



UNITED STATES v. GARY T. LONGLEY, SR.

175 IBLA 60

Decided: June 30, 2008



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 N. Quincy St., Suite 300  
Arlington, VA 22203

UNITED STATES

v.

GARY T. LONGLEY, SR.

IBLA 2008-18

Decided: June 30, 2008

Appeal from a decision by Administrative Law Judge Robert G. Holt finding that appellant's use and occupancy of Parcel C of Native allotment application F-3376 had not been potentially exclusive of others as required under the Alaska Native Allotment Act of 1906.

Affirmed.

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

An applicant for a Native allotment must show substantially continuous use and occupancy of land that was at least potentially exclusive of others. A claimant need not show that he or she actually excluded others from using the land; rather, a claimant must show that the use was such that, under normal circumstances, any person on the land knew or should have known it was subject to a prior claim. Such knowledge may be established by physical evidence of use or occupancy, including physical changes to the land or the presence of physical structures or artifacts, and by evidence of public awareness and acknowledgment of the applicant's superior right to the land.

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

Evidence that the residents of a community used the land claimed in an allotment application can lead to a finding that the applicant's use of land was not potentially exclusive of others, so long as their use was not permissive or done with notice of the

applicant's claim. An absence of evidence of community use supports but does not require a finding that the applicant's use was potentially exclusive of others; rather, the question remains whether under the circumstances others knew, or should have known, of the applicant's superior claim to the land.

3. Administrative Procedure: Burden of Proof--Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Board of Land Appeals--Contests and Protests: Government Contests--Evidence: Burden of Proof--Rules of Practice: Appeals: Burden of Proof--Rules of Practice: Government Contests

In a Government contest of a Native allotment application, the contestant bears the burden of presenting sufficient evidence to establish a prima facie case of ineligibility and, if a prima facie case is established, the Native applicant bears the burden of proving by a preponderance of the evidence that the requirements of the Native Allotment Act have been satisfied. On appeal from the decision of an administrative law judge denying an application, the appellant has the burden of proving that the judge erred. The Board is reluctant to overturn an administrative law judge's resolution of factual issues that was based upon findings about the credibility of witnesses whose deportment and demeanor were observed by the judge.

APPEARANCES: Carol Yeatman, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for the Appellant; Joseph D. Darnell, Esq., Office of the Regional Solicitor, U. S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Gary T. Longley, Sr., has appealed a September 12, 2007, decision by Administrative Law Judge (ALJ or Judge) Robert G. Holt finding that Longley's use and occupancy of Parcel C of his Native allotment application F-3376 had not been potentially exclusive of others as required under the Alaska Native Allotment Act of 1906, Ch. 2469, 34 Stat. 197, *codified as amended at* 43 U.S.C. §§ 270-1 through 270-3 (1970), *repealed subject to pending applications*, 43 U.S.C. § 1617(a) (2000). Judge Holt found that the evidence established that the residents of the adjacent community had used the parcel for berrypicking in conflict with the application and did not show that Longley's use had resulted, or should have resulted, in a public

awareness and acknowledgment of his superior right to the land. Decision at 15-16. Accordingly, Judge Holt declared Longley's interest invalid. *Id.* at 16.

The appeal raises issues about two related matters.<sup>1</sup> First, Longley lists six factual findings related to the exclusivity of his use of the land and the community's use about which he claims Judge Holt made rulings contrary to the evidence. SOR at 20-29. Second, Longley contends that the "potentially exclusive" use requirement is invalid and, even if not, that Judge Holt improperly disregarded the substance of the Board's ruling in *Kootznoowoo, Inc. v. Heirs of Jimmie Johnson*, 109 IBLA 128 (1989), *appeal dismissed sub nom. Kootznoowoo, Inc. v. Spang*, Civ. No. A91-254 (D. Alaska Dec. 23, 1992) (no jurisdiction due to lack of waiver of sovereign immunity), *aff'd*, 33 F.3d 59 (9th Cir. 1994) (table). SOR at 30-32.

Because the latter argument, if correct, would necessitate setting aside Judge Holt's decision and instructing him to undertake further review of the evidence and issue a new decision or, alternatively, require the Board to undertake *de novo* review of the evidence presented at the hearing, that legal challenge will be addressed after describing the procedural history which led to the hearing. *See United States v. O'Leary*, 125 IBLA 235, 243 (1993). Because we find that Judge Holt did not err in his treatment of the *Kootznoowoo* decision, the Board will then address the factual matters Longley raises on appeal. Because we do not find error in Judge Holt's findings, his decision is affirmed.

### *I. Background*

Longley filed two Native allotment applications. The first, apparently signed on February 24, 1967, is date-stamped as received by the Bureau of Land Management (BLM) on August 2, 1968. Ex. A-1 at 002-003; Ex. B-6.<sup>2</sup> Through

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<sup>1</sup> Longley presents an additional argument that he has met the standard for exclusive use developed in state court decisions concerning adverse possession, which he believes are "helpful in understanding the vague requirement of potentially exclusive [use] for an allotment." Statement of Reasons (SOR) at 36. As discussed below, the applicable standard of "potentially exclusive" use is provided by a Federal regulation and this Board has addressed it in a number of decisions that constitute the Department's case law. The analogy Longley seeks to draw to "exclusive" use against a landowner under adverse possession is unclear and unpersuasive.

<sup>2</sup> At the hearing BLM introduced a three-volume photocopy of case file AA-003376 as exhibit A-1. The contents are paginated in chronological order. Some documents from the file were also introduced as individual exhibits. Contestee's exhibits were introduced using "B" numbers. The record before the Board also includes two folders  
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extended procedures not relevant to the present appeal, the land Longley applied for (subsequently known as Parcel A) was identified as a 19.69-acre parcel about 15 miles east of Nome on a spit between Norton Sound and Safety Sound along the road to the village of Council. Ex. A-1 at 404. A certificate of allotment for Parcel A was issued to Longley on December 1, 1997. Ex. A-1 at 564-565.

Longley's second application (or amendment of his original application) was handwritten with a sketch showing the location of the land applied for and was signed by him on October 15, 1971. Ex. B-9. He claimed use of the land for berry-picking and fishing during the summer months from 1964 through 1968. Longley signed a typed copy of the application on November 1, 1971, and it was received at BLM's Fairbanks Land Office on April 14, 1972.<sup>3</sup> Ex. A-1 at 055-056; Exs. A-3, B-12. It describes two parcels, identified as Parcel B and Parcel C, using legal descriptions. Parcel B was a previously surveyed lot of 2.09 acres contiguous with Parcel A. A certificate of allotment for Parcel B was issued on September 16, 1993, and the land is not at issue in this proceeding. Ex. A-1 at 493-494.

Parcel C consists of approximately 130 acres along the east bank of the Niukluk River on the same side as the village of Council, but on the other side of the confluence of Melsing Creek and the river. A gravel road runs 72 miles from Nome to the village of Council, placing Parcel C approximately 57 miles from Parcels A and B. Ex. B-29. Parcel C covers the intersection of secs. 11, 12, 13, and 14, of unsurveyed T. 7 S., R. 25 W., Kateel River Meridian (K.R.M.). On June 8, 1977, Longley signed a relinquishment of Parcel C; however, by letters dated January 18 and February 19, 1982, he requested reinstatement, claiming that he had acted on misinformation from the BLM employee who had conducted the field examination of his Parcels A and B. Ex. A-1 at 83, 147, 151; Exs. A-6, A-9, A-10. By letter dated June 17, 1982, BLM informed Longley that his application had been "reinstated pending further determination." Ex. A-1 at 166, Ex. A-11; *but see* Ex. A-16 ("not intended to imply any final determinations had yet been made").

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<sup>2</sup> (...continued)

which seem to be the original file from which the documents in Exhibit A-1 were copied. The date received is taken from the document in the original file.

<sup>3</sup> The parties stipulated that the application was timely filed. Final Pre-Hearing Order (Mar. 6, 2007).

A field examination was conducted on August 14, 1983. Ex. A-12.<sup>4</sup> The examiner, accompanied by Longley and a friend of his, determined that “the boundary lines shown on Land office records are not the lines claimed by the applicant” and provided a metes and bounds description of the boundaries of Parcel C, a sketch of the claim, and survey instructions. Ex. A-1 at 173-75, Ex. A-12; Ex. A-13 at 6-7, 10.<sup>5</sup> U.S. Survey No. 9993, accepted May 7, 1990, identified the allotment boundaries and established that Parcel C includes 129.97 acres. Ex. A-1 at 364; Ex. A-20.

By Notice dated August 29, 2000, BLM informed Longley and other parties that it proposed to reinstate the application as to Parcel C. Ex. A-1 at 637. By decision dated May 30, 2002, however, BLM denied reinstatement based upon a determination that Parcel C had been knowingly, willingly, and voluntarily relinquished. Ex. A-1 at 721-27; Ex. A-25. Longley appealed and on April 5, 2004, this Board issued an order granting BLM’s motion that the decision be vacated and remanded with “instructions that a government contest be initiated alleging, *inter alia*, that the relinquishment of June 8, 1977, was knowing and voluntary and that, should the relinquishment be held to be invalid, Mr. Longley did not use and occupy the land, for which he applied, in a qualifying manner.” Ex. A-1 at 754, 758.

The hearing was initiated by a complaint dated August 26, 2005, alleging that Longley (a) had “voluntarily and knowingly relinquished his claim to the lands in Parcel C,” (b) “did not make substantially continuous use and occupancy of Parcel C of the claimed allotment land for a period of five years,” (c) “did not make substantially continuous use and occupancy of Parcel C of the claimed allotment land for at least five years that was at least potentially exclusive of others,” and (d) that the official case file for Longley’s application “does not contain satisfactory proof to establish that he made substantially continuous use and occupancy of Parcel C of the claimed allotment land in a qualifying manner.” Ex. A-1 at 810-12.

The hearing was held in Nome on March 20-22, 2007. After the parties submitted both post-hearing briefs and reply briefs, Judge Holt issued his

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<sup>4</sup> Parcel C was also identified as the subject of a field report dated Oct. 3, 1977. Ex. A-7. The report, however, discusses Parcels A and B and there is no indication that the field examiner was physically present on Parcel C during the June 5-8, 1977, period during which he conducted examinations in the area. See Tr. 41, 80-81.

<sup>5</sup> The field report described and drew the parcel as beginning at C-1 on the Niukluk River, extending northeast for 1320’ along the eastern boundary of M.S. 2317, which overlies Melsing Creek and its confluence with the river, thence southeast for 3600’ to C-3, southwest 1320’ back to the east bank of the river and northerly along the bank back to C-1. Ex. A-13 at 6-7.

September 12, 2007, decision finding that Longley had not “satisfied his burden to prove that he used and occupied the land in a way that was potentially exclusive of others.” Decision at 1. Judge Holt concluded that “credible evidence established that residents of the adjacent community used the parcel for berry picking in conflict with Gary’s use and occupancy” and that “his use did not result in a public awareness and acknowledgment of his superior right to the land.” *Id.* at 1-2. More specifically, Judge Holt ruled that Longley’s use of Parcel C had not been potentially exclusive of others because testimony by witnesses who had lived in or near Council during the years 1964-69, the period for which Longley claimed qualifying use, “established a long time community use which conflicted with Gary’s application.” *Id.* at 15. Because Judge Holt concluded that Longley had not satisfied the requirement of potentially exclusive use, he did not directly address whether Longley had made substantially continuous use and occupancy of Parcel C for at least 5 years. *Id.* at 4. Judge Holt also specifically declined to address the “conflicting” evidence as to whether Longley had knowingly and voluntarily relinquished his claim to Parcel C, noting that a ruling would require making determinations as to both the weight and credibility of the evidence. *Id.* at 3.

## *II. The Requirement of Potentially Exclusive Use*

On appeal, Longley asserts that the “potentially exclusive use” requirement is invalid because it is not found in the Native Allotment Act, but only in the Department’s regulations. SOR at 30. In a footnote, he further claims that “the regulation is invalid because it is inconsistent with the Allotment Act and violates its plain meaning,” that it is “arbitrary and capricious and exceeds the Department of Interior’s authority granted by the Allotment Act,” and that “[r]equiring allotment applicants to prove potentially exclusive use frustrates the policies of Congress concerning Alaska Natives and is inconsistent with the statutory purposes.” SOR at 30 n.218. Longley seeks a ruling that Judge Holt failed to apply the finding in *Kootznoowoo, Inc. v. Heirs of Jimmie Johnson*, 109 IBLA at 135, that the evidence in that case did “not establish that Native community use predated Johnson’s use, that it was more extensive than his use, or that it conflicted with his use or wishes.” See SOR at 31-33. Longley views this statement as the standard to be applied when a Native corporation or community opposes a Native allotment and believes that, applying the standard, “the testimony of the government’s witnesses fails to establish community use of Mr. Longley’s land.” SOR at 32. The absence of such testimony, he believes, establishes that his use was potentially exclusive of others. SOR at 22, 35.

[1] Although Longley does not provide authority or argument to support his legal challenges to the “potentially exclusive” use regulation, we address it briefly because a lack of potentially exclusive use of Parcel C was the sole basis on which Judge Holt ruled against him. As revised in 1956, the Native Allotment Act required

a Native applicant to submit satisfactory proof “of substantially continuous use and occupancy of the land for a period of five years.” Pub. L. No. 84-931, 70 Stat. 954 (1956); *codified at* 43 U.S.C. § 270-3 (1970). The requirement is restated in the Department’s regulations. 43 C.F.R. § 2561.2. The “potentially exclusive” use requirement appears in the definition of the statutory term:

The term *substantially continuous 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.

43 C.F.R. § 2561.0-5(a).<sup>6</sup> The definition was added when the regulations were revised after the Solicitor reviewed the Department’s authority to issue proposed regulations under the Native Allotment Act. *Allotment of Land to Alaska Natives*, Sol. Op. M-36662, 71 I.D. 340 (1964); 30 Fed. Reg. 3710 (Mar. 20, 1965). The revised regulations, as discussed by the Solicitor, eliminated the requirement to show evidence of residences, cultivation, and improvements to the land and, instead, permitted “consideration of (1) native custom and mode of living; (2) climate and character of the land applied for; and (3) customary seasonality of occupancy in determining whether an applicant for an allotment has shown substantially continuous use and occupancy of the land for a period of five years.” 71 I.D. at 342. The Solicitor explained that such changes would represent “a change of existing policy concerning the allotment of land to Alaskan natives” which recognized, “[i]n addition to occupancy according to the standards of the white settler, . . . occupancy according to the standards of the native in his present culture and environment.” *Id.* The requirements of substantiality and potential exclusivity, however, can be traced back to earlier Departmental decisions, and the Secretary’s authority to administer the Native Allotment Act “under such rules as he may prescribe” has been part of the law since 1906. Act of May 17, 1906, ch. 2469, 34 Stat. 197; *see* 43 U.S.C. § 270-1 (1970); *United States v. Mack*, 159 IBLA 83, 95-96 (2003), and cases cited.

The need for evidence to establish use of land at least potentially exclusive of others was addressed in *Angeline Galbraith*, 97 IBLA 132, 169, 94 I.D. 151, 170-71

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<sup>6</sup> Longley also asserts that the potentially exclusive use requirement “should be confined to those cases where two individuals claim the same land for their Native allotments” and that, because he is the only individual claimant, it “does not apply to Parcel C.” SOR at 36. Because potentially exclusive use is part of the definition of qualifying use, it cannot be ignored or limited by BLM or this Board. Moreover, this assertion seems at odds with appellant’s argument concerning *Kootznoowoo*.

(1987), *reaff'd, Angeline Galbraith (On Reconsideration)*, 105 IBLA 333 (1988). In addressing Galbraith's use of the land for berrypicking we stated:<sup>7</sup>

It does not follow, however, that the mere existence of evidence of berrypicking, without more, justifies the conclusion that substantial use and occupancy potentially exclusive of others has occurred. Standing alone, we find it difficult to conjure up any circumstances in which such a conclusion would be appropriate. It is, however, a relevant factor, when conjoined with other physical indicia, in determining whether an individual on the ground could properly be said to be on notice that the land was claimed by another, and could also serve to delineate the extent of any such claim. Indeed, this is the essential meaning of the phrase "potentially exclusive of others." A claimant need not show that he or she actually excluded others from using the land sought; rather, a claimant must show that the nature of the use was such that, under normal circumstances, any person on the land knew or should have known it was subject to a prior claim. . . .

In his decision, Judge Holt quoted a more recent pronouncement found in *United States v. Heirs of Pat P. Pestrikoff*, 167 IBLA 361, 379 (2006):

In order to demonstrate that the land was used and occupied to the potential exclusion of others, prior to the filing of a Native allotment application, it must be shown that others knew or should have known that the applicant asserted a superior right to the land because he actually used or occupied the land and/or left behind physical evidence of such use or occupancy, sufficient to put others on notice of the assertion of such a right, or because others acknowledged that assertion in some way.

Judge Holt also quoted the portion of *United States v. Heirs of Jake Yaquam*, 139 IBLA 376, 384 (1997), cited in *Pestrikoff*, to the effect that an applicant's use and occupancy of the land must be shown to have resulted in public awareness and acknowledgment of the applicant's superior right to the land, even in circumstances where others used it. Decision at 5. As Judge Holt correctly understood, a variety of evidence may be used to show potentially exclusive use, including physical changes to the land, the presence of physical structures or artifacts, and statements of witnesses about observing the applicant using the land. The defining standard, however, is whether the evidence establishes that the applicant's use created, or

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<sup>7</sup> Galbraith's application was again before the Board in *United States v. Angeline Galbraith*, 134 IBLA 75 (1996), and *United States v. Angeline Galbraith*, 166 IBLA 84 (2005).

should have led to, a public awareness and acknowledgment of his superior right to the land. *See also United States v. Peterson*, 170 IBLA 231, 234-35 (2006); *United States v. Estate of George D. Estabrook*, 94 IBLA 38, 53 (1986).

In this context, Longley's contention regarding *Kootznoowoo* can be readily addressed. The Native village of Kootznoowoo had appealed an ALJ's decision dismissing its private contest of Jimmie Johnson's Native allotment application. The Board reversed, concluding that the Department had retained jurisdiction to determine the validity of the application. *Kootznoowoo, Inc. v. Heirs of Jimmie Johnson*, 109 IBLA at 134. The Board then turned to Kootznoowoo's argument that evidence of use of the land by other Natives for hunting, fishing, and other subsistence activities established a conflicting community use as described in 43 C.F.R. § 2561.1(d), which invalidated the application. *Id.* The Board, however, agreed with the ALJ "that the evidence submitted does not establish that Native community use predated Johnson's use, that it was more extensive than his use, or that it conflicted with his use or wishes." *Id.* at 135. The statement identifies factors which were relevant to Kootznoowoo's claim of community use, but it does not purport to establish a standard which must be met in order to find community use of land under 43 C.F.R. § 2561.1(d). *See United States v. Zack Rastops (Deceased)*, 124 IBLA 294, 307 (1992) ("[i]n *Kootznoowoo* others were aware of Johnson's claim to the land and their use was with his implicit authorization"). We find no error in Judge Holt's treatment of *Kootznoowoo*.

[2] More significantly, Longley incorrectly claims that "exclusive use is established by the absence of evidence on conflicting community use." SOR at 22. As quoted above, the requirement of potentially exclusive use is part of the definition of "substantially continuous use and occupancy" at 43 C.F.R. § 2561.0-5(a). The term "community use" comes from a different regulation which requires the Bureau of Indian Affairs to certify that an applicant "has occupied and posted the lands as stated in the application, and that the claim of the applicant does not infringe on other native claims or area of native community use." 43 C.F.R. § 2561.1(d). Evidence that the residents of a community used the land claimed in an allotment application can lead to a finding that the applicant's use of land was not potentially exclusive of others, so long as their use was not permissive or done with notice of the applicant's claim. *See United States v. Pestrikoff*, 134 IBLA 277, 288-89 (1995); *United States v. Heirs of David F. Berry*, 127 IBLA 196, 209-10 (1993). On the other hand, an absence of evidence of community use supports, but does not require, a finding that the applicant's use was potentially exclusive of others; rather, the question remains whether, in the circumstances, others knew, or should have known, of the applicant's superior claim to the land. *See United States v. Heirs of Pat P. Pestrikoff*, 167 IBLA at 384 n.32; *United States v. Heirs of David F. Berry*, 127 IBLA at 209 ("[T]he applicant must establish that he provided notice to others of his intention to segregate a particular parcel of the land from community use.").

### III. The Evidence Concerning Potentially Exclusive Use

#### A. Burden of Proof and Standard of Review

[3] In a Government contest of a Native allotment application, the contestant bears the burden of presenting sufficient evidence to establish a prima facie case of ineligibility and, if a prima facie case is established, the Native applicant bears the burden of proving by a preponderance of the evidence that the requirements of the Native Allotment Act have been satisfied. *United States v. Heirs of Thomas Bennett*, 144 IBLA 371, 381 (1998); *United States v. Pestrikoff*, 134 IBLA at 283-84; *United States v. Galbraith*, 134 IBLA 75, 100-101 (1995); *United States v. Heirs of David F. Berry*, 127 IBLA at 205; *United States v. Estate of George D. Estabrook*, 94 IBLA at 51-53. As Longley recognizes, a Native allotment applicant appealing an ALJ's decision has the burden of proving that the judge erred. SOR at 30, citing *Heirs of Setuck Harry*, 155 IBLA 373, 377 (2001). The Board also has authority to undertake *de novo* review of the record and determine whether the evidence establishes that appellant, as applicant for the land, satisfactorily proved substantially continuous use and occupancy of the land for a period of 5 years as required by the Native Allotment Act. See *Ira Wassillie (On Reconsideration)*, 111 IBLA 53, 59-60 (1989), *appeal dismissed*, Civ. No. A98-0068 (D. Alaska Oct. 30, 1998), *order of dismissal withdrawn and appeal dismissed after reconsideration* (Dec. 7, 1998). Nevertheless, the Board is reluctant to overturn an ALJ's resolution of factual issues that was based upon findings about the credibility of witnesses whose deportment and demeanor were observed by the judge. *United States v. Pass Minerals, Inc.*, 168 IBLA 115, 149 (2006), citing *United States v. Pearson*, 148 IBLA 380, 390 (1999), and *United States v. Rothbard*, 137 IBLA 159, 163-64 (1996); see *BLM v. Carlo*, 133 IBLA 206, 211 (1995).

#### B. Judge Holt's Rulings on the Evidence

As previously noted, Judge Holt ruled against Longley on the single issue of whether his use of Parcel C had been potentially exclusive of others. Decision at 1, 4, 15-16. Judge Holt analyzed the question of potentially exclusive use by addressing, as Longley had argued in his post-hearing brief, first, the physical evidence which might put others on notice of the existence of the allotment claim, second, "visual sightings" by others of Longley using the land, third, community acknowledgment of his superior right to the land, and, fourth, the absence of evidence of conflicting community use.<sup>8</sup> Decision at 6-12; see Contestee's Post Hearing Brief at 46-48.

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<sup>8</sup> The term "community use" was borrowed from, but does not refer to, 43 C.F.R. § 2561.1(d), which, as previously quoted, requires the BIA to certify, *inter alia*, that  
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### 1. *Physical Evidence*

Judge Holt noted that Longley had not constructed any permanent structure on the land and that the only physical evidence “consisted of wooden stakes he placed at the corners and a tent his family erected for short periods of time.” Decision at 6. The decision states that Longley testified that he had placed white wooden stakes at the corners of Parcel C in 1964 and had replaced them from time to time, and it describes other testimony by appellant’s witnesses concerning the presence of stakes. Decision at 6-7; *see* Tr. 567-69, 618-20, 690-706, 804-07.<sup>9</sup> Judge

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<sup>8</sup> (...continued)

the land claimed in a Native allotment application does not infringe on an “area of native community use.” Judge Holt adopted the term from appellant’s post-hearing brief, stating that “the absence of a conflicting community use may serve to confirm the applicant’s superior right.” Decision at 5. The statement was correct. As discussed above, a lack of evidence of community use may indicate that the applicant’s use was potentially exclusive of others as required by the definition of “substantially continuous use and occupancy” at 43 C.F.R. § 2561.0-5(a), but is not conclusive.

<sup>9</sup> Longley testified that he had placed corner post number one on a bluff above the river next to a “survey cap” or a “metal gold-colored” marker which he believed was the corner of M.S. 2317, and he marked its location on exhibit A-31 as corresponding to the southeastern corner of the surveyed area, which he pointed out was incorrectly labeled M.S. 1152. Tr. 457, 567-68, 662, 697-700; *see* Ex. A-32. Exhibit A-31 is a blown-up portion of a topographical map on which the boundaries of Parcel C and a number of placer mining claims are projected, including one labeled “MS No. 1152” which encompasses the confluence of Melsing Creek with the Niukluk River. *See* Tr. 66-68. The survey cap could not have been from M.S. 2317. That survey would not have been conducted until after mineral patent application F-23149 was filed on Aug. 27, 1984, and would have been completed and approved sometime before mineral patent 50-90-0089 was issued Dec. 11, 1989. *See* Historical Index, Ex. A-1 at 191, 624-25, 661.

The cap may have been from M.S. 1152. The historical index lists M.S. 1152 as including 251.936 acres and the record includes a copy of patent no. 731178 issued to the Seward Placer Mining Company on Feb. 2, 1920. Ex. A-1 at 193, 277-85; *but see* Ex. A-1 at 705 (reporting 218.940 acres). Copies of the township plat show the eastern boundary of M.S. 1152 to lie on the eastern bank of the Niukluk River. Ex. A-1 at 254, 274, 298, 323, 352, 369, 439. More recent plats place the boundary inland from the river and show a monument south of M.S. 2317. Ex. A-1 at 528, 534, 611, 646, 662. The monument also appears on the plat of survey for Parcel C some distance from the southeast corner of M.S. 2317. Ex. A-20. Whether  
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Holt did not reject any of the testimony, but concluded that the stakes “were not substantial enough to create a public awareness that Gary occupied the parcel and asserted a right superior to others.” Decision at 7. More particularly, Judge Holt found that the stakes were insufficient to inform others of Longley’s superior right to the parcel because they “stood only one and a half to four feet high, and vegetation made them difficult to see,” were separated by sufficient distance so that “no more than one could likely be seen at a time,” and, even if seen, they “would not likely convey the message that Gary asserted a superior right to the parcel” due to its proximity to the community of Council and evidence “that the community used the land.” *Id.* Except for the asserted community use of the land, Longley does not object to this ruling.

Judge Holt also accepted that Longley, or his family, had erected a blue tent on the parcel’s northwest corner which could be seen from the west end of the village of Council. The Judge concluded, however, that the tent’s presence had not created public awareness of Longley’s claim to Parcel C because it could be viewed only for about a week during two or three summers and such use of the land was consistent with the use of the land by other residents. Decision at 7; *see* Tr. 883-86, 980-83, 988-91. Longley does not challenge this portion of Judge Holt’s decision.

## 2. Visual Sightings

Judge Holt’s decision points out that only Phillip Titus and Longley’s sons testified that they had seen Longley on Parcel C during the years 1964 through 1969. Decision at 8; *see* Tr. 412-17, 420. The Judge noted that Longley’s other witnesses confirmed that he had traveled from Nome to Council, but had not testified that they saw him on Parcel C. Decision at 8. Judge Holt also noted that community residents had testified that they had not seen Longley on Parcel C during the summers of 1964-69 and had not seen his family in the village of Council during that period. *Id.* at 9. In response to arguments that such testimony was not credible, Judge Holt agreed that the evidence established that Longley and his family had in fact visited Council, but thought it was possible that the witnesses had been in town at different times, had been too young to know all of those who came and went from Council

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<sup>9</sup> (...continued)

the eastern boundary of M.S. 1152 meanders the river or is located on the bluff above the river where exhibit A-32 shows Longley to have staked his allotment is critical because it would determine the location of the common boundary with Parcel C and, consequently, whether Longley was using Parcel C when fishing. *See* Tr. 67-71, 581-84, 589-91. Notably, a footnote in the contest complaint states: “Parcel C is incorrectly surveyed and will need to be resurveyed. The error is that the survey goes to the river encroaching on mineral patent 731178. The survey stated that mineral patent 731178 eastern boundary was to border Parcel C.”

during the summer, or simply may not have known the identities of the younger children, such as Longley's sons, who they might have seen at the time. *Id.* The Judge also believed that the testimony of both groups of witnesses could be "consistent because Gary's presence on the parcel may not have been frequent enough to capture the attention of the community witnesses." *Id.* at 10. Judge Holt pointed out that if such was the case, "Gary's use and occupancy did not rise to a level of significance or notoriety that created a public awareness of his use." *Id.* In addition, Judge Holt stated that, even discounting the testimony of the community witnesses, the close relationship of Longley, his sons, and his friend Phillip Titus meant that their testimony "lends little support to a finding that the public at large knew, or should have known, about Gary's use." *Id.* Weighing all of the testimony, Judge Holt concluded that "the preponderance of evidence does not show that observations of Gary using the parcel created a public awareness that Gary asserted a superior right." *Id.*

On appeal, Longley argues that Judge Holt erred in finding that the community witnesses did not see him on Parcel C and in finding that his visits were "limited." SOR at 24-25. He contends that several of his witnesses "squarely placed" him in Council during the summers in the late 1960's and that his sons testified about seeing several of the "community" witnesses during that time. *Id.* Longley claims that it would have been impossible not to have seen members of his family fishing and berry-picking and visiting with others at night. SOR at 24. He notes that there was testimony that those who drove to Council would park at the end of the road across the Niukluk River from Council and honk the car horn or flash the car lights in order to attract attention so that someone would bring a boat over to carry them across the river. SOR at 25 n.194. He claims that the presence of his car parked near the river would have been obvious and asserts that it is not credible that none of the Government's witnesses saw the Longley family in Council in the 1960's. SOR at 25. He also points to his own testimony that he and his family had used the parcel for at least 30 days a year from 1964 through 1968. *Id.* In addition, Longley claims that Judge Holt erred by finding the testimony of Charles Reader, Marie Reader, and Louis Green was "not 'very relevant' simply because they were not members of the community adjoining Parcel C." *Id.*

Longley correctly describes the testimony, but confuses the point of Judge Holt's conclusion. The ALJ described the arguments presented in Longley's post-hearing brief and responded by saying that his "argument has some merit with respect to whether Gary and his family visited the village of Council, but has little merit with respect to whether community residents observed Gary using the parcel in a way that potentially excluded others." Decision at 9; *see* Contestee's Post Hearing Brief at 29-30. Judge Holt's decision does not question Longley's use of Parcel C. He accepted the testimony of Longley and his sons about their use of the parcel, as well as Philip Titus's testimony that he had seen Longley on the land during the summers

of 1965-67. Decision at 10. Indeed, in addressing the physical evidence, Judge Holt recognized that Longley had traveled to Council “from 1964 through 1969 to establish Parcel C as his allotment” and, except for 1967, he and his family spent most of Longley’s five to six weeks of annual vacation in Council. *Id.* at 6. The exception of 1967 refers to Longley’s testimony that he and his family moved to McGrath that year and made only one extended trip to Parcel C in June. Tr. 540, 604-605, 670, 707, 809-814. Judge Holt, however, concluded that the testimony about Longley’s use of Parcel C did not establish that *others* in Council were aware, or should have been aware, that he had claimed the land as his allotment. Longley’s arguments on appeal do not provide a basis for overturning the Judge’s conclusion.

Contrary to Longley’s apparent understanding, Judge Holt did not disregard the testimony by the Readers and Green, but stated that they had “merely confirmed that Gary traveled from Nome to Council during the 1960’s to ‘prove up on his ground’” and did not provide “direct testimony that they saw him on the parcel.” Decision at 8. These statements are correct. Green testified that he owned a store in Nome where Longley would stop to buy snacks on his way out of town, but that, although Green had been to Council, he had never been on Parcel C. Tr. 433-37. Charles Reader lived in Nome and twice rented vehicles to Longley to drive to Council, but saw him there only once when Longley pointed out the area of Parcel C; Reader did not go onto the land with him. Tr. 1008-1013, 1015. Marie Reader knew of the allotment and knew that her sister Berda, who was married to Longley during the late 1960’s, spent time at Council. Tr. 1017-18, 1024. Although she had gone to Council on summer weekends during the 1960’s, she was not asked whether she had spent time on Parcel C with either her sister or Longley. *See* Tr. 1025. The testimony of the Readers and Green confirms that Longley went to Council and suggests that he would have used Parcel C when there, but does not provide evidence that residents of Council knew or should have known that he asserted a superior right to the land or in fact acknowledged his claim.

### 3. *Community Acknowledgment*

In addition, Judge Holt found there was no evidence of community acknowledgment of Longley’s claim to Parcel C. Decision at 10. The decision describes Longley’s testimony about a conversation he had with Jack Titus, Sr. in 1963 about vacant and unappropriated land that might have been available for a Native allotment, the fact that Titus suggested the area of Parcel C because there was good fishing and berrypicking, and that Titus said he had no objection to Longley staking an allotment. Decision at 10-11; *see* Tr. 563-67. Judge Holt pointed out that the testimony was hearsay and had less weight than direct testimony, but he rejected the conversation as establishing community recognition of Longley’s claim because it had occurred the year before Longley actually staked the allotment and there had been no showing that others either recognized Titus as having authority to speak for

them or had ratified his approval of Longley's allotment. Decision at 11. In addition, Judge Holt pointed out that Titus's knowledge that the land was good for fishing and berrypicking must have come from either his own or others' use of it and, therefore, "his knowledge corroborates a finding that the community also used the parcel and that Gary's intended use might not be exclusive of others." *Id.* Judge Holt rejected Longley's claim that his conversation with Titus "constitutes a community acknowledgment of Gary's superior right." *Id.* On appeal, Longley does not object to this ruling.

#### 4. *Conflicting Community Use*

The fourth factor Judge Holt examined, and the primary matter in dispute on appeal, is whether the testimony of seven BLM witnesses establishes a conflicting "community use" of the land in Parcel C. Judge Holt determined that the testimony by these witnesses, who had lived at Council either full time or during the summers Longley claimed as his qualifying use, "established that the community used the parcel for berry picking both before, during, and after Gary's use." Decision at 11-12. Longley vigorously disputes this ruling. His primary contention is that the witnesses did not testify that they picked berries on Parcel C, but instead "[t]he area the government's witnesses described when testifying they used Parcel C was an area they called Blueberry Hill which they all said was adjacent to an old airstrip." SOR at 18-19; *see* SOR at 22-23. Longley also points out that, in addition to blueberries and salmon berries, the witnesses testified about picking types of berries which are not found on Parcel C and that they generally failed to specify the years they picked berries. SOR at 10, 12, 23-24. Longley further contends that the Government witnesses were not credible and are biased against him because, as President of the Council Native Corporation, he was instrumental in allowing shareholders to receive quitclaim deeds for homesites which are now owned by non-Natives. SOR at 9, 16-17, 26-27; *see* Tr. 312-16.

Longley raised a similar argument in his post-hearing brief, to which Judge Holt responded by agreeing that:

Most of the witnesses did testify to picking berries on the airfield, but they each also credibly testified about picking berries on the parcel itself. Their testimony accurately described the terrain on the parcel in relation to the river on the west and the streams on the north and south. The testimony about picking berries on land near or adjacent to Parcel C does not require rejecting testimony that the witnesses picked berries on Parcel C. They could have picked, and did pick, berries at both locations.

Decision at 12 (citations to transcript omitted). Careful review of the testimony requires that Judge Holt's ruling be affirmed.

At the outset it is necessary to correct Longley's various descriptions of Blueberry Hill as "adjacent" to the old airstrip and separate from Parcel C. *See* SOR at 7, 19, 22, 27, 29, 35. Topographic maps show sec. 12 of unsurveyed T. 7 S., R. 25 W., K.R.M., to consist of a single hill with a height of 537 feet above sea level, the top slightly to the east of the center of the section. Ex. B-29. A ridge crosses the section's southeast corner to a second high point of 484 feet in the northwest corner of sec. 18. *Id.* As portrayed on exhibit A-31, the northern boundary of Parcel C crosses through the southwest corner of sec. 12, running near the 250 foot elevation, and faces the top of the hill. Parcel C's western boundary is roughly parallel to Melsing Creek and is shown on several exhibits as sharing a boundary with a mining claim which encompasses the creek and its confluence with the Niukluk River. Parcel C's eastern boundary is near Lumber Creek, a drainage in the draw between the two high points. The old landing strip is visible in aerial photographs as a scar on the southern side of the hill sloping southwest toward the northern boundary of Parcel C. Exs. B-2, B-29.<sup>10</sup> Longley's estimate that the airstrip is less than a quarter of a mile from his allotment seems reasonable. Tr. 628.<sup>11</sup> Although the old airstrip is not within Parcel C, both are on Blueberry Hill, which is also known as "Woman's Hill." Tr. 323-24, 420.

The geography is important in understanding the testimony of the witnesses. BLM's first witness, Virginia Holly (known as Dolly Holly), was born in 1943 and lived in Council either full time or during the summers from 1947 to 1958, returning to Council in 1968 to live there full time until 1994. Tr. 168-69, 175, 179, 181-82, 186.<sup>12</sup> Holly testified that she would wade across Melsing Creek and walk "up there"

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<sup>10</sup> There is no precise information in the record about when the airstrip was used. Longley testified that it was not being used in 1963. Tr. 624. Carolyn Schubert, who was born in 1943, remembered that the Marines used to land at the airstrip "a long time ago . . . when we were kids." Tr. 297-98. Virginia Holly, apparently referring to the period 1947-54, mentioned mail being delivered and airline service at the site. Tr. 172-73. The airstrip was replaced by a landing strip on the west side of Melsing Creek and later a new airfield was built northwest of Council. Tr. 250, 298, 390. An additional landing strip was next to the Pederson "camp" about a mile from Council. Tr. 366-68.

<sup>11</sup> Longley's post-hearing brief asserted that Blueberry Hill was "several miles north" of Parcel C and that "Parcel C is known as Melsing Hill, not Blueberry Hill." Post-Hearing Brief at 45, 47.

<sup>12</sup> Holly originally stated that she moved to Council in 1947 when she was age 7

(continued...)

around the airstrip, at times using a “four-wheeler,” and that she and others picked blackberries and blueberries on or near the airstrip. Tr. 174, 182-86, 191. Although this testimony is consistent with Longley’s argument, when her attention was directed to the area of the allotment on exhibit A-31, she said she would “go up there all the time all summer long.” Tr. 174, *see* Tr. 182-83. When Judge Holt questioned Holly about whether she had picked berries as far south as Lumber Creek, she responded that “we picked all the way” and explained that she had her own motorized boat and would “go down here to pick berries, go up here and pick berries,” but “liked to pick on top because it had bigger blueberries.” Tr. 189. Further questioning disclosed that she would beach the boat and climb the bank to hunt berries in addition to obtaining access by walking across Melsing Creek. Tr. 190-91.

Mary Rose Ann Titus was born in Council in 1953. Tr. 192-93. From 1959 to 1970 she lived with her family in Council from the time school was out in May until just before school started around Labor Day and in 1970 moved back to Council with her husband, living there year-round. Tr. 195-97, 208. When she was asked about her use of the area of Longley’s allotment when she was growing up, Titus said: “We pick our berries from there. I pick berries from there.” Tr. 199. She claimed that she had picked berries in “this whole area” and that in addition to wading across Melsing Creek, “[w]e come down by boat all along this part all the way down to here, and all, all the way up there (indicating). And then there’s the old airport up here, and we used to pick up there too.” Tr. 199. The “we” in her testimony referred to members of her family and she named others she had observed berry picking in the area. Tr. 200-201. On cross examination, she agreed that she had picked blackberries, blueberries, and cranberries, as well as salmon berries around the airstrip, but also interjected that “[t]here’s berries all along everywhere in that area” of the allotment. Tr. 208-209.

Flora Simon was born in 1954 and her family spent summers in Council “[a]lmost every year” from the time she was a small child until 1972, specifically the years 1964 through 1969. Tr. 212-13, 216, 231-32. She stated that she would walk or go by truck to the area of the allotment to pick berries and have a picnic lunch and she identified the names of others who had picked berries on Blueberry Hill. Tr. 214, 217-19. She also stated that no one had asked permission to use the area. Tr. 219. Similar to the prior witnesses, Simon testified that she had gotten to the area by wading across Melsing Creek and walking up the hill, but would also “sometimes float down the river.” Tr. 220-21. She claimed to have picked berries “[a]ll over” the

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<sup>12</sup> (...continued)

(Tr. 167) but later gave her birth year as 1943 (Tr. 186). The difference does not matter except for establishing her age when she returned to Council in 1968. Appellant is clearly mistaken in stating that Holly left Council in 1947 and did not return until 1968. SOR at 9.

mountain, including as far down as Lumber Creek. Tr. 222. She knew of the airstrip but did not remember seeing it when she was picking berries and stated that the berries went “pretty far” away from the landing strip. Tr. 220, 236.

Maureen Pederson was born in 1956 and moved to Council in 1958, but after she reached school age she would be away 5 or 6 months of the year. Tr. 261-62. Her family did not live in Council but in a house that was at one time about a mile outside of Council and her father, who had a dredge mining operation on Ophir Creek, would move the house every few years as his mining operation moved. Tr. 262-64. During the 1960’s, the house was near where her family had an airstrip and she testified about going to Council by boat, driving, and walking. Tr. 263-65. Her family would go twice a week to pick up mail and to visit with those living in Council. Tr. 265-66. Pederson testified that she had been in the area depicted on exhibit A-31 as Longley’s allotment to pick berries “maybe couple times a year,” did not ask permission from anyone, and named several people she remembered picking berries there. Tr. 267-68. When asked how far she had gone into the area of Longley’s allotment as shown on exhibit A-31, she responded that it had been “[n]ot too far. Down about maybe as far as the cliff there” on the western side, but had not walked “all the way down that way,” apparently meaning the eastern end of the allotment. Tr. 268-69. On cross-examination, Pederson agreed that the airstrip was close to where she had picked berries. Tr. 275. In 1972, Pederson left Council for work, but returned in the summers and weekends to work for her father until he died in 1984. Tr. 262, 272-73.

Carolyn Schubert was born in 1943. Tr. 280. Prior to 1953, she spent summers in Council and apparently divided the remainder of the year between Council and White Mountain, depending upon when her father worked on dredges near Council.<sup>13</sup> Tr. 280-82, 326-28. In 1953 the family moved to Nome, but they continued to return to Council in the summers to a house her grandfather had built. Tr. 283, 302. Schubert moved to Anchorage in 1961, but continued to return to Council for a month or two every summer and was still doing so as of the date of the hearing. Tr. 284-85, 305-309. In regard to the area of Longley’s allotment depicted on exhibit A-31, Schubert testified that she was familiar with the area, that she had spent time on Parcel C berrypicking and looking for greens on the river bank and had seen others doing the same things, and that she had never asked permission. Tr. 287-89. She explained that her family would cross Melsing Creek to pick berries and that they would also use a boat to get to “an area right in here where the bluffs sort of end” where there were lots of trees that her mother and aunt would use to help them climb, but “[o]nce you got up there, it was easy, easy walking all over the area” along the river bank. Tr. 295-96. Schubert also testified about picking berries

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<sup>13</sup> In 1975 Schubert visited a BLM office to object to Longley’s application for Parcel C. Ex. A-5; Tr. 39.

in the area of the airstrip, which she termed a “fantastic” area, but cautioned that “berries don’t grow in abundance every year.” Tr. 318-19. She also explained that when one of the “elderlies” or “mothers got hungry and had filled her bucket,” she would build a campfire to make tea. Tr. 319-20. No one particular spot was used; it was done “all over the hill.” Tr. 320.

June Pederson Kugelmann, Maureen Pederson’s sister, was born in 1947 and her family moved to Council in 1958 when her father bought a dredge placer mining operation. Tr. 363-64, 380-81. They would be in Council from late April to the middle of October and in Nome the remainder of the school year. Tr. 365. After she graduated from high school in 1965, she continued to spend summers in Council until she married in 1972. Tr. 365-66, 374. After that, she continued to visit, but 1976 was the last year she spent the entire summer in Council. Tr. 374-75, 377. Kugelmann agreed with her sister that their family’s “camp” had been about a mile from Council when they were young. Tr. 366. She remembered going to Council “[a]ll the time. Almost daily.” Tr. 367. During the early 1960’s Alaska Airlines would deliver mail at the airstrip next to their house and she would sign for it and take it into Council for distribution. Tr. 367-69, 386, 390-91.

Kugelmann was familiar with the area of Longley’s allotment and testified that she had spent time on Blueberry Hill picking berries, at first going with her mother and sisters in a small motorized boat they would park at Melsing Creek and then climb the hill. Tr. 370-71. She said that the kids had “walked around all over the place, even up to the top” where there was an old airstrip and where good cranberries could be found. Tr. 371-72, 387. She did not see anyone else picking berries when she was there with her family, but when she visited those she knew in Council, they would be berrypicking because “that was the main source of berries. There’s no berries right around Council itself other than across the river.” Tr. 373. She had not asked permission from anyone to pick berries on Blueberry Hill and had not been told she needed permission. Tr. 372-73. Kluglemann explained that there is a road that crosses the lower end of the Melsing airstrip and they would usually follow the road and “walk up around the hill” and then come down “toward the river where the tundra is; where the, you know, the berry spots are.” Tr. 375. She later referred to the road as an old horse trail they would use to reach the airstrip to pick cranberries. Tr. 387-89.

The Government’s last witness was John C. Johnson, Carolyn Schubert’s brother, who was born in 1935 and began going to Council with his family during summers beginning sometime in the 1940’s. Tr. 395-97, 402, 405. He said that he had personally known Longley for years and was familiar with the area of his allotment. Tr. 398. Johnson said he had picked salmon berries and blueberries in the area and had never asked permission to do so, stating that “[i]t was open country as far as I know. And it’s been that way as far as I could remember into the late ’60s

and into the '70s.” Tr. 399-400, 407. Berrypicking, he pointed out, “was kind of a family affair” and they would spread out in search of blueberries, doing so for several hours. Tr. 400.

As Judge Holt correctly understood, the witnesses not only described berrypicking on and near the airstrip but also doing so on Parcel C. For example, Pederson referred to going down to the “cliff” above the Niukluk River and Simon mentioned berrypicking near Lumber Creek. Longley testified about the presence of blueberries near the bluffs above the river on the western portion of his allotment (referred to as the “northern” portion on exhibit A-31), a larger patch in the central area, and salmon berries near Lumber Creek. Tr. 581-82, 643-45. His son, Steven, testified about picking berries on Parcel C. Tr. 888-89. Although the witnesses were not always specific about where they crossed Melsing Creek, Longley, Phillip Titus, and Steven Longley identified an old road or trail to the airstrip that crosses just north of the allotment and other trails that led onto the allotment. Tr. 418-19, 586, 588-89, 625-27, 657-60, 681-82, 817-19, 826-27, 887, 950-54. In addition, a number of witnesses described reaching the area by boat, landing downriver from the bluff, which would place them on the eastern portion of Parcel C. *See* Tr. 904-905. Whether access was obtained from the river or by crossing Melsing Creek, the thrust of the testimony was that they would pick whatever berries were ripe wherever they could be found, including the area Longley claims as Parcel C. Moreover, as was explained, berrypicking was a group activity and the witnesses had gone to Blueberry Hill with their mothers, siblings, other relatives, and friends, indicating that the general community of those living at Council used Blueberry Hill. The fact the witnesses were there as children suggests that berries had been harvested from Blueberry Hill for many years.

Judge Holt found, based upon the testimony of the Government’s witnesses, that “[c]redible evidence established a long time community use which conflicted with Gary’s application.” Decision at 15. Judge Holt correctly concluded that Longley had “not proven that he used the parcel in a way that was potentially exclusive of others,” within the meaning of 43 C.F.R. § 2561.0-5, because,

the evidence established that the residents of the adjacent community used the parcel for berry picking in conflict with Gary’s application. The totality of the evidence did not show that his use resulted, or should have resulted, in a public awareness and acknowledgment of his superior right to the land.

*Id.* at 15-16.

We find no error in Judge Holt’s decision.

*IV. Conclusion*

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Holt's September 12, 2007, decision declaring Longley's interests invalid is affirmed.

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/s/  
Christina S. Kalavritinos  
Administrative Judge

I concur:

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/s/  
Lisa Hemmer  
Administrative Judge