

UNITED STATES
v.
THE HEIRS OF DAVID F. BERRY

IBLA 90-194

Decided September 14, 1993

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer dismissing contest of Native allotment application AA-6600.

Affirmed.

1. Alaska: Native Allotments--Evidence: Prima Facie Case--Evidence: Preponderance

In a Government contest of an Alaska Native allotment application, the contestant bears the burden of presenting sufficient evidence to establish a prima facie case of ineligibility and the Native applicant bears the burden of proof by a preponderance of the evidence should a prima facie case be established. While a limited field examination presenting no significant evidence will not support a prima facie case, the applicant's statements, which if unrebutted would contradict the applicant's use of the allotment lands, may constitute a prima facie case.

2. Alaska: Native Allotments--Evidence: Preponderance

The ultimate burden of proof in an Alaska Native allotment application is on the applicant to establish compliance with the use and occupancy requirements of the Native Allotment Act. Where the evidence has been reviewed and the allotment approved, an appellant before the Board is to show by a preponderance of the evidence that the challenged decision is in error. Thus, the parties in an appeal from a decision approving a Native allotment application must seek to establish their respective positions at some point by a preponderance of the evidence, which means that there must be a showing that something is more likely than not.

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

Under the authority of sec. 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C.

§ 1634(c) (1988), the description in a Native allotment application may be amended where it designates land other than that which the applicant intended to claim at the time of the application.

4. Alaska: Native Allotments

Use of the land which does not leave physical evidence of use may be sufficient to establish entitlement to an Alaska Native allotment provided the applicant demonstrates by a preponderance of the evidence substantiality and exclusivity. Where witnesses for the applicant testify to his regular use of the land in question for subsistence hunting and other activities which do not always alter the appearance of the land, the requirement of substantial use is satisfied. The existence of other indicia of hunting attributed to the applicant, such as a campsite or trap sites, corroborates use of the land. In considering whether the use was exclusive of others, the Native customs and mode of living may be taken into consideration. The posting of the land and the testimony of witnesses that the applicant had affirmatively declared the area as his allotment are sufficient in the absence of contrary evidence to preponderate on the issue of exclusivity. A challenge to use of the subject lands as intermittent or discontinued based on statements of the applicant that he had been to the subject lands only a few times over several years is adequately rebutted by testimony explaining the statements and verifying regular use of the land.

APPEARANCES: James R. Mothershead, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management, contestant; Bruce A. Moore, Esq., Anchorage, Alaska, for the Heirs of David F. Berry, contestee; and Bonnie E. Harris, Esq., Office of the Attorney General, Anchorage, Alaska, for the State of Alaska, intervenor.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

By decision dated December 29, 1989, Administrative Law Judge Harvey C. Sweitzer dismissed the contest of David F. Berry's Native allotment application, AA-6600. This application was filed on November 22, 1971, in accordance with the Native Allotment Act of 1906 (the Act), 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 (ANCSA), 43 U.S.C. § 1617 (1988)). Berry claimed approximately 160 acres of land situated in T. 29 S., R. 59 E., Copper River Meridian, Alaska, approximately 3 miles northwest of Taiyansanka Harbor along the Ferebee River. The application asserted use and occupancy of the land commencing in "May 1947" after intermittent use beginning "in the earlier 1940's." Berry died intestate on July 10, 1979. His heirs were determined to be his sons, David Berry, Jr., Andrew Berry, and Kenneth Berry.

In his application, Berry declared the claimed 160 acres to be situated in sec. 22 of T. 29 S., R. 59 E., Copper River Meridian. A BLM field examination conducted in 1972 placed the allotment claim in secs. 9, 10, 15, and 16. Subsequently, Berry filed a "correction" to the legal description of the allotment claim, but this description placed his claim entirely within section 15 and created an apparent conflict with his brother's Native allotment claim. After a second examination was conducted in 1984, a description placing the allotment claim in secs. 9, 10, 15, and 16 of T. 29 S., R. 59 E., Copper River Meridian, was accepted.

Pursuant to section 6(b) of the Alaska Statehood Act, P.L. 85-508, 72 Stat. 399, the State of Alaska filed a general purposes grant selection, A-063034, on August 10, 1965, for lands including all those in the township where Berry's allotment claim was situated. By decision dated February 4, 1981, the selection was tentatively approved with respect to the subject township, T. 29 S., R. 59 E., Copper River Meridian, as follows: "Secs. 1 through 14, all; Sec. 15, all excluding Native allotment applications AA-6599 and AA-6600; Secs. 16 through 18, all; * * *."

As the BLM field examiners did not find signs of use or occupancy of the allotment lands by Berry in either 1972 or 1984, the claim was not approved and a contest in accordance with Pence v. Kleppe, 529 F.2d 135

(9th Cir. 1976), was initiated. A hearing before Judge Sweitzer was held June 6 and 7, 1989, in Haines, Alaska. At the hearing, the Government contestant presented the two BLM examiners as witnesses. After the Government had presented its case, a motion by contestees to dismiss the contest for failure to present a prima facie case was argued orally and denied. Intervenor State of Alaska was represented but did not present witnesses or evidence at the hearing. ^{1/} Seven witnesses then appeared on behalf of contestees. At the conclusion of the hearing, oral closing statements were waived in favor of posthearing briefs. While opening and answering briefs were later submitted by intervenor and contestees, nothing was received from contestant.

In his decision, Judge Sweitzer thoroughly detailed the evidence and testimony adduced at the hearing. Concerning the issue of the allotment's locality, Judge Sweitzer summarized the evidence:

The area in which David Berry hunted most frequently was referred to as "Taiyasanka," a long narrow valley extending from the Taiyasanka harbor up the Ferebee River including the parcel

^{1/} The State has been allowed to participate as an intervenor in these proceedings because it is the legal landowner inasmuch as tentatively approved selections are considered legislatively conveyed out of Federal ownership. See Northwest Alaskan Pipeline Co. (On Reconsideration III), 9 OHA 143 (1992). As noted, the decision tentatively approving the State selection conveyed all of secs. 9, 10, and 16 of the subject township without exception for the Native allotment in question. Only sec. 15 was so affected by the described exception. The State was allowed to select only vacant, unappropriated and unreserved lands, meaning a conveyance of

claimed by Mr. Berry (Tr. 240, 241-243, 366-368, 392-393, 396-397; Exh. AK-1). His wife recounted that he claimed the land he did because he used it (Tr. 464).

Of course his hunting was not confined to the 160 acres he claimed. He also hunted up the Chilkoot (see Exh. AK-1) and all along the Ferebee: e.g., geese and ducks at the harbor (Tr. 382-383), moose and bear up the river (Tr. 316-320, 325-326). Nevertheless, his hunting included the land he claimed (Tr. 246; cf. Tr. 256, 265-267).

The use of more than 160 acres does not vitiate a claim to 160 acres, as long as the use of the 160 acres claimed meets the tests prescribed by regulation. "A Native could clearly use or occupy in excess of 160 acres in a manner consonant with the Native Allotment Act. * * * By application, however, the Native would receive a preference right to an allotment of up to 160 acres." United States v. Flynn, 53 IBLA 208, 88 I.D. 373, 387 (1981).

(Dec. 29, 1989, Decision at 8). As to the specific, actual location, he concluded as follows:

The land that David Berry marked on the ground is different from that described in his initial application and different from that described in his subsequent "Motion to Correct Description." See Exhs. US-1, US-2, US-4, US-7. Such discrepancies are common (Tr. 116). The markers on the ground control (Tr. 142). The land marked by David Berry has remained constant on the ground and consistent with Exh. US-1 as marked by Mr. Bronczyk and Mr. Peake and as located by David Berry, Jr. (Tr. 129, 198-199, 200). It is also consistent with the metes and bounds description given by David Berry to Mr. Bronczyk and with the metes and bounds description submitted to BLM by Franklin Berry (Tr. 70-72; Exh. US-10).

(Decision at 6).

fn. 1 (continued)

lands encumbered with the inchoate rights of a qualified Native would be in error. With the legislative conveyance, the Department had lost jurisdiction over the subject lands and it has no authority on its own to affect title thereto. But even though the land may have been conveyed, the Department is obligated to determine whether the conveyance was erroneous, and if so, whether action should be undertaken to recover the land conveyed in error. See Aguilar v. United States, 474 F. Supp 840 (D. Alaska 1979); State of Alaska v. Thorson (On Reconsideration), 83 IBLA 237, 91 I.D. 331 (1984); Heirs of Doreen Itta, 97 IBLA 261 (1987); Matilda Titus, 92 IBLA 340 (1986). Thus, the proper procedure in this instance is for the Department to first determine whether the applicant is entitled to the subject land and, if so, then to proceed to seek reconveyance in order that the allotment may be granted.

With respect to the challenged use and occupancy, Judge Sweitzer summarized the evidence as follows:

The contestant's case has essentially four components: the 1972 field examination conducted by Stanley Bronczyk, the 1984 field examination conducted by William Peake, the statement of the applicant himself in the application that "I have not been up there [since 1962] other than to fly over the spot where I camped," and the hearsay testimony of Mr. Bronczyk that Mr. Berry told him only of visits to the allotment claim in 1953, 1965, and 1972.

* * * * *

In July 1972, Mr. Bronczyk flew over the land described in Mr. Berry's allotment application (section 22) and saw no improvements (Tr. 28). In October of the same year, he conducted an examination on the ground (Tr. 29). He landed at the head of Taiyasanka harbor and walked northwesterly in a fairly straight line through the woods between the cliffs and the Ferebee River (Tr. 30-31).

In about the middle of the section 15, he found a corner marker (Tr. 31). He remarked the corner with an aluminum tag (Tr. 32, 147, 152-153) and proceeded to return to the harbor by going down the river (Tr. 31). He assumed that he had located the NE corner of Franklin Berry's claim, which was north of David Berry's claim (Tr. 35, 36, 49).

Soon after examining the land, he met with David Berry. Together they determined that Mr. Bronczyk had actually dis-covered the SE corner marker (corner #4) of David Berry's claim (Tr. 37, 40-42, 49, 82-84). Mr. Bronczyk's field examination did not include any of the land marked and claimed by David Berry (Tr. 48, 54, 136). His findings on the ground are therefore irrelevant to these proceedings, except to establish that the proper location of David Berry's Native allotment claim is in fact as captioned above and described in Exh. US-1. United States v. Estabrook, 95 IBLA 38, 45 (1986); Linda L. Walker, 23 IBLA 299 (1976).

Mr. Peake, an experienced field examiner, served as a realty specialist for BLM in Alaska in 1974-1979 and 1983-1985 (Tr. 158-159, 161). He examined David Berry's allotment claim in 1984 (Tr. 161) to check for compliance with the requirements for an allotment and to resolve an apparent conflict on the ground between the Native allotments claimed by David Berry (AA 6600) and his brother Franklin Berry (AA 6599) (Tr. 163-164).

For this examination, Mr. Peake was accompanied by David Berry's wife, Judith, and son, David Jr. (Tr. 168-171). They flew in by helicopter, landed just north of the claim according

to the advice of David Jr., and proceeded southerly to a point where they marked the NE corner of the claim (Tr. 171-172, 175, 193-194).

Mr. Peake spent about an hour in the vicinity of the claim, of which time 40 minutes was used to walk from the helicopter to the point where they marked the corner and then back (Tr. 201-202, 204-205, 258-259, 437-438). Only 10 minutes was actually spent in examining the claim (Tr. 205). Only a few acres were examined (Tr. 176-178). After marking the corner, Mr. Peake took a quick look at the claim from the air on the way back to Haines and saw nothing noteworthy (Tr. 205-206). Mr. Peake's examination is inadequate to provide any probative evidence concerning the issues of "substantial use and occupancy," "potentially exclusive use," or "continuity of use." United States v. Estabrook, 95 IBLA 38, 45 (1986); Linda L. Walker, 23 IBLA 299 (1976). His examination does confirm the location of the claim as depicted in Exh. US-1.

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The statement in Mr. Berry's application (Exh. US-2) about his absence from the claim for 9 years, taken at face value, is readily susceptible to the interpretation that Mr. Berry's use was neither substantial nor continuous. Additionally, Mr. Bronczyk testified that what Mr. Berry told him about his visits to the claim was only that he had marked it in May 1972 (Tr. 40-41), and that he had previously been to the claim in 1965 (Tr. 42) and in 1953 (Tr. 43-44). This testimony on its face, although hearsay, tends to confirm the interpretation that Mr. Berry's use was neither substantial nor continuous.

* * * * *

David Berry's Native allotment application asserts that he used the parcel for hunting and berry picking (Exh. US-2). There is no doubt that game is available on the land (Tr. 104, 105, 203, 317). Nor is there any doubt that Mr. Berry hunted frequently to provide game for his extended family. David Berry, Jr., recalls frequently eating game provided by his father's hunting (Tr. 260). John Berry, the applicant's brother, confirmed that David Berry provided a lot of game in the 1950's (Tr. 384-385, 389-390). Edith Jacquot, the applicant's sister, also confirmed that David Berry hunted often for subsistence (Tr. 395-397). Judy Berry, the applicant's wife, testified to David Berry's extensive hunt-ing from the mid-1950's through the 1970's (Tr. 414, 415, 418-419, 428, 429-430, 431).

* * * * *

David Berry marked and surveyed the land he claimed on several occasions. His son, David Jr., recalls his father spoke of

surveying "his" land in 1968 (Tr. 283). His wife confirmed that he went to Taiyasanka with Hank Reeves in 1968 to survey his land (Tr. 421, 446-447). She testified that he surveyed or marked his land several times (Tr. 423, 424-425, 449).

Harold Jacquot, the applicant's brother-in-law, testified that he accompanied Mr. Berry and Tom Katzeek to the allotment in 1970 or 1971 to stake it (Tr. 331-332, 349-357). Mr. Bronczyk recounted David Berry's statement to him of going to the allotment in May 1972 with Tom Katzeek to survey it (Tr. 40, 41).

In locating what turned out to be corner #4 of David Berry's allotment claim in 1972, Mr. Bronczyk relied on a corner that was already marked: "a blazed tree with some flagging tape around it" (Tr. 31). He marked the corner again with a more durable aluminum tag (Tr. 32).

Ten years later, in 1982, David Berry Jr., went to the area described to him by his father and found a corner marked with an aluminum tag (Tr. 249-251, 277, cf. Exh. US-5, photo 1). This marker was located well to the south of the corner located by him and Mr. Peake in 1984 (Tr. 270, 309-322). More likely than not, it was the corner marked by Mr. Bronczyk. A few hundred feet north of this corner #4, David Berry Jr., discovered evidence of earlier campers: a coleman stove, a cooking pot, some cans and some black visqueen (Tr. 252; cf. Tr. 421-422). Additional indicia of Mr. Berry's potentially exclusive use of his allotment are the testimony of his son that people in Haines generally knew of David Berry's allotment and would respect it (Tr. 308) and Tom Katzeek's 1984 affidavit that he would not go on David Berry's allotment claim without first asking permission (Exh. US-16).

* * * * *

The April 1975 affidavit of Tom Katzeek asserts that David Berry used his allotment claim during each fall and winter from 1940-1948 and 1952-1975. The March 1984 affidavit of Tom Katzeek restates that David Berry used the claim each year beginning in 1940, except 1948-1952. Mr. Katzeek indicates his knowledge of the land whereof he speaks by noting that he helped Mr. Berry mark the corners of the claim.

The April 1984 affidavit of David Berry's brother Franklin attests that David continued to use his claim frequently from the 1950's until his death in 1979. The July 1986 sworn statement of Harold Jacquot attests to his familiarity with David Berry's allotment claim and to David Berry's continued use of it throughout the 1960's and 1970's. The July 1986 sworn statement of Judy Berry also attests that David Berry "used that land since the time I met him until his death in 1979."

(Decision at 5-10). His observations at the hearing and his review of the testimony and arguments presented led Judge Sweitzer to the following conclusion:

Despite the paucity of evidence on either side adduced at the hearing, it is plain that contestees have preponderated on all issues. It is clearly more likely than not that David Berry used the land he marked as his allotment claim for subsistence hunting on a regular basis from at least 1953 to 1979 in accordance with the applicable regulations. It is also more likely than not that one going onto the land he marked would see indicia of his use and claim to entitlement.

(Decision at 10). Judge Sweitzer then dismissed the contest and directed BLM to seek reconveyance of the land from the State and to approve the allotment application.

The State of Alaska and BLM have appealed from the decision.

In its statement of reasons, the State argues that both the record and the facts adduced at the hearing do not support the allotment claim. In the instance of the record, the State contends that Berry's use did not satisfy the statute and the regulations. Citing several Board decisions, the State argues that the well-established principle in this line of cases states that mere use of the land for a few days, absent physical improvements, does not qualify the Native for an allotment. The State asserts that Berry's own statements clearly establish that his claimed use was at most occasional and sporadic, not enough to constitute even intermittent use. In this aspect, the State charges that Judge Sweitzer disregarded evidence not favorable to his conclusions and misconstrued certain other evidence.

As for the evidence and testimony brought forth at the hearing, the State of Alaska repeatedly challenges those statements where they contra-dict Berry's own statements made in his application and to the examiners. The State contends that there is nothing ambiguous about Berry's statement that he had been to the claim only three times after the summer of 1953 and had not been there in more than 9 years. The State asserts that the evidence clearly shows that Berry did not use the land in a manner which would satisfy the statutory requirements for an allotment and that, at best, he was probably in the area of the claim only a relatively few number of times. Further, the State argues that Judge Sweitzer's decision should be reversed inasmuch as he relied upon self-serving testimony of the applicant's heirs and widow, ignoring the clear import of the applicant's own statements. The State maintains that the contestees have not established the applicant had any ties to the specific land at issue and, therefore, the application should be denied.

BLM, in its statement of reasons, adopts the State's brief and additionally contends that Judge Sweitzer's "more likely than not" measurement is not a proper application of the preponderance of the evidence standard in the case of Native allotment contests. BLM argues that it is not a

question of contestee's insufficient evidence preponderating over the Government's insufficient evidence but, rather, whether the contestee has presented a prima facie showing that the requirements for an allotment have been satisfied.

In their answer, the heirs of David F. Berry contend that the State in its arguments failed to establish any error in Judge Sweitzer's conclusions of law and fact. Regarding the debate over the appropriateness of allowing testimony to explain inconsistencies in Berry's statements concerning use and occupancy, contestees assert that the testimony was properly considered because it was intended to corroborate the applicant's qualifications. Contestees maintain that a hearing is conducted to determine qualifications and that the applicant's statements in the application therefore may be explained or substantiated at that time. Contestees further assert that de novo review by the Board is unnecessary in the instant situation because the State on appeal has not presented rebuttal evidence but merely attacks the credibility of the contestee's case. They suggest that Judge Sweitzer's observations and conclusions are wholly adequate as he observed the demeanor of the witnesses and thoroughly reviewed the total evidence presented, and his decision contained no erroneous rulings of law. Contestees challenge the State's assertion that the record and the evidence at the hearing do not support the decision. They contend that David F. Berry used the land he claimed as an allotment for subsistence hunting and the physical evidence verifies it. They allege that his use was potentially exclusive and did not cease from 1952 through 1979, although it was not as intense after 1971. Contestees assert that the State did not refute the evidence cited by Judge Sweitzer in concluding in favor of the allotment. Finally, contestees argue that BLM mistakenly asserts error in the preponderance standard employed by Judge Sweitzer and that the burden of proof was properly allocated in the decision.

The Alaska 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 qualified Indian, Aleut, or Eskimo. 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 regulations interpret the Act 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.

43 CFR 2561.0-5(a).

Adjudication of Native allotment applications was affected by passage of section 905 of the Alaska National Interest Lands Conservation

Act (ANILCA), 43 U.S.C. § 1634 (1988), which approved Native allotment applications pending before the Department on or before December 18, 1971, subject to certain exceptions. Subsection 905(a)(4) of ANILCA required adjudication of applications which conflicted with State selection applications under the Alaska Statehood Act filed prior to December 18, 1971. Where the Native allotment applicant alleges use and occupancy prior to

the filing of the State selection application, an application cannot be rejected without affording the applicant notice and an opportunity for a hearing. See Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976); Elizabeth G. Cook, 90 IBLA 152, 155-56 (1985). Thus, this case required a hearing when BLM, relying on its field reports, judged the application to be without merit. See Aguilar v. United States, supra.

[1] 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 the Native applicant bears the burden of proof by a preponderance of the evidence should a prima facie case be established. See, e.g., United States v. Estabrook, 94 IBLA 38, 45, 51-53 (1986); John Moore, 40 IBLA 321, 86 I.D. 279 (1979).

At the hearing, counsel for contestees motioned for dismissal on the basis of a lack of a prima facie case by the contestant. Based on its experience in Government contests challenging the validity of mining claims, the Board has addressed the propriety of dismissal for lack of a prima facie case:

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.

Estabrook, 94 IBLA at 44-45. However, in that case, counsel for contestee did not make a motion to dismiss but proceeded to present evidence in support of use by the Native claimant and ultimately the issue was decided on whether the claimant proved use by a preponderance of the evidence. Hence, the Board "examine[d] all the evidence presented to determine whether a preponderance of that evidence shows that the statutory and regulatory use and occupancy were not met." Id. at 45.

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. Estabrook, 94 IBLA at 43. In this case, the United States, as contestant, presented two witnesses, the field examiners, who testified that they attempted to inspect the allotment on the ground. The first examiner failed to examine the land Berry had marked (Tr. 48, 136). The second examiner spent about ten minutes examining only a few acres of the claimed lands (Tr. 205). The Board in Estabrook, 94 IBLA at 45, opined

that a very limited field examination will not support a complaint against an application. The field examiners do not claim to have investigated the parcel except in a very limited manner. Further, they made no attempt to substantiate from other sources whether Berry's claims were valid. In our view, these examinations do not establish that the applicant failed to use these lands in a substantial and exclusive manner.

However, Judge Sweitzer appropriately ruled that the other two components of contestant's presentation constituted a prima facie case. The applicant's two statements at issue here -- i.e., the one in his application that he had not been up there for the nine years previous to filing the application and the testimony of one of the examiners that he said he had only visited the claim in 1953, 1965, and 1972 -- if un rebutted or unexplained, would constitute adequate proof that the applicant's use was merely intermittent and such use had long since been abandoned. In light of this conflict with the applicant's purported use, Judge Sweitzer properly denied the contestees' motion to dismiss the proceedings after the Government's presentation.

[2] One of the State's concerns is the standard and burden of proof required of the parties involved. The ultimate burden of proof is on the Native allotment applicant to establish compliance with the use and occupancy requirements of the Native Allotment Act. United States v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981). The Board at one time required the Native applicant to establish qualifications by clear and credible evidence but later adopted the preponderance of evidence standard as the prevailing standard of proof to be applied in Native allotment cases. See Estabrook, 94 IBLA at 51-52. We have discussed infra that the applicant is burdened with this preponderance of the evidence standard only after a prima facie showing of nonqualification has been made by the Government contestant. In a private contest, while the applicant still has the burden of proving the application, the contestant has the burden of going forward with the evidence and the ultimate burden of persuasion that the applicant was not entitled to the land. See Ira Wassillie (On Reconsideration), 111 IBLA 53 (1989). In other words, the private contestant must establish with a preponderance of the evidence that the application is without merit before the application will be denied. In this situation, the Government contestant presented its case at the hearing and the contestee responded. The State, as an intervenor, appeared at the hearing but did not present evidence. If it had, the evidence may have supplemented the Government's prima facie showing. Regardless, the State's primary contribution to these proceedings, its brief in this appeal, focuses on whether Judge Sweitzer's conclusions are in error. The burden on an appellant before the Board is to show, by a preponderance of the evidence, that a challenged decision is in error. Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984); Galand Haas, 114 IBLA 198 (1990).

Thus, in Native allotment cases, a party seeking to establish a position must do so by a preponderance of the evidence. Under the Board's interpretation of the term "preponderance of the evidence," it means that

there must be a showing that something is more likely so than not. Galand Haas, 114 IBLA at 203.

[3] One of the first concerns at the hearing was the location of the allotment claim. As noted, the description was amended several times, including after the tentative approval of the State selection. Section 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), provides for amending a Native allotment application "if said description designates land other than that which the applicant intended to claim at the time of the application and if the description as amended describes the land originally intended to be claimed." The legislative history for this provision illustrates the difficulty with many applications:

A significant percentage of Alaska Native allotment applications do not correctly describe the land for which the applicant intended to apply. Technical errors in land descriptions, made either by the applicant or by the Department in computing metes-and-bounds or survey description from diagrams, are subject to correction under the authority of Section 905(c). In accordance with the Department's existing procedures for the amendment of applications, subsection (c) requires that the amended application describe the land the applicant originally intended to apply for and does not provide authority for the selection of other land.

S. Rep. No. 413, 96th Cong., 1st Sess. 286, reprinted in 1980 U.S. Code Cong. & Admin. News 5230. Thus, it is clear that the objective intended by Congress is for applications to be processed according to the actual, on-the-ground location of the lands purportedly used and occupied, and to encourage correction of any description that does not conform. Appellants have not demonstrated that Judge Sweitzer's conclusion regarding the correctness of the current description is in error. Accordingly, we shall proceed on the basis that the last description entered properly reflects the intent of the applicant. The fact that the applicant had posted the land and was very familiar with the on-the-ground position of the bound-aries is persuasive as to the actual location of the allotment claim despite the discrepancy with the technical description.

[4] The initial issue presented for our review is whether Berry's use was substantial. Substantial use and occupancy cannot be defined in any more detail than in the regulations found at 43 CFR 2561.0-5(a). Appellants argue that Berry's two disputed statements regarding his visits to the parcel only prove that his use was intermittent. Appellants also contend that there is nothing notable to associate the applicant with this particular land, also demonstrating that his use was not substantial. In Angeline Galbraith, 97 IBLA 166, 94 I.D. 151 (1987), the Board held that the mere use of land for a period of a few days each year, absent the presence of physical improvements thereon, does not constitute substantially continuous possession or use exclusive of others and is properly categorized as "intermittent use." When confronted with the assertion that a new standard or rule was established in the Galbraith decision, the Board iterated in Angeline Galbraith (On Reconsideration), 105 IBLA 333 (1988), that use of

the land which does not alter its appearance, i.e., does not leave physical evidence of use, may be sufficient to establish entitlement provided the applicant demonstrates substantiality and exclusivity.

Moreover, corollary to the issue of substantial use in the instant situation is the question of whether applicant continued such use of the land claimed. Absent timely filing of an application, where a Native has completed the requisite five year use and then ceases to use and occupy the land and permits it to return to an unoccupied state, the right to an allotment of the land terminates regardless of the subjective intent of the Native. United States v. Flynn, 53 IBLA 208, 238, 88 I.D. 373, 389-90 (1981); State of Alaska, 85 IBLA 196, 204 (1985). While appellants contend Berry discontinued his use of the claim according to the two statements at issue, contestees argue otherwise.

Based on our review of the record, we agree with Judge Sweitzer that the evidence indicates that it was more likely than not that Berry used this land in a substantial manner. As evidenced by his opinion, Judge Sweitzer carefully considered testimony of the witnesses for Berry at the hearing, such as those statements that he did a substantial amount of necessary subsistence hunting on his allotment before and after his service in the Army as well as before and after his marriage to Judy Berry in 1956. There was no evidence offered that Berry did not use his allotment land as specified in the application and in a manner consistent with the statutory requirements. Berry stated in his application that "[t]he land that I have applied for is land that I have used on many a time" (Exh. US-2). Judy Berry testified about his declaration that the land he applied for was land that he used (Tr. 464). Others convincingly described Berry's comments about his allotment and uses of the land. He marked and measured this land several times, even selecting his cabin site, according to Judy Berry (Tr. 449, 451, 460). As physical improvements, Berry claimed a food cache, campsite, tent frame, and fire pit (Exhs. US-2 and US-16). David Berry, Jr., testified to the existence of the campsite, a game trail, and a trap site on the allotment (Tr. 272-75). None of this and similar testimony was rebutted by appellants. Judge Sweitzer noted the abundance of witnesses who testified that Berry openly asserted his use of this land throughout the 1960's and 1970's. All this was taken into account by Judge Sweitzer in his review

and led him to conclude that Berry's assertion that he was qualified to receive the lands described as his allotment was more convincing than appellants' challenge. There is nothing in the record to persuade us that Judge Sweitzer's conclusion was in error. Thus, we affirm his holding that it was more likely than not that Berry used the specific land at issue in a substantial manner and such use was not discontinued.

The other issue of concern is that of potential exclusivity. Contestees contend that this issue is not properly considered here because contestant did not present a prima facie case that the applicant did not establish exclusivity in his application. Taking into consideration that a prima facie showing may be premised on all the evidence presented, the issue which emerges after all the testimony was given concerning how the subject lands were used is whether those identified uses may be attributed to the applicant. 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. Angeline Galbraith, 97 IBLA at 169, 94 I.D. at 171. (This principle was not challenged on the Board's reconsideration of that decision.) In considering whether use and occupancy is potentially exclusive of others, we are directed to take into consideration, among other things, the Native customs and mode of living. Maxie Wassillie, 17 IBLA 416, 417 (1974). As the Board has explained:

[A]n Alaska Native following the traditional Native way even for part of the year, might reasonably use and occupy several tracts of public land comprising in the aggregate, hundreds or even thousands of acres * * *. Arguably, under the Department's liberal construction of "use and occupancy" he could establish his qualification to any of this land by alleging that it was known as "his" campsite, fishing ground, trapping area, etc., on a seasonal basis for at least 5 years. But under the law, he could not apply for all of it; he could only seek up to a maximum of 160 acres. Therefore, if he desired an allotment, he was obliged to apply for the particular acreage he most wanted. The fact that he regularly visited the remaining land in pursuit of his various subsistence activities cannot affect the legal status of that land, or make it unavailable to any other lawful applicant. [Emphasis added.]

Andrew Petla, 43 IBLA 186, 195-96 (1979); see also Kootznoowoo v. Heirs of Johnson, 109 IBLA 128, 135 (1989) (Native community use does not necessarily defeat potential exclusivity). Thus, at some point the applicant must establish that he provided notice to others of his intention to segregate a particular parcel of the land from community use in pursuit of establishing it as his own.

The presence of physical evidence of use found on the allotment parcel goes to the question of potential exclusivity. Galbraith (On Reconsideration), 105 IBLA at 335. Just as a visual sighting of a Native using a parcel of land would serve to apprise other individuals that the land was under occupancy, physical evidence of such use would be equally effective in alerting others to the existence of an outstanding claim to the land.

In this case, there is very little physical evidence to corroborate exclusivity. Although the known campsite and cornerposts are attributed to the applicant, appellants contend that there is nothing to indicate that others were excluded from using the land. However, Judge Sweitzer's determination of exclusivity is not at odds with the preponderance of the evidence. Several witnesses testified that the people of Haines knew of Berry's claim to the land and have respected this parcel as his for many years. They also testified that in keeping with the local concept of land ownership, they would also use the land but only with the approval of Berry. Moreover, one witness testified that, despite many overlapping claims in other areas, he knew of no Native claims conflicting with the subject allotment claim. Further, the testimony of Bronczyk, the first

BLM examiner, suggests that Berry was very familiar with the land and that he had attempted to mark it on several occasions. As exclusivity is difficult to prove, it likewise is much easier to disprove, usually by providing testimony or evidence of community or adverse use. Appellants did not provide such evidence but merely attack the corroborating testimony provided. As did Judge Sweitzer, we find the testimony regarding exclusivity to be persuasive. Thus, we agree with Judge Sweitzer's conclusion that the evidence proffered preponderated in the applicant's favor.

Judge Sweitzer was correct in stating that the evidence in the case is meager. However, considering the burden of proof imposed on the the appellants, *i.e.*, a preponderance of the evidence, we agree with Judge Sweitzer's conclusion that the evidence weighed in favor of the applicant. It appears that, more likely than not, the applicant substantially and exclusively used the lands in question in a manner to qualify him (and, thus, his heirs) for the Native allotment.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Will A. Irwin
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge