

UNITED STATES  
v.  
ESTATE OF GEORGE D. ESTABROOK  
JOHN J. ESTABROOK  
LELAND R. ESTABROOK

IBLA 85-85

Decided September 25, 1986

Appeals from three decisions of Administrative Law Judge Harvey C. Sweitzer, dismissing contest complaints involving Native allotment applications AA-7696, AA-6973, and AA-6974, respectively.

Reversed.

1. Alaska: Native Allotments

The Alaska Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed subject to pending applications, 43 U.S.C. § 1617 (1982), authorized the Secretary to allot not to exceed 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Indian, Aleut, or Eskimo who resided in and was a Native of Alaska. No allotment shall be made to any person until said person has made proof satisfactory to the Secretary of substantially continuous use and occupancy of the land for a period of 5 years.

2. Alaska: Native Allotments--Segregation

Segregation of lands from appropriation under the Native Allotment Act by a proposed multiple-use management classification does not bar completion of the required 5-years' use and occupancy where such use and occupancy has commenced prior to the segregation.

3. Alaska: Native Allotments-Contests and Protests:  
Generally--Evidence: Prima Facie Case--Rules of Practice: Appeals:  
Burden of Proof

When the Government contests a Native allotment application on the basis of a failure to meet the requirements of the Native Allotment Act and the regulations, the contest is subject to dismissal where at the hearing the Government fails to present sufficient evidence

to establish a prima facie case to support its complaint. However, where the applicant goes forward and presents evidence, all the evidence will be considered to determine whether a preponderance of that evidence establishes that the statutory and regulatory use and occupancy requirements were not met.

4. Alaska: Native Allotments--Rules of Practice: Appeals: Burden of Proof

The standard of proof requirement to be applied in Native allotment cases is the preponderance of evidence standard, rather than the previously utilized standard of clear and credible evidence.

5. Alaska: Native Allotments

To qualify for an allotment under the Native Allotment Act and regulations, a Native must show substantial actual possession and use of the claimed land at least potentially exclusive of others and not merely intermittent use. Where the established use consists of approximately two trips per year to an area principally for hunting for a total of a few days to a week per trip, such use is properly characterized as intermittent.

APPEARANCES: David C. Fleurant, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for appellees; Roger L. Hudson, Esq., Bruce E. Schultheis, Esq., Office of the Regional Solicitor, Alaska Region, Department of the Interior, Anchorage, Alaska, for appellant, the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

The Bureau of Land Management (BLM) has appealed from decisions of Administrative Law Judge Harvey C. Sweitzer dated September 12, 13, and 14, 1984, dismissing the Bureau of Land Management's (BLM's) contest complaints against the Native allotment applications of George D. Estabrook (AA-7696), John J. Estabrook (AA-6973), and Leland R. Estabrook (AA-6974), respectively. 1/ Their applications were filed in accordance with the Native Allotment Act of 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed subject to pending applications by section 18 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1982)). Judge Sweitzer held a hearing in the three Native allotment cases on October 18 and 19, 1983, and subsequently issued his three separate decisions. 2/

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1/ These three appeals have been consolidated by the Board because they involve one hearing and deal with similar facts and issues.

2/ The Oct. 18, 1983, transcript is designated "Tr. 1" and the Oct. 19, 1983, transcript is designated "Tr. 2."

The three Estabrooks were brothers. <sup>3/</sup> Each filed a Native allotment application with the Department prior to December 18, 1971, for lands lying adjacent to Old Man Lake in protracted T. 4 N., R. 8 W., Copper River Meridian, Alaska. George and Leland Estabrook claim lands on the east side of the lake near the outflow for Mendeltna Creek. <sup>4/</sup> John Estabrook's allotment is on the opposite shore of the lake, approximately due west of Leland Estabrook's allotment, in an area where a creek flows into the lake. All the brothers claim use and occupancy of the land commencing in the late 1950's or early 1960's.

The State of Alaska selected the lands in question on December 16, 1968, under State selection AA 4805. On April 19, 1982, BLM issued a tentative approval to the State for lands in T. 4 N., R. 8 W., Copper River Meridian, specifically excluding the lands involved in the three allotments.

[1] The Native Allotment Act of 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), granted the Secretary of the Interior authority to allot, "in his discretion and under such rules as he may prescribe," vacant, unappropriated, and unreserved nonmineral land in Alaska not to exceed 160 acres to any Indian, Aleut, or Eskimo of full or mixed blood who resided in and was a Native of Alaska and was the head of a family or was 21 years of age. Entitlement to an allotment is dependent upon satisfactory proof of substantially continuous use and occupancy of the land for a 5-year period. 43 U.S.C. § 270-3 (1970).

Departmental regulation 43 CFR 2561.0-5(a) defines the phrase "substantially continuous use and occupancy" as follows:

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.

Substantially continuous use and occupancy is a determination to be made based on the facts of each particular case; it "cannot be defined in any more detail than in the regulations." Memorandum from Jack O. Horton, Assistant Secretary, Land and Water Resources, to the Director, BLM, dated October 18, 1973, regarding "Adjudication of Pending Alaska Native Allotment Applications," cited in John Nanalook, 17 IBLA 353, 356 n.3 (1974). The Horton memorandum states that BLM should consider Native traditional and customary occupancy and that evidence of a cabin, food cache, campsite, fish

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<sup>3/</sup> George Estabrook died in 1983 prior to the hearing in his case. His allotment is pursued by his heirs.

<sup>4/</sup> Leland Estabrook's allotment lies north of the creek. Directly south of his allotment is the 80-acre approved allotment of Morrie Secondchief. The north boundary of George Estabrook's allotment is the southern boundary of the Secondchief allotment.

wheel, dock or boat landing, fish- or meat-drying racks, berry picking, animal bones, as well as the vegetation, climate, and resources on the land should all contribute to a use and occupancy determination.

In addition to those factors, Judge Sweitzer also announced another which he found appropriate and which he applied in the John and Leland Estabrook cases -- the "subsistence lifestyle" of the modern Alaska Native. He stated:

When one speaks of "subsistence" the definition includes the "behaviors, motivations, products, attitudes and personal characteristics" of the Native. Dr. Jack Kruse (Asst. Professor, Institute of Social and Economic Research, University of Alaska), Subsistence: A Decision of Relevant Concepts and Some Observations on Patterns of Change in Alaska in The Subsistence Lifestyle in Alaska; Now and in the Future, p. 79 (M. Murray editor, 1978). Subsistence activities have changed with the encroachment of the "white man's culture" on the Native lifestyle. A Native can now work full time and still pursue a subsistence lifestyle. The money earned is used to buy snow machines (snowmobiles) and ATVs (all terrain vehicles). "Technological changes may enable subsistence users to obtain the food they need in a shorter time than was necessary when traditional techniques and equipment were used." Kruse at 83. In addition, "the quality and diversity of take [food] and of the activities themselves are . . . important." Id. at 88. Thus, the attempts by the Native to pursue subsistence activities on his allotment must also be considered when deciding if substantial use and occupancy has occurred.

(Sept. 13 and 14, 1984, Decisions at 5-6).

We reject Judge Sweitzer's consideration of "subsistence lifestyle" as an additional factor to the extent it represents a deviation from the regulatory requirement of use and occupancy with substantial actual possession and use of the land, at least potentially exclusive of others. The fact that a Native may utilize modern technological advances, such as snow machines or all-terrain vehicles, in pursuing traditional and customary activities on claimed lands is not really relevant. What is relevant, as the Horton memorandum states, is that there be evidence of those activities on the lands.

[2] Adjudication of Native allotment applications was affected by passage of section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(1) (1982), which approved Native allotment applications pending in the Department on or before December 18, 1971, which described either land that was unreserved on December 13, 1968, or land within the National Petroleum Reserve in Alaska subject to valid existing rights, except where otherwise provided by other subsections of that section. The lands in question were segregated from appropriation under the Native Allotment Act by publication of a Notice of Proposed Classification of

Lands for Multiple-Use Management. 33 FR 7264 (May 16, 1968). <sup>5/</sup> Thus, the lands were not unreserved on December 13, 1968, due to the proposed classification, and the statutory approval of section 905(a)(1) is not applicable. Adjudication of the applications under the requirements of the Native Allotment Act and the regulations is appropriate.

Secretarial Order No. 3040 of May 25, 1979, provides that a Native applicant may be granted an allotment on withdrawn land if all other requirements have been met, when the applicant has commenced the required use and occupancy prior to the withdrawal. See Sarah F. Lindgren (On Reconsideration), 54 IBLA 181 (1981); Bella Noya, 42 IBLA 59 (1979); see also Catherine Angaiak (On Reconsideration), 65 IBLA 317 (1982). Likewise, the same holds true for lands segregated from appropriation under the Native Allotment Act by a proposed classification. Such action does not bar completion of the required 5-years' use and occupancy. Memorandum to Director, BLM, from Assistant Secretary, Land and Water Resources, dated May 16, 1975. <sup>6/</sup>

We will examine the evidence in each of the cases separately to determine whether the Estabrooks have complied with the requirements for receipt of an allotment.

#### George Estabrook

BLM issued a contest complaint against George Estabrook's Native allotment claim on July 23, 1982. BLM charged in the complaint that he had not met the requirements of the Native Allotment Act. George Estabrook filed an answer to the contest complaint with BLM on August 3, 1982, in which he asserted that he had met the requirements of the Native Allotment Act through use of the lands for subsistence purposes. In his decision Judge Sweitzer found that BLM failed to establish a prima facie case of noncompliance and dismissed the complaint. The Judge found BLM had conducted an insufficient field examination of the claimed lands. The Judge did not make a finding that the heirs of George Estabrook had established entitlement to an allotment.

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<sup>5/</sup> The proposed classification was issued pursuant to the authority of the Act of Sept. 19, 1964, 43 U.S.C. §§ 1411-1418 (1970). A final notice of classification was published on Dec. 28, 1968. 33 FR 19951-58. The classification was cancelled on Nov. 13, 1981. 46 FR 56058.

<sup>6/</sup> The memorandum entitled "Supplement to Alaska Native Allotment Guidelines," stated:

"Accordingly, the October 18, 1973, guidelines are hereby supplemented by adding a paragraph numbered 3 on page 2 reading as follows:

"When a Native has initiated use and occupancy of the land prior to the date of classification under the Act of September 19, 1964 (43 U.S.C. 1411-1418), such classification will not constitute a bar to the completion of the statutory five-year use and occupancy period, and the allotment may be granted, even though the classification encompassing the land is still in effect."

In its statement of reasons, BLM claims that the allotment was examined and that it presented a prima facie case. In the alternative, it argues that even if it did not, a preponderance of the evidence shows that the applicant failed to use and occupy the land as required by the Native Allotment Act.

In their answer the heirs of George Estabrook argue that BLM failed to state any allegation of error or identify any evidence showing error in the Judge's conclusion, and, therefore, BLM's appeal should be dismissed. They assert the Judge properly concluded that BLM did not present a prima facie case and that their evidence did not create or buttress BLM's prima facie case. The heirs claim they have established by a preponderance of the evidence that George Estabrook met the use and occupancy requirements under the Native Allotment Act and that his claim should be approved.

It is true that a statement of reasons which does not point out in what respect the decision appealed from is in error renders the appeal subject to dismissal. However, dismissal is not mandatory, and each case may be considered on its merits. Score International, 78 IBLA 142 (1983). In this case, BLM has pointed out error. The request to dismiss the appeal is denied.

BLM contends that the Judge erred in finding that BLM had failed to present a prima facie case that there had not been substantially continuous use and occupancy as required by the Act. Prima facie means that the case is adequate to support the Government's contest of the claim and that no further proof is needed to nullify the claim. See United States v. Williamson, 45 IBLA 264, 278, 87 I.D. 34, 42 (1980); see also S & M Coal Co. v. Office of Surface Mining Reclamation and Enforcement, 79 IBLA 350, 354, 91 I.D. 159, 161 (1984). We will examine the evidence presented by BLM to determine if it established a prima facie case.

The description of lands in George Estabrook's allotment application is incorrect (Exhs. 7 and 11). It describes land claimed by another Native allotment applicant, Morrie Secondchief. See note 4, supra. The error apparently arose when George Estabrook filed a metes and bounds description with the Bureau of Indian Affairs (BIA) and someone erroneously changed it in an attempt to conform it to legal subdivisions (Tr. 2 at 59-60). Actually, the south boundary of Secondchief's allotment is the north boundary of Estabrook's allotment. George Estabrook and his wife informed BLM in 1976 that the description was in error and that the claimed land was south of Secondchief's land. They did not provide a new description, however, and a change was never made on the application (Tr. 2 at 59-60; Exh. A).

On July 12, 1979, Darryl Fish, the BLM Glenallen Area Manager, and Rick Tevebaugh, BLM Realty Specialist, conducted a field examination of all three allotments. They thought they were examining George Estabrook's allotment. They found no evidence of use by him. In their report they stated, "all evidence found on subject area has been concluded to belong to conflicting applicant, Morrie Secondchief" (Exh. 10). At the hearing Fish testified that only the day before the hearing did he learn that George Estabrook actually had applied for other land (Tr. 1 at 80). He did state he and Tevebaugh "did go along the shore line. We probably walked in as far as a little lake, wet

area, in the northwest corner of what is now showing as the George Estabrook allotment" (Tr. 1 at 67). He admitted, however, that if the allotment were as described at the hearing he could not rely on the field examination and "in fairness to George Estabrook, we'd go out and conduct a new one" (Tr. 1 at 77). The record shows Fish was in the area four other times, twice officially, once to hunt, and another time canoeing (Tr. 1 at 76). On neither of his other official visits did he conduct a field examination of the land claimed by George Estabrook. On none of his trips to Old Man Lake did he ever see any of the Estabrooks (Tr. 1 at 79).

Morrie Secondchief testified for BLM. She lived on Old Man Lake from 1934 to 1965. She has been back to the lake many times since 1965, principally during the summer (Tr. 1 at 108). Her allotment, for which she received a patent in 1980, lies between those of Leland and George Estabrook. She and her husband did not have jobs. They lived off the land at Old Man Lake--trapping, picking berries, hunting, and fishing (Tr. 1 at 91-96). They would stay at the lake September through June 15 each year (Tr. 1 at 94). They would trap November through March and after it was too warm to trap, they would shoot muskrat (Tr. 1 at 99). She never saw any of the Estabrooks use the land at the lake (Tr. 1 at 111).

After reviewing Secondchief's testimony, Judge Sweitzer concluded that "it is still insufficient to prove the Government's case" (Sept. 12, 1984, Decision at 5).

BLM also presented the testimony of Rick Houston, who conducted an air taxi service for many years and was a guide for 10 years (Tr. 1 at 130). He was very familiar with Old Man Lake. He flew over it many times, "[s]ometimes several times a week; sometimes several times a day" during the 1960's especially in the spring, summer, and fall (Tr. 1 at 130, 132). In response to a question whether he had ever taken parties to "the destination of Old Man Lake itself," he stated, "Not very often as far as fishing is concerned. Hunting yes. Primarily duck hunting, but once in a while for moose or caribou" (Tr. 1 at 131). He also testified he had gone to the lake, "quite often" for his own recreation and to go hiking with his wife (Tr. 1 at 131). Although he never saw the Estabrooks using the land, he did not state they could not have used the land, rather he testified, "I'd say as much as I've been there and flown across and gone around it and so for[th], it looks to me that sooner or later I would have seen some sign of it. If they had been there frequently, I've been there frequently" (Tr. 1 at 144).

BLM also called three other witnesses, another pilot, Lloyd Ronning, and two State of Alaska Department of Fish and Game employees, Fred Williams and Ken Roberson, all of whom were familiar with Old Man Lake and had been to it on business or utilized it for recreation, such as duck hunting (Tr. 1 at 146, 151, 171, 185). None were familiar with use of the lake by the Estabrook brothers.

[3] We must agree with the Administrative Law Judge that BLM failed to present a prima facie case in support of its complaint. The Board has held that a field examination of a Native allotment is not sufficiently thorough

where it is shown only a part of the allotment was actually examined for evidence of use and occupancy. Linda L. Walker, 23 IBLA 299 (1976). Thus, the field examination report by Fish and Tevebaugh does not support BLM's complaint. Nor does the testimony of BLM's witnesses establish a prima facie case, given the lack of a proper field examination.

However, BLM's lack of presentation of a prima facie case against the George Estabrook allotment is not fatal. In mining claim contest cases the Board has held that a timely motion to dismiss the contest complaint may be made at the completion of the Government's case on the basis of failure to present a prima facie case. United States v. Winters, 2 IBLA 329, 78 I.D. 193 (1971). Where the contestee proceeds to present evidence after making the motion, however, that evidence must be considered as part of the entire evidentiary record and, even though the Government may have failed to establish a prima facie case, any record proof which supports the Government's case may be considered for purposes of decision. United States v. Anderson, 83 IBLA 170, 178 (1984); United States v. Bechthold, 15 IBLA 77, 86-87 (1976). Further, in United States v. Pool, 78 IBLA 215, 220-21 (1984), the Board held that where in a mining claim contest the Government fails to present a prima facie case of invalidity of a mining claim for lack of discovery and the claimant proceeds to present its case, the claimant bears only the risk that the record will establish by a preponderance of evidence that an element of discovery is not present.

We find this method of proceeding appropriate in this case. Thus, since counsel for the Estabrooks made no motion to dismiss, we will examine all the evidence presented to determine whether a preponderance of that evidence shows that the statutory and regulatory use and occupancy requirements were not met.

In his allotment application, George Estabrook claimed use and occupancy of the land from June to October for the years 1962 to the date of the application, June 22, 1971. He also claimed improvements of a meat-drying rack, a tent frame and a cleared campground. Janet Sue Estabrook, George's wife, testified that she first went to the land in the fall of 1963 (Tr. 2 at 46). She returned once a year after that, except in 1969 when both she and George were out of the State (Tr. 2 at 47). She went to the land for relaxation, berry picking, and some fishing (Tr. 2 at 47). Her husband made several trips a year to the lake increasing over the years from two to four, sometimes five (Tr. 2 at 49). The length of his stays was sometimes only a couple of days but "through the years he would stay ten days, two weeks" (Tr. 2 at 49). She further testified she never saw anyone else on the land except for the family; George's hunting provided a major supplement to the family food supply in the 1960's because of his sporadic employment; and she never saw canoeists on the lake or planes fly over (Tr. 2 at 48-50). She also stated her husband did not go to Old Man Lake with the intention of claiming a Native allotment. It was not until 1970 or 1971 that he began talking about it with her and with his brothers. The land at Old Man Lake was what he wanted because "that's the area they always went to" (Tr. 2 at 54).

Ed Royer, a family friend, testified he traveled to Old Man Lake with George to see George's property in early fall 1962 or 1963 (Tr. 2 at

72-73). They stayed 3 or 4 hours (Tr. 2 at 73). He returned two or three times. In 1965 or 1966, he returned on a 3 or 4 day hunting trip (Tr. 2 at 73). The other trips were for probably 3 days (Tr. 2 at 73). He saw John and Leland Estabrook when he was there and on one occasion he saw "some people out on the lake on the ice in snow machines" (Tr. 2 at 75).

The use of Old Man Lake for recreational purposes was the subject of conflicting testimony. Secondchief, a long-time resident of land adjoining the lake, stated, "I never see not one on Old Man Lake" (Tr. 1 at 111). Fish testified the lake received heavy recreation use for moose hunting, with other uses being caribou hunting, duck hunting, and general canoeing (Tr. 1 at 74). Over the years, Fish had made three official visits to the lake and two personal trips. He stated that on those five occasions, "I never ran into anybody, no" (Tr. 1 at 79-80). Houston stated that "if there's a lot of game around, Old Man Lake receives quite a bit of hunting" (Tr. 1 at 133). He further testified, however, that "[i]n the early years, there was not too much activity there except Morrie and Joe [Secondchief]" (Tr. 1 at 140). <sup>7/</sup> Ken Roberson, one of the State of Alaska Department of Fish and Game employees to testify, stated he had flown the lake since 1969. He had seen a float plane in there once or twice and possibly a boat. In his opinion, given the size of the lake, "there is very little activity" (Tr. 1 at 193). Over the years John Estabrook had seen only a few other people (Tr. 2 at 23). Janet Sue Estabrook never saw anyone but family (Tr. 2 at 49). Royer saw

<sup>7/</sup> In all three decisions Judge Sweitzer failed to analyze completely Houston's testimony concerning use of the lake (Sept. 12, 1984, Decision at 5; Sept. 13, 1984, Decision at 6; Sept. 14, 1984, Decision at 6). In each decision Judge Sweitzer cited testimony by Houston that he had taken "one caribou hunter in their [Old Man Lake] one weekend" (Tr. 1 at 142). That testimony related, however, to Houston's services as a guide and was given in response to a question whether he had ever guided people to hunt in that area. What Judge Sweitzer failed to consider was Houston's testimony that:

"Q. Did you ever take parties to the destination of Old Man Lake itself?

"A. Not very often as far as fishing is concerned. Hunting, yes. Primarily duck hunting but once in awhile for moose or caribou.

"Q. How far is Old Man Lake from your home there?

"A. Oh, air miles to the south end of it, maybe six miles.

"Q. And in a non-pilot capacity, did you ever go there yourself, or as a pilot, did you go there yourself?

"A. Yes, quite often.

"Q. What did you do there?

"A. Well, it's a pretty lake so sometimes my wife and I would go hike around. It's not easy hiking but it's worth it. Quite often I would check on Morrie Secondchief's cabin for them.

"Q. You said that this area was used quite a bit for hunting. Have you ever brought parties into the area or talked to the people who are in there hunting in the fall hunting season?

"A. Yes, many times."

(Tr. 1 at 131, 133-34 (emphasis added)).

some people on the ice on the lake on snow machines (Tr. 2 at 75). Leland Estabrook once observed two canoes and one boat on the lake (Tr. 2 at 97-98).

Judge Sweitzer found that Old Man Lake did not experience much recreational use and was fairly inaccessible prior to 1969, when Oil Well Road was built near the lake. We agree with Judge Sweitzer regarding use of the lake. It does not appear Old Man Lake received much recreational use during the 1960's, although the evidence indicates that whatever use there has been has increased over the years with the most activity occurring in years beyond the time period of relevance to our determination.

The testimony at the hearing does not support the claim made by George Estabrook in his allotment application that he used the land from June through October in the years 1962 through 1970. The evidence is that he made two to five trips a year to the lake beginning in 1962 with the number increasing over the years. There is no indication when the trips became more frequent, but it is likely that it may have been in the 1970's when there is evidence the brothers began the log structure on John Estabrook's allotment and later constructed a plywood cabin thereon (Tr. 2 at 99-100). In any event, the actual use was much less than that alleged in the application. Moreover, the testimony of the witnesses places George Estabrook on his claimed lands only once a year when he traveled there with his wife, and on a few other occasions when he was on the land with Ed Royer. Neither the testimony of John nor Leland Estabrook corroborated use and occupancy by George Estabrook of his claimed allotment.

The improvements alleged in the application, a meat-drying rack, a cleared campground, and a tent frame were not corroborated by testimony. George's wife did testify that when they "first started going up there, we camped maybe 200 feet from the shore. Later on, we moved back" (Tr. 2 at 48). She did not, however, state that any particular area was cleared. In addition, she stated that when they went to the land, "[w]e always took our own tent \* \* \* It was a blue frame tent" (Tr. 2 at 52). Further, the application states the tent frame was made in 1969, a year in which George's wife testified they did not visit the land because they were out of the State.

Even accepting as true all of the hearing testimony concerning George Estabrook's use of his claimed allotment, we must conclude that a preponderance of the evidence establishes that the statutory and regulatory use and occupancy requirements were not met. Taking into consideration the Native custom and mode of living, the climate and character of the land, and the customary seasonality of occupancy, we cannot find that the record shows satisfactory proof of substantially continuous use and occupancy of the land for a period of 5 years, as required by 43 CFR 2561.2 and 43 CFR 2561.0-5(a).

The regulations require that a Native's use and occupancy of the land be "substantial actual possession and use of the land." 43 CFR 2561.0-5(a). The evidence shows George Estabrook did not intend to claim an allotment when he began to utilize the Old Man Lake area in 1962 for hunting purposes. He

returned to the lake over the years because game was plentiful, and he was able to supplement his family food supply. While it is not necessary to have the intent to establish an allotment when a Native commences use and occupancy of land, the lack of such intent may be considered in determining whether the Native has satisfied the allotment requirements.

The record indicates that on many occasions the Estabrook brothers visited the Old Man Lake area together on hunting trips (Tr. 2 at 36). It strains credulity to believe that on each trip after hunting all day the two or three brothers would separately retire to their respectively claimed areas only to rendezvous again the next morning to commence hunting. See Exh. 4. <sup>8/</sup> In fact, John Estabrook testified that George and/or Leland went with him on about half his trips to the lake and that they would sometimes during the 1960's stay with him in his tent (Tr. 2 at 33, 38). The fact that George Estabrook traveled to the lake many times over the years does not itself establish the requisite use and occupancy of the specific lands claimed for an allotment.

We find Judge Sweitzer correctly determined that the Government failed to present a prima facie case; however, he improperly dismissed the complaint. The record, as a whole, shows by a preponderance of evidence that the statutory and regulatory use and occupancy requirements were not met.

#### John J. Estabrook

John J. Estabrook filed his Native allotment application on March 1, 1971, with BIA. He requested approximately 160 acres of unsurveyed land in protracted sec. 10, T. 4. N., R. 8 W., Copper River Meridian, Alaska. The application was filed with BLM on January 28, 1972. In 1976, BLM approved the application. This approval was appealed by the State of Alaska because of the conflicting State selection application and, in July 1979, the Board remanded the case to BLM. State of Alaska, 41 IBLA 315 (1979). In August 1979, BLM notified the State that it had the right to initiate a private contest against the allotment application and that, if the contest were not filed within the specified time, the decision approving the application would become final. In March 1980, the State protested the approval but did not file a private contest. BLM never issued a final decision approving the allotment, but issued a contest complaint against the allotment in July 1982, informing Estabrook that the evidence of record supporting his claim was insufficient to satisfy the use and occupancy requirements set forth in the

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<sup>8/</sup> By estimating distances on the Geological Survey map (Exh. 4), it appears that it is approximately 1 mile across the lake from John Estabrook's campsite on his land to the allotment of Leland Estabrook or approximately 4 miles around the southern part of the lake. To travel north around the lake would be even further. From John Estabrook's campsite to George Estabrook's allotment is over 1 mile across the lake, and the shortest distance on land between the allotments is approximately 3 miles.

regulations promulgated under the 1906 Act. In his answer, Estabrook denied BLM's charges, asserting that he had used and occupied the allotment as required by law.

In his Native allotment application, John Estabrook stated he used the claimed land from June 1962 to the date of the application (March 1971) during the hunting and fishing seasons. He described his uses as hunting, fishing, and berry picking. Improvements were listed as a lean-to and meat- and fish-drying racks, all constructed in 1962, and a clearing for a cabin site in 1968. At the hearing, John Estabrook testified he was born and raised in Anchorage, Alaska, and at the time of the hearing was a real estate salesman in that city (Tr. 2 at 4-6). In 1958, at the age of 12, he visited the Old Man Lake area with two of his brothers on a hunting trip (Tr. 2 at 6). In 1962, he first visited the land he is claiming as his Native allotment; however, at that time he had no intention of claiming it because he did not know about the Native Allotment Act (Tr. 2 at 28). It was in June and he walked in "to get an area so that I could hunt in the fall season" (Tr. 2 at 7). The trip was "around four, five days" (Tr. 2 at 7). He went back in "probbably" December 1962 with another person for "three, maybe four days" of hunting (Tr. 2 at 89). He testified he thought he "would have made two trips in '63, both for hunting, both 3 to 5 days, the first for moose in the fall, the second for caribou in the winter" (Tr. 2 at 10-11).

In 1962 he constructed a lean-to in the area where he later built a cabin (Tr. 2 at 110). The canvas cover for the lean-to was left in a tree on the claim. He stated the meat rack was "nothing more than a pole in a couple of trees" (Tr. 2 at 12). He stated he made at least two trips in 1964, explaining that he would make more than one winter trip because the caribou limit was three at that time and if he did not get his limit, he would return (Tr. 2 at 13). One of his 1964 trips was for several days in the summer with his brother Leland to hunt moose (Tr. 2 at 13). John Estabrook did not present specific testimony about trips to the lake in 1965, but he did describe in general terms subsequent use of the claimed lands. He hunted caribou in the winter time at Old Man Lake until 1976 when the winter season was eliminated. In addition, there were two moose seasons up until the early 1970's (Tr. 2 at 15). He stated his stays in the area were from 2 days to maybe 10 days to 2 weeks (Tr. 2 at 15). He earlier testified, however, that the period during which a single trip might have lasted 10 days or 2 weeks was during the "log-laying era," i.e. 1971 (Tr. 1 at 127). Winter trips were shorter than summer or fall visits (Tr. 2 at 15). He stated he was not at the claim in 1969 because he was in the service (Tr. 1 at 12). However, he later stated he began cutting logs for his cabin in 1969 (Tr. 2 at 16). The first log for the cabin was laid in 1971 but he "[g]ave up" and in 1974 constructed a plywood cabin (Tr. 2 at 16-17). There were not many signs of use on his land prior to the abortive attempt to build a log cabin. He stated he carried out almost all his garbage from his trips there (Tr. 2 at 20).

John's wife, Geraldine Estabrook, testified that her first visit to John's claim was in the winter of 1967 to hunt rabbits or spruce hens. They were there overnight (Tr. 2 at 78-79). They returned in the fall of 1968 for a 3- or 4-day stay. John scouted for moose; she picked berries (Tr. 2 at 79-80). In 1970 she was on the claim twice, once in July or August to fish

and pick berries and again in December 1970 when John, Leland, and George all went to the lake "to actually stake the property out" (Tr. 2 at 81).

John Estabrook testified that during his trips to the lake, Leland and/or George accompanied him "[m]aybe half the time" (Tr. 2 at 36). He further stated that when they accompanied him in the 1960's they would stay in the tent on his property "[s]ometimes" (Tr. 2 at 38).

Fish and Tevebaugh also conducted a field examination of John Estabrook's allotment in July 1974. John Estabrook was contacted prior to the examination, but there was some mixup and he did not accompany the examiners. The examination report stated that a

partially constructed (seven tiers of logs) 12' x 16' cabin and boat docking area, as well as a few tools and supplies were observed. The area southeast of the cabin is where the building logs were obtained. After a thorough inspection, no sign of old use was found. Every sign of use appeared to be new (one to two years)

(Exh. 9). Upon returning to Old Man Lake in July 1983 Fish observed a "fairly adequate" plywood cabin on John Estabrook's allotment.

In his decision, Judge Sweitzer found "the amount of use required of John Estabrook which would fulfill the regulatory requirements is contingent upon the amount of general use made of the pertinent area" (Sept. 13, 1984, Decision at 6). He then found that Old Man Lake did not experience much recreational use and "[c]onsequently, the level of use and occupancy which John Estabrook must meet is that use of a relatively remote piece of land, which was fairly inaccessible prior to the building of Oil Well Road in 1969" (Sept. 13, 1984, Decision at 7).

Judge Sweitzer concluded that employing a liberal interpretation of the Native Allotment Act in favor of the Native applicant, and considering the lack of general public use, John Estabrook established potentially exclusive use and occupancy of the land. Judge Sweitzer described John Estabrook's use as evidencing a "stereotypical modern subsistence lifestyle" (Sept. 13, 1984, Decision at 14).

BLM attacks the Judge's decision on a number of fronts. First, BLM asserts John Estabrook failed to commence a qualifying use and occupancy prior to the May 16, 1968, date of the proposed classification. It argues the evidence does not show substantial actual possession of the land prior to that date. BLM strongly disagrees with the Judge's characterization of the applicant's use as the "stereotypical modern subsistence lifestyle." BLM contends an urban dwelling, steadily employed wage earner is not a typical subsistence user in terms of actual dependence on the resources available on the land claimed. Also it points to a definition of subsistence uses in section 803 of ANILCA, 16 U.S.C. § 3113 (1982), which states: "The term 'subsistence uses' means the customary and traditional uses by rural Alaska

residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, \* \* \*." (Emphasis added.) Appellant argues that while this definition should not be used to establish a rule that no urban Native may qualify for an allotment, it undermines the credence given by Judge Sweitzer to applicant's claim on the basis of a lifestyle which BLM asserts is indistinguishable from any other Alaska sportsman, Native or non-Native, urban or rural.

BLM argues applicant's use prior to May 1968 was nothing more than occasional recreational use. John Estabrook failed to demonstrate substantial actual possession, BLM contends. Utilization of his campsite for a few days a couple of times a year in the 1960's, BLM asserts, was not "substantial actual possession" so as to protect his claim from rejection on the basis of the May 1968 segregation notice. Moreover, BLM argues his lack of intent to establish an allotment is consistent with his brief trips. BLM also points to the fact that substantial portions of time were not spent on the claimed property and to applicant's failure until 1970 to mark or post it, or make intensive use of it to the exclusion of others. BLM claims the most logical inference to draw from John Estabrook's initial ignorance of the Native Allotment Act, his post-1969 staking and his subsequent cabin building effort, is that he only became aware of the opportunity to pursue title to the lot in 1970 or shortly before. BLM argues this lack of intent, the relevancy of which was dismissed by Judge Sweitzer, is highly relevant to the exclusivity issue. BLM questions how John Estabrook, when he was on the land, could have been in exclusive control of it, as the Judge found, when he had no intent to claim it at that time. Finally, BLM asserts that while John Estabrook submitted evidence that his family and friends considered the parcel to be "his" in the sense of it being his customary preferred camping site, there is no evidence that anyone in the local area knew of his pre-1970 activity on the land.

In the alternative, BLM argues that even if John Estabrook's pre-May 1968 activities could be considered substantial use and occupancy of the site so as to establish a "preference right" surviving the segregation of the land, John Estabrook should be limited to that area actually used and occupied prior to May 16, 1968.

With regard to substantial use and occupancy, the 5-year period therefor need only commence prior to a State selection or a multiple-use classification; neither constitutes a bar to completion of the required period by the Native. John Nusunginya, 28 IBLA 83, 86 (1976); Memorandum to Director, BLM, from Assistant Secretary, Land and Water Resources, dated May 16, 1975. To the extent BLM is arguing that a higher level of use and occupancy may be required where land is segregated subsequent to the commencement of use by the applicant, but prior to the filing of an application, we reject that argument. Although the Board has intimated the possibility of such a requirement (see State of Alaska, 41 IBLA 315, 329 (1979)), we find no support for such a position.

[4] In previous Native allotment cases we have stated that the applicant bears the burden of meeting the use and occupancy requirements by clear

and credible evidence. See, e.g., United States v. Flynn, 53 IBLA 208, 244, 88 I.D. 373, 393 (1981); John C. Krutsen, 23 IBLA 296 (1976). However, we believe the Tenth Circuit Court of Appeals decision issued in 1984, Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984), indicates that the proper standard of proof to be applied in Departmental review of virtually all classes of cases is the preponderance of evidence standard. See Woods Petroleum Co., 86 IBLA 46, 50-51 (1985). We find this standard is appropriate in evaluating the evidence presented regarding John Estabrook's allotment.

The regulations contemplate customary seasonal use to the degree it represents substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use. The evidence required to establish substantial actual possession, at least potentially exclusive of others, necessarily is dependent upon the circumstances of each particular case. The burden for the applicant does not change, however, and the amount of evidence necessary to sustain the burden is a matter of proof on a case-by-case basis.

John Estabrook alleged that his use and occupancy of the land in question began in 1962, and, thus, neither the 1968 proposed classification nor the 1968 State selection nor the repeal of the Native Allotment Act in 1971 would preclude him from completing the required 5 years of substantially continuous use and occupancy. See Warner Bergman (On Reconsideration), 31 IBLA 21 (1977). However, the issue we must consider is whether John Estabrook's use prior to the 1968 proposed classification was, in fact, sufficient to initiate a qualifying use and occupancy.

Based on our review of the record we conclude it was not. The evidence shows that from 1962 through 1971, with the exception of 1969, he visited his claimed land approximately twice a year, principally for hunting purposes, although he did some fishing and his wife picked berries. While he did not know about the Native Allotment Act during the early years and, thus, had no intent to claim the land thereunder, he did return to Old Man Lake year after year and, when he learned of the Act, he selected the land because in his opinion it was the best land on the lake (Tr. 2 at 6). During the 1960's, recreational use of Old Man Lake was not heavy, and he found no evidence of use of his site by others. When he filed his application in the spring of 1971, he listed as an improvement made in 1968 a clearing for a cabin. The cleared area was the same area in which he had camped over the years and where in 1971 he commenced construction of the log cabin (Tr. 2 at 16, 20).

Although Morrie Secondchief never saw John Estabrook or his brothers at Old Man Lake, the last time she spent much time at the lake was 1965. After that she was back many times, but only in the summers (Tr. 1 at 108). John Estabrook's use was principally in the fall and winter during the hunting seasons (Tr. 2 at 15). In addition, his land was across the lake from Secondchief's allotment. The other Government witnesses had not seen John Estabrook at Old Man Lake either, although Ronning testified he noticed the log structure on the land in question while flying over (Tr. 1 at 153, 158). He stated: "That's the only thing that's there is that round of logs, and there's a party--two, three fellows, I guess; they filed on that and they

built a cabin" (Tr. 1 at 158). He further stated, "They'd go in there on snow machines. \* \* \* I'd see them in there quite often" (Tr. 1 at 163. His statement that this observation "[m]ust have been ten years ago" (Tr. 1 at 163) is consistent with John Estabrook's testimony that the plywood cabin was constructed in 1974. In commenting on Ronning's testimony, Judge Sweitzer stated, "While some of the testimony seems to concern the post prove-up period of time, and thus is not pertinent, it is clear that Ronning did see John Estabrook during the 1969-1971 cabin building period" (Sept. 13, 1984, Decision at 12). First, we note Judge Sweitzer was mistaken about the "post prove-up period." As we stated, supra, the repeal of the Native Allotment Act did not bar completion of the 5-years' use and occupancy period. Second, we find the testimony does not support this finding by Judge Sweitzer. The Ronning testimony indicates he observed individuals (presumably the Estabrooks) at the plywood cabin which was constructed in 1974. None of his testimony supports a finding that he saw John Estabrook during the log-cabin-building period.

Judge Sweitzer found that John Estabrook "did substantially use and occupy his land prior to the 1968 selection" (Sept. 13, 1984, Decision at 14). 9/ The record, however, does not support this finding, even accepting the testimony of John Estabrook and his witnesses. Two visits per year to the Old Man Lake area for a total of a few days to a week per visit from 1962 through 1968 does not constitute substantial actual possession and use of the land claimed. Although John Estabrook testified he saw no evidence of use of his land by others, the regulations do not require that the applicant bar the use of his land by others, but that his use be "potentially exclusive of others," meaning that there be such evidence of use on the land that there is a public awareness of and acknowledgement of the applicant's superior right to the land. No such evidence of use existed on the lands prior to the May 1968 segregation. 10/

[5] We find that John Estabrook's 1962-1968 use of the land must be characterized as "merely intermittent use." In that regard, his use is essentially the same as that which the Board found to be insufficient in Jack Gosuk, 22 IBLA 392 (1975), and Gregory Anelon, Sr., 21 IBLA 230 (1975), where the Native allotment applications were rejected 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. The Board stated in Anelon:

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9/ Although at the hearing the Judge and the parties were under the assumption that the State's Dec. 16, 1968, selection first segregated the land in question from appropriation under the Native Allotment Act, as set forth, supra, the critical date was actually May 16, 1968, when the notice of proposed classification of the lands was published in the Federal Register. 33 FR 7264. See BLM Statement of Reasons (John J. Estabrook) at 10-11.

10/ It is highly unlikely that the clearing activities for the cabin site alleged to have taken place in 1968 would have been completed prior to May 1968. In fact, the testimony concerning visits to the Old Man Lake area by John Estabrook indicate such trips were undertaken in summer, fall, or winter.

Even if we accept all of appellant's assertions as established \* \* \*, the evidence of record \* \* \* is convincing that since 1962 appellant has \* \* \* only used the land intermittently in the same fashion as any other fisherman or hunter who returns to a particularly favorite site during the course of a season. This is not the manner of use and occupancy contemplated by the regulations.

21 IBLA at 232.

Judge Sweitzer distinguished these cases on the basis that the amount of use required to be shown by an applicant is contingent upon the amount of use of the same land by others. Because he found that prior to 1969 the Old Man Lake area was relatively remote and received infrequent use, he concluded that John Estabrook's use and occupancy was sufficient. This was error. The fact that Old Man Lake received infrequent use does not serve to distinguish the Anelon and Gosuk cases. Although those cases admittedly involved greater evidence of use by others, 11/ a critical factor in those cases, as in this case, is that the use by the Native was merely intermittent. 12/ Without evidence of greater use, substantial actual possession and use of the lands cannot be established. John Estabrook failed to show he had initiated a qualifying use and occupancy prior to May 1968. Therefore, his allotment application must be rejected.

#### Leland Estabrook

Leland Estabrook filed his Native allotment application with BIA on March 1, 1971, for approximately 160 acres of unsurveyed land located in protracted secs. 11 and 14, T. 4 N., R. 8 W., Copper River Meridian, Alaska. The application was filed with BLM on January 28, 1972. On December 7, 1976, BLM issued a decision holding that Estabrook was entitled to his Native allotment. Due to a conflicting State selection application, the State of Alaska appealed and in State of Alaska, 41 IBLA 309 (1979), the Board dismissed the State's appeal without prejudice. The State was granted the opportunity to file a private contest complaint and when it failed to do so within the required time period, BLM issued a decision which approved Estabrook's Native allotment application and rejected in part the State selection. The State appealed this decision to the Board arguing in part that the record did not

11/ In Anelon part of the land in question was included in a special land use permit issued to the Alaska Department of Fish and Game. In addition, BLM field examiners photographed several planes and fishermen in a camp set-up on the lands under application. In Gosuk the record indicated the land was used by residents of the village of Togiak. In the present case the Government's evidence showed that, at least prior to the May 1968 segregation, John Estabrook's use was not of a nature as to have become known to local users or observers.

12/ "Intermittent" is defined in Webster's Seventh New Collegiate Dictionary 442 (1970) as "coming and going at intervals."

support Estabrook's claim of use and occupancy sufficient to meet the requirements of the Native Allotment Act. In State of Alaska (Leland R. Estabrook), 54 IBLA 346 (1981), the Board concluded that there was an insufficient evidentiary foundation upon which to approve the allotment, and remanded the case to BLM for initiation of a contest hearing on the facts. Accordingly, on July 23, 1982, BLM issued a contest complaint. In his September 14, 1984, decision, Judge Sweitzer found that Leland Estabrook had established his entitlement to an allotment through evidence of lack of general public use resulting in potential exclusivity and evidence of traditional Native use supported by credible witnesses.

In his allotment application Leland Estabrook alleged use of his claimed land from February 1958 to the date of the application for "[s]easonal use for hunting and fishing then return to town." He listed improvements of a tent frame, boat dock, and cleared area for a cabin in the years 1958, 1959, and 1960, respectively.

In its previous opinion, State of Alaska (Leland R. Estabrook), *supra*, the Board commented at page 348:

To provide further information bearing on his use of the land the applicant submitted the statements of three witnesses. The statements, all apparently written in the same hand except for the signatures, indicated that the witnesses had seen the applicant use the land, that a campsite, tent, tent frame, fire pit, cleared area, and boat dock were to be found on the land, and that the land was used for hunting, berry picking, and food gathering.

In remanding for initiation of the contest the Board stated it was "not satisfied the controverted evidence, which is of questionable origin and the unverified statements of applicant's witnesses constitutes a sufficient basis on which to approve the Native allotment application." *Id.* at 350. Those statements were not presented as part of the record at the hearing. <sup>13/</sup>

Fish and Tevebaugh inspected Leland Estabrook's allotment on July 12, 1974. They found no physical evidence of a tent frame, boat dock, or cleared area. They did find two firepits with a small amount of litter and a few game trails. The field report stated it was impossible to determine if the firepits and litter belonged to Estabrook or others (Exh. 6).

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<sup>13/</sup> BLM commented regarding the statements in its statement of reasons at page 2, n.1, as follows:

"Notably, only one of the three "witnesses" whose unverified statements were discussed in the previous IBLA Decision, testified at the consolidated hearing on the three appeals now before the Board, IBLA Nos. 85-85, 85-86, and 85-87, and he primarily in support of another applicant's claim." This observation was not contradicted by counsel for Leland Estabrook in his answer.

Leland Estabrook provided the following testimony at the hearing in support of his allotment. He first traveled to Old Man Lake in 1958 (Tr. 1 at 29). He returned again in 1959 (Tr. 2 at 91-1). These visits were for 2 or 3 days (Tr. 2 at 91-1). He stated that he missed a year or two between 1958 and 1964 (Tr. 1 at 33), but "from about the '60s on, the average [stay] was probably a week" and the average number of visits per year were two (Tr. 2 at 92). He selected the land in question because "I've been there quite a bit, and I liked that area, and it was a good meat-producing area for me (Tr. 2 at 91). He testified he brought a boat to Old Man Lake in 1958. He left it there year round and during the winter would put it at the south end of the lake. In 1970 he removed the boat when he got a bigger boat which he would haul in and out (Tr. 2 at 95-96). His improvements consisted of a boat landing "[t]hat was only a couple of logs tied together," which washed away every spring (Tr. 2 at 95). He also stated he had campfires and a tent frame (Tr. 2 at 95).

After summarizing Leland Estabrook's testimony, Judge Sweitzer found it to be credible, but, standing alone, insufficient to grant his application (Sept. 14, 1984, Decision at 8). However, he found the testimony of several witnesses substantiated the claim. Judge Sweitzer stated:

John Estabrook, the claimant's brother, often went to Old Man Lake with Leland. (Tr. 2 at 6-7, 13-14, 25, 36-37, 38) Bill Magnuson, a witness for the claimant, went to Old Man Lake with Estabrook several times in the summer and fall of 1965. (Tr. 2 at 40-41) Magnuson testified that it was "common knowledge" to everyone in the shop at which the two men worked that Estabrook had a camp at Old Man Lake. (Tr. 2 at 41) Janet Sue Estabrook, the claimant's sister-in-law, testified that "I never seen anybody else . . . Just the family [at the lake]." (Tr. 2 at 49) Ed Royer, another witness for the claimant, testified that while visiting Old Man Lake with George Estabrook during the 1960's, he saw Leland. (Tr. 2 at 75) Finally, Geraldine Estabrook, another sister-in-law, testified that Leland, George and John Estabrook had all been to the lake in 1970. (Tr. 2 at 81)

(Sept. 14, 1984, Decision at 8-9).

We disagree with Judge Sweitzer. Close analysis of the testimony of the supporting witnesses and Leland Estabrook's own testimony does not support a finding that Leland Estabrook made substantially continuous use and occupancy of the land claimed by him for an allotment.

First, much of the testimony cited by Judge Sweitzer as substantiating the claim does not, in fact, tie Leland Estabrook to the selected land. Both Janet Sue Estabrook's and Ed Royer's testimony place Leland at the lake, but not necessarily on his land. Geraldine Estabrook's testimony was given in response to a question about her reasons for going to John Estabrook's land. She stated: "I think we went twice that year. Once in late fall; August or

July, picked berries and did some grayling fishing, and then I think it was later that winter; like in December, and then I went up with John, Leland, and George to actually stake the property out" (Tr. 2 at 81).

The testimony appears to relate to the staking of John Estabrook's allotment. Judge Sweitzer did not consider it to be more than that; in fact, he cited it only as establishing that the three brothers had been to the lake in 1970. Geraldine Estabrook's testimony does not place Leland on his claimed land. Only the testimony of Bill Magnuson arguably supports the claim. He went to Old Man Lake three or four times in 1965 with Leland and/or George Estabrook (Tr. 1 at 42), and stayed overnight each time (Tr. 2 at 44). He believed he had stayed overnight on Leland's allotment on those occasions (Tr. 2 at 44).

Judge Sweitzer cites as support for his finding, testimony that John Estabrook often went to Old Man Lake with Leland. While that may be true, the transcript pages cited by Judge Sweitzer do not always support that finding. At Tr. 2, page 6, John Estabrook stated he went to Old Man Lake in 1958 or 1959 with two of his brothers. Later there was testimony he had more brothers than George and Leland (Tr. 2 at 36). The Tr. 2, page 13 citation places John and Leland at the lake for a summer moose hunt in 1964. Page 25 of Tr. 2 relates to a 1974 trip and is, thus, not relevant to our consideration. At pages 36-38 of Tr. 2, John Estabrook testified that either George or Leland or possibly both accompanied him on approximately one-half of his trips to the lake and that on those trips during the 1960's the brothers would stay with him in his tent "[s]ometimes." While John Estabrook testified that on the 1964 summer hunt his shelter was "that thing on my side of the lake, and Lee had a tent on his side of the lake" (Tr. 2 at 13), the remainder of the cited testimony contradicts it. Thus, John's testimony that his brothers would sometimes stay with him in his tent in the 1960's indicates Leland did not always use and occupy his land on his trips to the lake. It seems logical that brothers traveling to a remote area for hunting purposes might share the same camping facilities, especially in winter and especially in light of the fact that the brothers were unaware of the Native Allotment Act until 1969 or 1970 and, thus, had no specific reason to use and occupy their later selected lands on each visit to the lake.

Moreover, even Leland Estabrook's testimony indicates he spent much time on John Estabrook's allotment. Leland stated:

This picture here shows [Exh. C] \* \* \* it shows the log structure that we built on Johnnie's place. \* \* \*

\* \* \* \* \*

Well, they [the logs] weren't all placed there at the same time. That doesn't look like too much of a deal there, but that's over a period of a few years. We started gathering those logs up \* \* \* seems to me it was in '69. We finally kind of gave up on this thing. That was a couple of years later, and that was

probably '74. We just gave up on it and built that cabin. [Emphasis added.]

(Tr. 2 at 99-100).

Our review of the record leads to the conclusion that Leland Estabrook failed to provide a preponderance of evidence to establish his entitlement to an allotment on the basis of substantially continuous use and occupancy. Therefore, Judge Sweitzer's decision must be reversed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are reversed.

Bruce R. Harris  
Administrative Judge

We concur:

James L. Burski  
Administrative Judge

Franklin D. Arness  
Administrative Judge

