11/} Once again, appellant's affidavit corroborates the initial field examination report and contradicts the favorable report. Thus, in the 1977 report, describing the history of land use by the applicant, the examiner stated, "Since 1953, used once a year since 1953 for picking berries." In the 1983 report under the same heading, no specific quantum of use is given, yet the clear inference is that appellant used the land numerous times in various seasons.

97 IBLA at 165-66.

Accordingly, the Board remanded the case to BLM for a contest to determine both questions.

Our review of the record, as we shall show, convinces us that there is substantial room for doubt that appellant originally intended to apply for lot 5. Moreover, even if it is established that such was her original intent, we do not believe that the record as it presently exists justifies BLM's determination that her alleged use constitutes substantial use and occupancy. Accordingly, we will set aside not only BLM's rejection

of the amendment but also its finding of compliance with the 1906 Act. On remand, BLM will initiate a contest of appellant's application, under the standards we delineate herein, to determine whether appellant can establish an original intent to apply for the land in lot 5 and, assuming the first question is answered in the affirmative, qualifying use and occupancy of that tract. See Donald Peters, 26 IBLA 235, 83 I.D. 308, sustained on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976). See also Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976).

97 IBLA at 148 (emphasis added).

Subsequently, the Board issued Angeline Galbraith (On Reconsideration), 105 IBLA 333 (1988), addressing the issue of whether berry-picking could constitute sufficient use and occupancy, and clarifying its prior holdings on that point. While the Board clarified there that berry-picking is a qualifying use, it explained the difficulty in determining from such use that others were put on notice of an appropriation or exclusive use of land by an allottee. We stated:

Physical improvements, of course, would serve to give notice to the world of the prior appropriation of the land during any period that the applicant was not physically present thereon. Thus, while improvements are clearly not necessary in every case to show potential exclusivity, they could serve to establish a right to possession of land where the amount of actual use occurring would not be deemed sufficient to put a third party on notice that the land was under the claim of another. * * *

105 IBLA at 334 n.1. The Board cited a "lack of physical evidence which might apprise others of her asserted claim thereto" which can arise where berry-picking is the use alleged. Id. at 335.

In response to the IBLA decisions, BLM issued a contest complaint stating that Galbraith had failed to establish that the amended application correctly described the lands for which she intended to apply and that she had failed to establish use and occupancy. Galbraith answered the complaint and a hearing was scheduled for June 11, 1990. At that hearing, the State of Alaska indicated that it had reached a settlement with Galbraith and withdrew its protest. After BLM concluded its case-in-chief, Galbraith moved to dismiss the contest on the basis that BLM failed to present a prima facie case and that the State of Alaska's withdrawal revived the automatic approval provisions of the Alaska National Interest Lands Conservation Act (ANILCA),

43 U.S.C. § 1634 (1988).^{4/} Judge Child took the motion under advisement and Galbraith declined to present any evidence at the hearing.

On March 5, 1991, Judge Child denied the motion to dismiss.

The evidence submitted by [BLM] at the hearing thus is sufficient, if barely so, to constitute a prima facie case that where an adjudication is necessary at least some additional evidence in support of Ms. Galbraith's claim is required before a decision to grant her application for lot 5 can be justified, both on the issue of original intent and on the issue of use and occupancy.

United States v. Galbraith, Mar. 5, 1991, decision by Administrative Law Judge Ramon Child.

Judge Child determined that Galbraith should be given an opportunity to present "whatever evidence she may have to overcome the Government's case." He did not, however, set a date to continue the hearing because he decided the case on grounds that the withdrawal of the State of Alaska's protest revived the applicability of the legislative approval provision of ANILCA. Judge Child indicated that three protests had been filed in response to Galbraith's claim and that one had been dismissed as legally insufficient (Demoski protest), one had been considered by BLM and denied on the merits (Haggland protest), and the third, the State of Alaska protest, had been withdrawn. Judge Child, therefore, determined that with no pending protests, Galbraith's application was legislatively approved pursuant to the provisions of 43 U.S.C. § 1634(a)(1) (1988).

BLM appealed Judge Child's decision with respect to legislative approval. Galbraith appealed, asserting that he erred in determining that BLM had presented a prima facie case. In United States v. Galbraith, 134 IBLA 75 (1995), the Board reversed Judge Child's decision on grounds that the State of Alaska's withdrawal of its protest did not result in legislative approval of Galbraith's application. IBLA determined that pursuant to 43 U.S.C. § 1634 (1994), a withdrawal of a pending protest in 1990 did not resuscitate the legislative approval mechanism for applications without protests effective in 1980. Further, IBLA noted that the evidence

^{4/} The provision of ANILCA applicable at the time of the 1990 hearing provided for legislative approval of all Alaska Native allotment applications pending before the Department of the Interior on or before Dec. 18, 1971, except where a protest was filed by a Native Corporation, the State of Alaska, or another person or entity on or before the 180th day following Dec. 2, 1980. 43 U.S.C. § 1634(a)(5) (1988). In 1998, Congress amended that provision to allow for legislative approval where the State of Alaska had withdrawn protests. 43 U.S.C. § 1634(a)(5) (2000).

of record was insufficient to demonstrate that the Haggland protest had been dismissed or withdrawn. Therefore, even if legislative approval applied, it was not available and was precluded by the existence of the Haggland protest. Finally, IBLA noted the inconsistency of Judge Child's determination that BLM had presented sufficient evidence to contradict Galbraith's original intent to apply for Lot 5 with his determination that her application had been legislatively approved.

IBLA agreed with Judge Child that BLM had presented a prima facie case, implicitly disagreeing only with his conclusion that the prima facie case could be characterized as barely sufficient.

In our original consideration of this allotment application, we expressly held that (1) "[i]t was manifest error for the District Office based on the record before it, to find, as it did, that appellant had, at all times, intended to file on lot 5," and (2) "the District Office's finding of qualifying use and occupancy cannot be sustained." Angeline Galbraith, [97 IBLA] at 165-66, 94 I.D. at 169. These were, indeed, findings of fact that the record before the Board failed to show entitlement to an allotment. They did not, of course, technically constitute a finding that a prima facie case of invalidity existed for the simple reason that the concept of a prima facie case has no vitality except in the course of a hearing or an appeal from such a hearing. However, as a matter of logical tautology, inasmuch as the Board expressly found that the facts of record failed to establish either a consistent intent to apply for lot 5 or the requisite use and occupancy of lot 5, admission of the case record at the hearing, without more, would necessarily establish a prima facie case since the evidence does not affirmatively show compliance with the law and regulations. The facts of record admitted below, which were scrutinized in great detail in our prior decisions, were clearly sufficient to establish a prima facie case. Thus, unless other evidence adduced during the Government's presentation undercut this showing, there is no question but that a prima facie case existed.

Galbraith suggests that precisely such additional information was developed. See Appellee's Answering Brief at 26-27. The record of the hearing, however, simply fails to support this assertion. Indeed, Haggland's testimony clearly brought into doubt the extent to which Galbraith could have picked berries on lot 5 since he testified that, until the upgrading of the Rosie Creek road, commencing in 1975, it was virtually impossible to obtain access to lot 5 until after the ground had frozen because of the bad condition of the lower stretch of the road (Tr. 110-11, 118). Moreover, his testimony (while admittedly hearsay)

that lot 5 was also the original situs of improvements placed there by a homestead entryman (Benson) in the early 1960's (Tr. 113-24) would also tend to undercut any assertion by Galbraith of potential exclusivity with respect to a substantial part of lot 5.^{5/} We will not further belabor the instant decision by recounting all the difficulties apparent from the record with respect to the instant application. Suffice it to note that we have no difficulty in affirming Judge Child's determination that the Government presented a prima facie case that Galbraith had not established her entitlement to the grant of lot 5. The more vexing question is whether or not Galbraith should be afforded another opportunity to attempt to establish entitlement to the parcel.

United States v. Galbraith, 134 IBLA at 101-103 (footnotes omitted).

The Board criticized Judge Child's action in refusing to decide that question during the hearing before requiring Galbraith to decide whether to present her case prior to his ruling on the motion to dismiss.

[T]he exercise of choice by the contestee was fatally compromised by the failure of Judge Child to timely rule on the motion to dismiss for failure to present a prima facie case. At the hearing, Judge Child, rather than rule on the motion, took it under advisement and then proceeded to inquire whether Galbraith wished to proceed. See Tr. 157-59. This, we believe, was error.

A motion to dismiss for failure to present a prima facie case loses its essential value if it is not ruled upon before a contestee is required to proceed with his or her case. The Administrative Law Judge's ruling on the motion is absolutely critical in correctly ascertaining whether or not to proceed since, in many cases, challenges to credibility constitute a vital element in the contestee's case. Given the weight afforded by this Board to determinations of credibility based on demeanor evidence by an Administrative Law Judge (see, e.g., BLM v. Carlo, 133 IBLA 206 (1995)), a contestee cannot fairly be forced to decide whether to present his or her own evidence or rely on the failure of the Government to present a prima facie case in the absence of a ruling by the judge on the motion to dismiss.

^{5/} At the hearing, Haggland testified that improvements had been constructed on Lot 5 during the 1960s by a homestead entryman who lived there and then departed. (1990 Tr. 114-15.)

United States v. Galbraith, 134 IBLA at 106-107. The Board remanded the matter to the Hearings Division to give Galbraith a final opportunity to present evidence in support of her application for Lot 5.

Judge Sweitzer conducted a hearing on October 27 and 28, 1999. Galbraith presented a settlement agreement entered into among Galbraith, the State of Alaska, Golden Valley Electric Association, and the Hagglands, providing for Galbraith to convey easements to the other parties when and if her allotment application might be approved. This agreement is in the record as Galbraith Exhibit B.

Other than this, Galbraith's presentation of her case in rebuttal of the Government's prima facie case consisted of the testimony of three witnesses (her brother, Edward Smagge; her daughter-in-law, Carole Lucie Noble; and herself) and an exhibit. Exhibit A is an aerial photograph, on which Galbraith's allotment and others are depicted in handwriting.

Galbraith's case focused primarily on the second question directed for consideration by the Board in 1987, which was proving use and occupancy of Lot 5 consistent with the 1906 Act. She began her case with the testimony of her brother, who identified a square on an aerial photograph, Exhibit A, as the land for which Galbraith sought an allotment. He testified, however, that he found that map "very confusing" and "map-wise, you know, I just don't know." (1999 Tr. 24.) He stated that he "kn[ew] by the river" on the map that the land was in the vicinity, but could not ascertain other information than this from the map. (Tr. 26-27.)

Smagge primarily testified that he knew Galbraith snared rabbits and cooked rabbit stew when he visited her home in Fairbanks. He testified that he went rabbit-snaring with her in 1954. (Tr. 29-30). When pressed regarding other periods of use, he demurred. When asked whether he visited the land with Galbraith in "'54, '58, '59?," he stated "I went there in '54." (Tr. 30.) Pressed again as to the other years, he stated:

A. Well, what happened was I was going to school then, and I know she brought some rabbits home, you know. And I know she got, had a nice rabbit stew and stuff like that for me * * *

I graduated high school, and I came back and she had a nice stew of rabbits. * * *

(Tr. 32.)

He could not verify where the land was. In answer to questions regarding whether he went with his sister to rabbit-snare he stated:

A. Yeah, I remember going over in areas with her. But like I say, I don't know which.

I know it was in that area, you know, but as far as – I know we went out to some land out there.

(Tr. 24.) He stated that they snared rabbits in fall or winter “when there was snow” but that in December it would have been too cold: “you don't go out in that land * * * after 50-below.” (Tr. 35.)

Pressed as to whether he engaged in other activities on the land with Galbraith, he again demurred: “I never really went with her, you know, but I know she, she had the land in there, you know.” (Tr. 32.) At another point, he stated: “if I did go, I wouldn't remember.” (Tr. 33.) Attempting, unsuccessfully, one last time to obtain a statement of Smagge's participation in subsistence activities with Galbraith, Galbraith's attorney and Smagge engaged in the following colloquy:

Q. Did you ever see her pick birch bark, snare rabbits, pick berries?

A. Well, we would snare rabbits, you know. I mean, we would talk together a lot of – You know, we, we grew up together in our village as, and we always talk.

Q. And you would talk about it?

A. Yeah, like I say, it was cold when I came back, and not would I go out there when I came back [sic]. Too cold.

Q. Yeah, I understand. I was just trying to find out if you were ever on the land with her.

A. Yeah, I was in winter, like maybe you '64 [sic], but it was more like the, a walk or something like that.

(Tr. 37.) Smagge asserted his view that his sister was telling the truth. “I'm sure, you know, like, my sister's not lying, and I know that.” (Tr. 33.)

Galbraith also presented the testimony of Carole Lucie Noble, wife of Galbraith's son, Harvey Allen Noble, who died in approximately 1998. She briefly testified that she went out to “that land” with her husband and Galbraith beginning in 1978, when they were living in Fairbanks and Galbraith would come visit from Anchorage. (Tr. 146-47.) She did not testify as to a single fact regarding the land, about the qualifying 5-year period of continuing use beginning in the 1950s, when

she went, how often, over what period the visits took place, nor, most importantly, did she identify the land to which she was referring. Like Smagge, she made no connection between her testimony and Lot 5. Her remaining testimony related to Galbraith's showing her how to make baskets and picture-frames from birch bark for holiday gifts. (Tr. 146.)

Galbraith testified, with regard to Exhibit A: "I don't understand the map, but I know where the property is if I went there." (Tr. 41.) She testified that the land was next to that of her cousin Mary McLean. She said that she could get there on roads existing today on Cripple Creek Road, Potter Road, and "from the Chena River, the Tanana River, and walk up that bank." (Tr. 42.) On the aerial photograph identified as Exhibit A, she indicated the location of Potter Road, and Cripple Creek Road. In this depiction, Potter Road was due north of McLean's allotment at Lot 1, running east-west along its north edge. Cripple Creek Road is depicted as running north-south along the west edge of McLean's allotment and Lot 5, which is due south of McLean's allotment. See Tr. 47-49.^{6/}

Galbraith testified that she began using the land while living in Fairbanks in 1953, when her two children were four and five. (Tr. 50.) She confirmed that she began using the land when they were in kindergarten. (Tr. 53.) Her first child was born in September 1949 and her second child was born in October 1950. In the spring of 1953, the children would have been 2 and 3. They would have been four and five years old in the spring of 1955.^{7/}

She testified that she went to the land with her children, going on picnics with another family. (Tr. 50.) She testified that the land appeared to be open and that she would pick birch bark in the spring and summer. (Tr. 51.) She testified that they would visit the land:

A. Around until the middle of October. I have to, can't go there because no, I, you know, it's too, too cold to bring my kids up there.

^{6/} A master title plat in the record of the Rosie Creek Subdivision submitted by BLM shows Potter Road as running north-south along the west border of McLean's allotment and Lot 5. (1990 Tr., Contestant's Exhibit 18.) There is no explanation in the record of this discrepancy between Galbraith's placement of the road and that on the subdivision map, though Galbraith testified quite clearly that she was confused as to which roads might have been which, given that some did not exist in the 1950s.

^{7/} Galbraith's application indicates that she began to use the property in 1955, and in 1953. If, in fact, she began to use it when her children were four and five, as she repeated in her testimony, the 1953 date is necessarily incorrect.

Q. Are there * * * any activities that you would engage in in October when you went on the land?

A. Oh, just set some [rabbit] snares, you know. And had to quit because my kids are in school, kindergarten, so I have to walk with them. So had to, couldn't go up there while they were in school. * * * But on weekends we could go up there, you know.

(Tr. 52-53.)

She then testified that she would go to the land "every other day" when she set snares. "You can't leave it more than two days." (Tr. 53.) She stated that she would go there by herself during this period after school was out, but without the kids for whom it was too cold. (Tr. 54.) She stated that she had to "kind of slow it down in * * * the winter because the snow would be too deep." (Tr. 63.) She stated that if her family had "the money for picnic, I mean to get gas and food, then we go every, every other day," (Tr. 63), or 15 days a month in May, June and more in July. (Tr. 65.) If it was raining they did not go. (Tr. 65.)

Galbraith testified that they would pick berries. (Tr. 55-58.) She stated that in 1964 she moved to Anchorage and could no longer visit the land as often, but would go infrequently and in the summer. (Tr. 58-59.) She testified that her activities were not limited to particular lands but rather she "picked berries on land other than [hers]." "Right. We go all over" depending on whether she could get a ride until she learned to drive in 1960. (Tr. 55, 62.) She also testified that they would go on the river on a friend's boat, once in a while, for picnics, usually on weekends. (Tr. 66, 69.)

Galbraith testified extensively as to her snaring activities after the snows in October. See Tr. 72-78. She testified, however, that she put snares in "the same place all the time." (Tr. 74.) She states that after she moved to Anchorage and got a job at the Anchorage Pioneers Home (Tr. 125), she largely stopped setting snares because her children were in school there and she could not get back to Fairbanks. She said, however, her now-deceased son set snares from 1965-68 because he was in military service, and presumably stationed nearby. (Tr. 81.)^{8/}

In her testimony, Galbraith asserted that she used the land to peel birch bark, and that such activity was evident by markings on the trees. (Tr. 102-110.) She testified regarding berry-picking and making jam. (Tr. 110-112.)

^{8/} Her oldest son would have been 15-18 years old during those years.

With regard to the application process, Galbraith testified that when she went to the BIA offices in 1970 to apply for land, she pointed to land east of the land applied for by Mary McLean. (Tr. 86.) As to the 1973 application which identified that she applied for Lot 2, counsel asked her to corroborate a BIA letter indicating that she had gone to BIA offices to pick out an allotment. She denied doing so. (Tr. 90.) She states that “after the road went in” “some [BLM] guy” “took [her] up there,” she showed him exactly where her land was, “they nailed my name up there [on a spruce tree] and then disappeared,” and he took two pictures of her, one with the sign and one next to berries. (Tr. 91-93.)^{9/} With regard to the fact that she applied for Lot 2, she testified, again for the first time, that at the field examination in 1977 she “told them, how come * * * they took me there when it wasn’t the place I put in for? And he * * * didn’t say anything.” (Tr. 136.)^{10/}

On cross-examination, Galbraith stated that she went to the land “every day at 1953.” (Tr. 118.) Pressed as to the frequency of her visits with small children, she asserted that the trip to the land from her home in Fairbanks took “about three hours” or “a half an hour to get * * * as far as we can drive” and “then the rest of the way it would take about three, about two and a-half hours to walk in.” (Tr. 119.)^{11/} She stated that the walk was through very tall grass across which some sort of heavy equipment had “gone through there years ago” and created a sort of trail alongside the property which they used. (Tr. 121, 142.) When they went on their friends’ boat, they drove to the friends’ house, went by boat to the friends’ camp along the Tanana River and walked to their land. She stated that the Potter and Cripple Creek Roads did not exist until the 1970s, but that there was a private trail or road to the land she visited. (Tr. 143.)

With respect to the improvements placed on and occupancies by others on Lot 5, Galbraith testified that she did not notice the runway until 1972 and had never seen the power line. (Tr. 129.) She testified that she never saw anyone on Lot 5 except her own family and friends. (Tr. 134.)

Judge Sweitzer issued his ruling on September 12, 2000, approving Galbraith’s amendment to the Native allotment application. Judge Sweitzer cited the standard derived from this Board’s previous decision applicable to the question of whether Galbraith originally intended to apply for Lot 5.

^{9/} The pictures that appear in the record were taken at the 1983 field examination. (1984 Affidavit of Angeline Galbraith, attachments.)

^{10/} Both Galbraith and her ex-husband Peter had stated in their 1984 affidavits that they were silent about this to the field examiner.

^{11/} It took “at least 12 hours” to get to the land when she first moved to Anchorage. (Tr. 135.)

That an applicant contends his amendment describes the land originally intended does not, of course, settle the matter. Rather, the question of intent must be determined based on the facts and circumstances reflected in the record. Relevant to the question of intent are the 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., [88 IBLA 349 (1985)]. 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.

United States v. Galbraith, Sept. 12, 2000, decision by Administrative Law Judge Sweitzer, citing Angeline Galbraith, 97 IBLA at 147.

Judge Sweitzer found that Galbraith had presented a reasonable explanation as to why her original application had identified Lot 3. (Decision at 12.) He made clear, however, that he had considerable misgivings about concluding that she likely intended to apply for Lot 5. Judge Sweitzer noted that neither Galbraith nor the field examiner had mentioned or discovered the existence of the power line or airstrip in 1983. (Decision at 12.) Judge Sweitzer found nothing in the testimonies of Smagge or Noble to be probative, and acknowledged that “contestee did not take full advantage of the opportunity at hearing to provide explanations that would render [certain troubling evidence identified by the Board] less troubling.” (Decision at 13.) In particular, Judge Sweitzer observed that the affidavit of Galbraith’s husband, Peter, refuted Galbraith’s claims that she ever intended to apply for Lot 5. Nonetheless, he concluded that she showed a reasonable likelihood of an intent to apply for Lot 5.

As the quotations above reveal, Peter Galbraith discussed the 1977 field examination which he attended with his wife in paragraphs 8 and 9. Excising paragraph 8 and the portion of paragraph 9 expressly referring to the 1977 field exam, Judge Sweitzer quotes Peter Galbraith as stating:

7. Angeline indicated that the land description which BIA gave her was not the land that she actually used and wanted to apply for. I believe that Angeline was told that the land she originally intended to apply for was not available.

* * * * *

9. * * * At the time [of the field examination] I understood that Angeline wanted to get the land but that the land she really used and wanted was not available.

Judge Sweitzer supplied a hypothesis to explain the portion of the affidavit he quotes:

[T]here is at least one other reasonable interpretation of this paragraph. The first sentence of paragraph 7 may reference the original description [of Lot 3], given that the November 22, 1972, decision informed her that the land was located in the Army gunnery range. * * *

If this scenario is correct, paragraph 9 and the second sentence of paragraph 7 of Mr. Galbraith's affidavit may simply reference the fact that Contestee believes that BIA had misdescribed the land in the original application * * *.

(Decision at 12.) Judge Sweitzer proceeds to describe the events of 1970 leading to the application for Lot 3 as the subject of Peter Galbraith's affidavit. (Decision at 14.)

Judge Sweitzer explained that Galbraith's efforts to obtain Lot 2 may be explained as follows:

As the Board noted, the evidence allows for the possibility that [Galbraith] was willing to accept the land in the 1973 amendment because she believed the land she originally wanted was unavailable. Even if this possibility is the actual truth, it does not necessarily follow that she originally intended to apply for lot 3 rather than lot 5, given the possible scenario described above.

In the final analysis, the factors which weigh most heavily in finding that [Galbraith] originally intended to apply for lot 5 is the well-supported and reasonable explanation as to why her original application described the nearby lot 3, her credible testimony of her use of lot 5, Mr. Eubanks' Field Report that she had good knowledge of lot 5 and its location, and the absence of evidence that lot 3 or some other parcel adjacent to lot 4 was used by [Galbraith] or could have sustained her claimed uses. [Galbraith] clearly established a reasonable likelihood that the land described by the proposed amendment was the land intended to be claimed at the time of the original application.

(Decision at 15.)

Having determined that Galbraith's application could thus be amended, Judge Sweitzer proceeded to conclude that the allotment application would be legislatively approved pursuant to 1998 amendments to section 905(a) of ANILCA, 43 U.S.C. § 1634(a) (2000), because all protests had been withdrawn by settlement. (Decision at 17.) With these findings behind him, he proceeded to consider whether Galbraith had submitted satisfactory proof that she engaged in "substantially continuous use and occupancy of the land for a period of five years." 43 U.S.C. § 270-3 (1970). Regulation 43 CFR 2561.0-5(a) states that such use and occupancy

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

He found that her evidence satisfied this test. Acknowledging the difficulty presented by the fact that she had asserted in her 1984 affidavit that she would go to the land "every summer and stay for several days," he concluded that it would be unreasonable to construe this affidavit to "be read as a complete itemization of the time which she spent on the claimed land." (Decision at 19.) Judge Sweitzer acknowledged the different dates on the application (1953 and 1955), and the fact that it only identified qualifying activities as rabbit-snaring and berry-picking, and Haggland's testimony at the 1990 hearing that he never saw Galbraith on the land after moving there in 1971. Nonetheless, Judge Sweitzer asserted that Galbraith presented strong evidence that she gathered bark. (Decision at 20.) He concluded based on this that, even though no witness submitted any evidence supporting the notion that the public was or would be aware of Galbraith's use, or that it was regular or exclusive, "her regular use would have been noticeable." He asserted that the fact that others did not notice this was due to the fact that the land was inaccessible. (Decision at 20.) Judge Sweitzer concluded that she used the land continuously from 1955 through 1970. (Decision at 19.)

BLM appealed. BLM argues that Judge Sweitzer erred in concluding that there was a reasonable likelihood that Galbraith intended to apply for Lot 5, because he focused on the original error made by BIA in identifying the land which she sought in 1970 in Lot 3. BLM explains that this conclusion failed to take into account the evidence of record regarding Galbraith's efforts to obtain Lot 2 in 1983. BLM cites to the three 1981 witness statements prepared by Noble, Mason, and McLean, and submitted by Galbraith in support of her application for Lot 2, which expressly endorsed her use of Lot 2 and would refute her 1999 testimony that she construed the application for Lot 2 as an error at the time of her 1977 field examination. BLM also points to evidence from the 1990 hearing regarding the improvements on Lot 5 which would refute Galbraith's assertion of exclusive use. BLM contends that

Galbraith was fully aware of these inconsistencies, was provided an opportunity to explain them, and that her 1999 testimony simply added more difficulties in understanding her story. (BLM Statement of Reasons (SOR) at 10-13.)

BLM objects to Judge Sweitzer's conclusions regarding legislative approval under section 905(a) of ANILCA. BLM argues that he erred in concluding that the 1998 amendments could apply in a case where parties besides the State of Alaska protested. (SOR at 14.) ^{12/}

Finally, BLM objects to Judge Sweitzer's findings of continuous use and occupancy. (SOR at 16-17.) BLM contends that the 1999 hearing was the first time at which Galbraith claimed to go on the land for more than a few days in any year and points out that all of Galbraith's prior statements consistently asserted that she went out to the land once or a few days per year. (SOR at 17-18.) BLM points out that her testimony on cross-examination reveals the difficulty in accessing the property. BLM seriously questions her contentions that she took small children every day or every other day on 6-hour round trip excursions, at least 5 hours of which constituted hiking. (SOR at 18.) BLM argues that the story she presented for the first "fifteen years" after her 1984 affidavit, in light of her circumstances as a mother of young children, is far more credible than the assertion that she took the children on weekends sometimes well into the darkness of the fall and maybe winter months, on these round trip 5-hour walking excursions. (SOR at 18.)

BLM objects to Galbraith's testimony regarding use of birch bark, again pointing out that the 1999 hearing was the first mention of this use. Noting her testimony that stripping the bark will eventually kill the trees, BLM asserts that the 30-acre lot could not support bark-stripping at the intensity level she describes, from every other day to daily, during the spring and summer for years. (SOR at 19.)

Finally, BLM contends that Galbraith's use could not be found to be exclusive. BLM points to evidence at the 1990 hearing of a homestead entry filed on Lot 5 in the 1960s, the airstrip and road, the power line, and testimony and evidence submitted by others during the 1990 hearing of persons indicating familiarity with Lot 5, but not with Galbraith. (SOR at 20-21.)

Galbraith argues that the Board should defer to Judge Sweitzer's conclusions as the fact-finder. With regard to the three 1981 witness statements supporting Galbraith's use of Lot 2, Galbraith argues that the Board should now construe those affidavits to relate to Lot 5. (Answer at 18.) Galbraith largely cites the ALJ decision

^{12/} Galbraith objects to this legal argument. (Answer at 26-28.) The conclusions we reach below obviate any need to consider this issue; accordingly, we provide no further details as to the parties' arguments on this point.

with favor and criticizes BLM's construction of her 1984 affidavit. (Answer at 20-23.) With regard to the evidence of conflicting uses of and improvements on Lot 5, Galbraith argues that "there was little, if any, chance for contact between the alleged homesteaders and Galbraith." (Answer at 25.) Finally, Galbraith argues that her marking of the birch bark would serve as evidence, along with snares left on snow during winter, would "put one on notice of her prior claim." (Answer at 29-30.)

[1] Section 905(c) of ANILCA provides that a Native allotment application may be amended by the applicant if the amended, rather than the original, land description designates the land which the applicant "intended to claim at the time of application." 43 U.S.C. § 1634(c) (2000); Estate of Stan Paukan, 146 IBLA 204, 208 (1998). To justify an amendment, the evidence should clearly evince a reasonable likelihood that the land described by the amendment was the land the applicant actually intended to claim when the original application was filed. Heirs of Setuck Harry, 155 IBLA 373, 378 (2001). It is not enough that the land described in the proposed amended application is land the applicant would have desired to select.

[S]ection 905 (c) of ANILCA is only intended to permit * * * the amendment of a Native allotment application so that it accurately reflects the land which the applicant had originally intended to claim, but that through some error was misdescribed, in the application, and not to permit the substitution of new or additional land which the applicant had not originally intended to claim.

State of Alaska (Helen M. Austerman), 119 IBLA 260, 266 (1991).

An "error" might result from either the improper placement of the allotment claim on a protraction diagram or some other error in the generation of the land description. Heirs of Setuck Harry, 155 IBLA at 378, citing S. Rep. No. 413, 96th Cong., 2d Sess. 286 (1979), reprinted in 1980 U.S.C.C.A.N. 5070, 5230; Stephen Northway, 96 IBLA 301, 307 n. 5 (1987). An amendment can either shift the location of the claim, change its configuration, or both. The intent is to have the claim encompass the "actual, on-the-ground location of the lands purportedly used and occupied." United States v. Heirs of David F. Berry, 127 IBLA 196, 207 (1993). In Angeline Galbraith, 97 IBLA at 147, we set forth factors deemed relevant when trying to determine a Native applicant's original intent. They concern the geographic positions of the land originally described in the application and the land now sought under the proposed amendment, their location relative to landmarks or improvements, the history of the legal status of the underlying land, and the applicant's activities since filing the application.

In a Native allotment application case, the Government bears the burden of presenting sufficient evidence to establish a prima facie case of ineligibility. Should a

prima facie case be established, the burden then shifts to the Native applicant to prove his or her claim by a preponderance of the evidence. United States v. Mack, 159 IBLA 83, 91 (2003); United States v. Heirs of Thomas Bennett, 144 IBLA 371, 381 (1998); United States v. Heirs of David F. Berry, 127 IBLA at 205.

In this case, it was determined that the Government established a prima facie case. Therefore, Galbraith must overcome this showing by a preponderance of the evidence. Regarding her burden to demonstrate that the amendment of her application is warranted, Galbraith was required to show a reasonable likelihood that the land described by her amendment (Lot 5) was the land she intended to claim at the time of the original application, by a preponderance of the evidence sufficient to overcome the Government's prima facie case.

Where the resolution of disputed facts is influenced by 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 witnesses and is in the best position to judge the weight to be given to their testimony when that testimony conflicts with other evidence. United States v. Higgins, 134 IBLA 307, 316 (1996), and cases cited therein. The Board will not defer to findings of an administrative judge that are not supported by substantial evidence.

Our dilemma here is that we find no evidence in Galbraith's case to provide substantial evidence to support Judge Sweitzer's conclusions. While the findings of Judge Sweitzer might provide a basis for a conclusion that Galbraith showed a reasonable likelihood that she intended to apply for Lot 5, his findings are based upon his own surmising about, rather than evidence in, the record. Nor do his speculations support a conclusion that Galbraith preponderated over the Government's prima facie case at the contest hearing presented in 1990.

Looking at the elements of Galbraith's case presented in 1999, a clear and straightforward story regarding Galbraith's use of the land is almost impossible to construct. From her story now and before, it is not possible to determine her position as to when she began to use the land. She claims in her testimony it was 1953. Her brother claims he went to the land some time in 1954. Yet, correlating the dates with her children's ages, she cannot have begun to use the land until 1955, when her children were 4 and 5 years old and in kindergarten, if that aspect of the testimony is to be believed. This brings into question Smagge's testimony. He could not be budged beyond a single assertion that he was there in 1954 (or 1964 at one point), which predates the use she describes beginning with her children's time in school. But for this assertion, there is no testimony in the record amounting to an assertion

that supports Galbraith's claim that she went to Lot 5.^{13/} While her then-husband Carl Noble claims to have accompanied her on excursions to some land, his only testimony relates to Lot 2.

A careful search of Galbraith's claims regarding Lot 5 itself reveals no testimony actually validating that she went there. The field examiner in 1983 reported that she had some familiarity with the land. The testimony in 1999 did not. Neither Smagge nor Carole Noble was able to, or in Noble's case asked to, give any identifying feature that would tie his or her testimony to Lot 5 as opposed to any other location.^{14/} Galbraith identified the parcel on a map as the one she wanted but gave no identifying feature. Rather, scouring her testimony reveals that the only identification of Lot 5 came from her identification on the map (Exhibit A). Yet she said: "I don't understand the map, but I know where the property is if I went there." (Tr. 41.) "With the map [I] don't know. It's right next to my cousin's." (Tr. 42.) This is not enough, without any identifying feature, to preponderate over the contrary statements in the record identified clearly in this Board's prior decisions.

Any testimony on Galbraith's part was vague as to identification of Lot 5. Attempting to correlate her statement with her own Exhibit A, it is almost impossible to determine how she accessed the land. She stated (Tr. 42): "The only way I could get there is on Cripple Creek Road, you know, or Potter Road, you know or from the Chena River, the Tanana River, and walk up that bank," presumably referring to trails in existence during the 1950s where roads may be located now. (Tr. 42.) A review of the map she submitted shows that the two roads are perpendicular to each other. See also Contestant's Exs. 1 and 2 (submitted May 2, 2005). Cripple Creek Road runs north-south along the western boundary of her claim; the other (Potter) runs east-west north of McLean's Lot 4. (Tr. 47; Exhibit A.) It is not possible to tell what

^{13/} In this, we must accept but also fully agree with the Board's prior conclusion that the affidavit of Mary McLean is not probative. 97 IBLA at 163. We accept the truth of McLean's assertion that she went to some land with her cousin. Her willingness to state that she went to whatever parcel Galbraith was applying for and to sign off on entirely contradictory lot shapes and locations makes it impossible to determine where McLean and Galbraith went together other than McLean's own allotment. Making McLean's testimony even less relevant, Galbraith testified that she went to the land with her neighbors and friends with cars or boats. (Tr. 50, 55, 66, 69, 133-34.) Only once on cross examination did she testify about going to the land with McLean. (Tr. 118.) Her testimony about McLean focuses on the fact that she and McLean went together to the BIA office to submit applications in 1970, and that she sought land next to McLean's allotment. (Tr. 83-85.)

^{14/} As quoted above, Smagge denied having gone to the land at several points, or being able to identify it.

she meant by this, or whether she meant to substitute Potter Road for Cripple Creek. In the ensuing pages of testimony, Galbraith identifies the roads on the map, but does not explain further how she accessed the land. Her affidavit and all the 1981 affidavits state the her land was “off Chena Pump Road” and either “Rosie Creek” or “Rosemary” Road. It is not possible from this testimony to determine that she went anywhere but in the vicinity of these roads, or the trails that were there in the 1950s.^{15/} There is no landmark identified anywhere in the record to substantiate a clear route of access to Lot 5 from a location in Fairbanks, where she lived in the 1950s until 1964. While the testimony verifies that she used routes to get to land to conduct her activities, we would have to speculate that such routes actually deposited Galbraith within Lot 5; it was her burden to demonstrate that.

The discussion regarding access by river is no more enlightening. The map at Exhibit A shows that the Tanana (Chena) River is closest to Lot 2 due east of that river, and that Lots 3 and 5 are further to the west. See also Contestant’s Ex. 1 (submitted May 2, 2005). The River is also closer from the east to Lot 3 than to Lot 5. She states that she walked “up the bank,” but provides no guidance as to where. There is no location on the river, as depicted by Exhibit A, from which Lot 5 is closer to the river than Lots 2 or 3 are. Nonetheless, Lots 4 and 5 are still closer to the river to the east than from any other river location. We could speculate as to why she and McLean might have crossed Lots 2 and 3 to get to Lots 4 and 5 from the east, or why she might have walked due north across an even longer expanse of land to get to Lot 5. There may be a perfectly reasonable explanation but it is not for us to supply it. Galbraith and her attorney, unfortunately, had 9 years to prepare a comprehensible case. She did not do so in terms of explaining how she got to Lot 5, in a way that makes clear it was Lot 5, as opposed to any other location in the vicinity, that she went to.

Galbraith testified that her land use was not limited to the parcel she now claims. As noted above, she testified that she “picked berries on land other than [hers].” “Right. We go all over.” (Tr. 55.) The story Galbraith gave was not that she had a parcel which she used, exclusively of others, or even exclusively for herself. Rather, when one reads her testimony in its entirety, the story that emerges is that Galbraith used lands with other families based upon where she could get to,

^{15/} Contestant’s Ex. 2 shows Rosie Creek Trail as running from the southwest to the northeast, into, with a jog along Cripple Creek Road, Potter Road, and then Rosie Creek Road, which, in turn, turns into Chena Pump Station Road. It is not possible to tell from Galbraith’s statements where she walked to get to the land, and it is likely that her access depended on whether she left Fairbanks by car or boat. That various possibilities exist does not assist the finder of fact in deciding where the land she went to was actually located.

depending on their kindness in giving her family a car or boat ride, until she learned to drive. This is what she said:

Q. Sounds like you maybe picked berries on land other than yours, too?

A. Right. We go all over, however we get a ride. Or, you know, we didn't have a car for, big enough for our kids.

We had, we always had to bring neighbor's kids, so we would go with the neighbors that had big cars * * * like stationwagon or truck.

(Tr. 55-56.) Later, she stated that she looked for birch bark

every other day for a whole month, you know, just to go looking for, if we get a ride. Sometimes we, we have a – After we bought our car, then we, we go there quite more often, you know.

Q. When did you get a car?

A. When I learned how to drive, I guess. In 1950-, 1960.

* * * * *

Q. But you'd have to get rides from other people?

A. Right. Well, most the time my husband would drive us, you know, because he didn't have a job, steady job. So he, we spent a lot of time up there.

(Tr. 62-63.) ^{16/}

There is no question that Galbraith testified that she used lands for various purposes. Her testimony, though, was that for the first few years she used land in various locations, not just Lot 5, based on other families' use. The picture presented simply does not indicate either that she intended to apply for a Lot 5 which can be identified by any feature, or that her use was open and notorious. In fact, her testimony suggests why she might have been willing to accept Lot 3 or Lot 2.

^{16/} The only evidence in the record regarding her then-husband's use is his 1981 affidavit stating that together they used Lot 2. (1981 Carl Noble Affidavit.)

Further, Galbraith's testimony raises new concerns and discrepancies with her past statements. In her testimony, she claims to have raised the issue with the field examiner in 1977 that Lot 2 was not land she wanted to apply for. (Tr. 136.) This contradicts her own statement and that of Peter Galbraith regarding the 1977 field examination in their 1984 affidavits. (1984 Affidavits of Angeline Galbraith and Peter Galbraith, both at paragraphs 9.) Both stated then that they said nothing to the field examiner in hopes of obtaining Lot 2.

Prior to 1999, at every available juncture, Galbraith testified that she used the land on at most a few days during the summer. See 1984 Affidavit of Angeline Galbraith at paragraph 4. In her testimony in 1999, however, Galbraith presents an erratic picture as to far more extensive use, complicated by the fact that she claims to have engaged in such use during the school year after her children were released from kindergarten. Thus, her story is that she went daily or every other day during the year for a 6-hour round trip, 5-hour walking excursion, with or without small children, after their school day ended, notwithstanding the fact that much of this trip during the fall and winter would be accomplished in the dark. While Judge Sweitzer could be correct that the picture presented in her 1984 affidavit did not expressly discuss the scope of her use, the question would arise as to why this is so when the standards for qualifying use and occupancy were the same in 1984 as today. In any event, speculating that this is so does not change that it was incumbent upon Galbraith to present a sensible and consistent picture of use. She did not do so.

What Galbraith did present was extensive testimony regarding the peeling and use of birch bark. However, at no juncture prior to the 1999 hearing had Galbraith mentioned this use. Never, in her application, in the affidavits of four witnesses, in her own affidavit, at the 1977 field examination, in the 1983 field examination, or in her briefing of her case to this Board, did Galbraith or her attorney identify the stripping of birch bark as her use of the land. In fact, her own affidavit and that of Mary McLean indicate other uses. While this may explain why her testimony focused on her trips to the land with numerous people other than McLean, it again created a new and different story from that presented in all of her prior statements.

Moreover, Galbraith testified that the "bark would not grow back," apparently in support of the notion that others entering the land would be aware that another was using the land. (Tr. 114). Nonetheless, Galbraith was unable to present testimony of a single person who witnessed her gathering of birch bark or the evident effects on the trees. Further confusing the story, Galbraith testified that others cut down the trees for firewood. (Tr. 114.) She made these statements on cross-examination seemingly in defense of the notion that verifying her bark-stripping was not possible. Yet, to show use and occupancy, it was her burden to adduce some evidence that others had reason to be aware of her potential use.

This testimony appears calculated to fill in the discrepancy identified by the Board in its explanation of the difficulties in demonstrating notorious use by virtue of the sort of uses including berry-picking identified by Galbraith before. 103 IBLA at 334-35. While BLM's view that her testimony amounts to admission that she must have killed all the birch trees in 30-acres is extreme, we do agree with BLM that her story seems more directed to the test established for use and occupancy than to presenting a credible picture of her use of those 30 acres.

Finally, Galbraith's only testimony regarding competing uses of Lot 5 is that she did not notice an air strip, a road, a power line, or a potential homesteader all in place during the 1950s or early 1960s when she was living in Fairbanks. Her attorney's explanation for this is that "there was little, if any, chance for contact." (Answer at 25.) This construction of events is simply inconsistent with Galbraith's testimony in 1999 regarding the frequency of her use, and the constancy of almost daily use alleged during the summer.

We find that Judge Sweitzer's conclusions are not supported by substantial evidence. Rather than rely on the testimony of Galbraith and the witnesses called on her behalf, Judge Sweitzer developed his own explanation for the discrepancies created by Galbraith's various statements and amendments beginning in 1971. His conclusion regarding Peter Galbraith's testimony is pivotal to his efforts to make sense of her testimony, as compared with prior evidence in the record. Nonetheless, his conclusion can only be reached by his deleting a critical portion of Peter Galbraith's affidavit. Peter Galbraith stated:

8. A couple of days before the field examination in 1977 I went up to the land with Angeline and posted corner markers according to the legal description which she got from BIA.

9. I went on the field exam and pointed out the corners which were marked. Neither Angeline nor I really said much to the examiner. At the time I understood that Angeline wanted to get the land but that the land she really used and wanted was not available.

(Affidavit of Peter Galbraith, July 18, 1984.) The underscored language was omitted by Judge Sweitzer in his construction of Peter Galbraith's statement. In its entirety, this statement is unequivocally tied to the 1977 field examination. We must reject Judge Sweitzer's conclusion that Peter Galbraith was testifying about some other point in time, or in particular about the application process in 1970. Neither Peter nor Angeline Galbraith ever suggested Peter was present during the 1970 application process, and the full citation to his affidavit makes clear he was not purporting to discuss it at paragraph 9.

Other findings in Judge Sweitzer's conclusion are not supported by substantial evidence. He cites the "well-supported and reasonable explanation as to why her original application described the nearby Lot 3." We agree with BLM that Judge Sweitzer avoids any explanation of her extensive efforts to obtain Lot 2. He cites Galbraith's "credible testimony of her use of lot 5," yet, as noted above, there was none. He cites the 1983 "Field Report that she had good knowledge of lot 5 and its location." While this may be true, it seems clear from the failure of the examiner to notice improvements on the field report that a full examination of Lot 5 did not take place until it was supplemented in 1984. Finally, while Judge Sweitzer cites "the absence of evidence that lot 3 or some other parcel adjacent to lot 4 was used by [Galbraith] or could have sustained her claimed uses," it is the absence of such evidence regarding Lot 5 that is our concern.^{17/}

In fact, the evidence indicates that Galbraith was not as familiar with Lot 5 as would be expected given her testimony regarding the frequency of her use of the land. On the basis of the above discussion, we find that Galbraith has failed to demonstrate a reasonable likelihood that she originally intended to apply for Lot 5 such that her evidence preponderated over that of the Government's prima facie case. We also find that she failed to present evidence that her alleged use constitutes substantial use and occupancy.

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 reversed and the allotment application is rejected.

Lisa Hemmer
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge

^{17/} We reject Galbraith's suggestion that at this juncture we revise the 1981 affidavits to refer to Lot 5. To the extent this suggestion presumes that these affiants signed affidavits constructed by Galbraith without a clear understanding that the odd-shaped Lot 2 which they swore she used was really incorrect, she obtained those signatures for a lot she did not use at her peril.