

Editor's Note: aff'd in part, rev'd in part, remanded to IBLA, sub nom., Heirs of Palakai Melgenak v. United States, Civ. No. A95-0439 CV (JKS) (D.Alaska May 5, 1997)

UNITED STATES

v.

PALAKIA MELGENAK

IBLA 86-32

Decided September 24, 1993

Cross-appeals from a decision of Administrative Law Judge E. Kendall Clarke approving Native allotment application AA-7604 in part and rejecting it in part.

Affirmed in part, reversed in part.

1. Alaska: Native Allotments

A Native allotment application was pending before the Department of the Interior on Dec. 18, 1971, if it was filed in any bureau, division, or agency of the Department on or before that date. Where the evidence shows that an application was delivered to the Bureau of Indian Affairs before that date, the application was timely.

2. Alaska: Native Allotments

An Alaskan Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of the land for a minimum period of 5 years. Such use and occupancy contemplates substantial actual possession or use of the land, at least potentially exclusive of others, and not merely intermittent use.

3. Alaska: Native Allotments

The right to a Native allotment vests only upon the completion of 5 years' use or occupancy of land and the filing of an application therefor. Absent the timely filing of an allotment application, where a Native, who has completed the requisite 5 years' use, ceases to use or occupy the land and permits the land to return to an unoccupied state, the right to an allotment of that land also terminates, regardless of the subjective intent of the Native.

APPEARANCES: John W. Burke III, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, San Francisco, California, for the National Park Service; Tred Eyerly, Esq., Anchorage, Alaska, for Trefon Angasan, Sr.; Thomas E. Meacham, Esq., Anchorage, Alaska, for Household-Alaska Properties, Inc.; J. L. McCarrey, III, Esq., Anchorage, Alaska, for Katmailand, Inc.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

These are cross-appeals from the decision of Administrative Law Judge E. Kendall Clarke that approved Palakia Melgenak's Native allotment application (AA-7604) in part and rejected it in part. ^{1/} Melgenak claimed approximately 120 acres of land in sec. 6, T. 19 S., R. 39 W., Seward Meridian, at the confluence of the Brooks River and Lake Naknek (known as Brooks Camp or Kittiwick) within Katmai National Park. Approximately half of the lands described in Melgenak's application lie north of the Brooks River, and the remaining half lie south of Brooks River. Judge Clarke concluded that "[a]lthough [Melgenak] failed to carry her burden of establishing substantial use and occupancy on the north portion of the lands applied for (as separated by the Brooks River), that burden has been met as to the land to the south of Brooks River" (Decision at 16). He also determined that "[t]he form and sufficiency of the application, particularly with respect to the date of filing, is found to meet the requirements of 43 CFR 2561.1(a) and relevant decisional law." *Id.*

The National Park Service (NPS) has appealed Judge Clarke's decision to the extent that he approved Melgenak's application for the lands south of the Brooks River, and Trefon Angasan, Sr., Melgenak's sole heir, has appealed Judge Clarke's decision insofar as he rejected her application for the lands north of the Brooks River.

Melgenak executed her allotment application on March 31, 1971, the Bureau of Indian Affairs (BIA) certified it on April 10, 1972, and BLM received it on April 13, 1972. She claimed actual residence on the land from 1877 to 1913, and use and occupancy for berrypicking and fishing at least 3 months a year in the fall from 1914 through 1971. She died on February 19, 1972. In 1973, the Alaska Legal Services Corporation (ALSC), on behalf of Angasan, requested a hearing to resolve factual disputes as to the application. A hearing was not promptly scheduled, so ALSC obtained affidavits from a number of elderly individuals familiar with Melgenak and the area of her requested allotment and submitted them to BLM in support of her application. BLM conducted a field examination on July 1, 1975, and in his report dated November 17, 1975, the examiner indicated that he could not conclude that Melgenak met the requirements of the Native Allotment Act. By memorandum dated January 21, 1977, BLM informed BIA of its conclusion that Melgenak had not met the use and occupancy requirements of the Native Allotment Act. BLM afforded BIA 60 days to submit additional

^{1/} Her application AA-7604 was 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 (1988)).

information in support of Melgenak's claim. BIA did not submit additional information, but ALSC filed an extensive letter making legal and factual arguments on behalf of Melgenak's heir. On March 7, 1983, the Alaska State Office, BLM, informed BIA that Melgenak's application "has been adjudicated under the Act of May 17, 1906 * * * and has met the use and occupancy requirements of that Act and the subsequent Department regulations." Katmailand, Inc., Wien Air Alaska, Inc., Household-Alaska Properties, Inc., and NPS appealed BLM's decision to the Board.

In Katmailand, Inc., 77 IBLA 347 (1983), we considered, inter alia, whether BLM had properly decided that Melgenak's application met the use and occupancy requirements of the Native Allotment Act, supra. In setting aside BLM's approval of Melgenak's application, we stated:

In the absence of any analysis of the facts supporting BLM's decision in the case file, and in view of the conflicting evidence in the file as to Palakia's use and occupancy of the land particularly since 1950 and the additional conflicting evidence presented by the parties on appeal, we have no alternative but to set aside BLM's decision and direct that contest proceedings pursuant to Pence v. Kleppe and the procedures established as a result of that decision be promptly initiated to determine Melgenak's entitlement to receive a patent.

77 IBLA at 353.

In that decision we addressed several "issues raised by the appellants that would preclude approval of the allotment application as a matter of law were they substantiated by the record." Id. One such issue was whether Melgenak's application was filed on or before December 18, 1971. Angasan and BLM presented copies of the BIA file copy of the application reflecting a date stamp of April 22, 1971. "Ordinarily," we said, "in the absence of any facts showing that the BIA date stamp is incorrect, we would find such date stamp sufficient evidence of timely filing, Alyeska Pipeline Co., 52 IBLA 222, 224 (1981), and would do so in this case except for one discrepancy." 77 IBLA at 354. Evidence in the record indicated that in accordance with BIA procedure, "[t]he original date-stamped application was forwarded to BLM and a thermofax copy kept for BIA files." Id., quoting Angasan Response, Exh. 3, at 2. However, the application in the BLM file failed to reflect the BIA date stamp, and the BIA file copy was not a copy of the same application as that in the BLM file. We stated: "While it appears likely that Melgenak did submit an allotment application to BIA before December 18, 1971, we direct that the parties address this discrepancy at the hearing held pursuant to the Government contest." 77 IBLA at 354.

On February 10, 1984, BLM filed a contest complaint on behalf of NPS. Judge Clarke conducted a hearing on September 6 and 7, 1984, in Anchorage, Alaska, on September 10, 11, and 12, 1984, at Naknek, Alaska, on September 13 and 14, 1984, at Brooks Camp Lodge, Katmai National Park, Alaska, and on September 17, 18, and 19, 1984, at Anchorage, Alaska. Judge Clarke issued the challenged decision on September 12, 1985.

Judge Clarke first disposed of a number of arguments which the appellants had raised before the Board in Katmailand, Inc., supra. He noted that in Katmailand, Inc., supra, the Board remanded the case for a hearing on three issues: (1) whether Melgenak's allotment application was submitted to BIA before December 18, 1971; (2) whether there is sufficient evidence of Melgenak's use and occupancy to justify approval of her application; and (3) whether approval of her application violates the limitation that an entry extend no more than 160 rods along the shore of any navigable river. Prior to commencement of the hearing, the parties joined in a request to bifurcate the hearing, postponing the third issue until after adjudication of the validity of the allotment application. Judge Clarke granted this request by order dated August 14, 1984, setting aside paragraph 6(d) of BLM's complaint until the other issues had been resolved. Accordingly, evidence presented during the hearing addressed only issues (1) and (2) set forth above.

On March 7, 1984, Angasan moved to strike paragraphs 6(b) and 6(c) of the contest complaint. Judge Clarke granted that motion to the following extent:

Some of the charges made in those paragraphs were addressed and dismissed by IBLA in Katmailand, Inc., et al., 77 IBLA at 347 (1983). Specifically, those charges concerning whether or not Melgenak had filed her application in the proper office as required by 43 CFR § 2561.1(a) (1982), whether the application showed *prima facie* entitlement to an allotment, technical matters relating to the form of the application, its certification by BIA, the forwarding of the application to BLM, and whether BLM or NPS should adjudicate the application were addressed and dismissed by the IBLA (77 IBLA at pp. 352-357). Insofar as those matters appeared in appellee's Motion To Strike, the motion was granted (1 Tr. 3-5). IBLA's ruling on those matters is the law of the case.

(Decision at 3).

Judge Clarke first addressed the question of whether Melgenak's application had been timely filed. Below we set forth his summary of the evidence and testimony concerning this issue:

Testimony was received from several witnesses describing the flurry of allotment applications received by BIA immediately prior to the repeal of the Native Allotment Act of 1906 by the Alaska Native Claims Settlement Act (ANCSA). According to Robert Sorenson, former BLM Chief, Branch of Lands and Minerals Operations, some 9,000 applications were received just prior to passage of [ANCSA]. These applications were not necessarily filed directly with BLM; BIA had enlisted the aid of VISTA, RURALCAP, and other individuals to assist Natives in filing applications before the December 18, 1971, deadline (1 Tr. 91-98).

Charles Bunch, BIA realty officer, testified that of the some 15,000 applications filed from 1906-1971, approximately half of those were filed in the last year. BIA was aware of the impending repeal of the Allotment Act, and thus undertook a drive to get applications. RURALCAP (Rural Alaska Community Action Program) was one agency responsible for assisting with the application process (3 Tr. 4-7). To file an application, an applicant would fill out the application to some degree (normally the legal description of the land would not be included), and a tracing of the land made from a 1:63,360 quadrangle map would be attached to the application. The applicant would then sign some blank applications before the whole package was forwarded to BIA. The reasons for signing blank applications were several: The original application was usually in handwritten form; the legal description was absent and sometimes BIA would make a typing mistake when putting the legal description on the application prior to forwarding it to BLM (3 Tr. 7-9).

Apparently the number of applications received by BIA overwhelmed the staffs of the local agencies involved. A task force from the western agency of BIA was formed in Sacramento. The applications would be sent from Alaska to Sacramento, where a legal description of the land would be worked up based on the tracing from the map. That description would be attached to the application which would then be returned to BIA in either Anchorage, Fairbanks or Juneau. The Anchorage agency alone sent approximately 4,000 applications to Sacramento. Once the applications were returned to BIA, the application would be typed by BIA, including the legal description. BIA would then verify that the applicant was a Native and that the corners had been posted prior to forwarding the completed application to BLM (3 Tr. 9-10).

Ted Angasan was the RURALCAP employee who assisted Melgenak in filling out her application. He also assisted approximately 1,500 other Natives in applying for allotments (3 Tr. 102). He received no instructions or training in filling out applications and legal descriptions other than to make a tracing of the land from a map and to send that in with the application (3 Tr. 104), and to pencil in the other required information identifying the applicant and evidencing occupancy (3 Tr. 106).

On March 31, 1971, Angasan interviewed Melgenak and acquired her mark on some eight blank applications which were witnessed by Trefon Angasan, Sr. and Annie Zimon. [Ted] Angasan was unsure whether the witnesses were present when Melgenak made her mark on the applications (3 Tr. 117-119, 125-126). After the applications were signed, Angasan made a trace map of the land claimed at Brooks River. Although Melgenak did not assist him in doing this (at 96 years old, she didn't see too well), Angasan himself had spent time at Brooks River and, in fact, claimed to have marked several of the corners at the direction of Melgenak in

the early 1960's (3 Tr. 119-121). Based on the interview and his personal knowledge, Angasan typed two applications for Melgenak (Ex. A; BLM Ex. 10). There are differences between the two applications, which Angasan attributes to the lack of xerox machines in South Naknek in 1971. He had to type them separately, and became tired while typing the second one (3 Tr. 108, 115).

The two typed applications, the trace map, and three blank, signed applications were sent to BIA (Ex. A; BLM Ex. 10; Ex. B; Ex. M-1 through M-3, respectively). Exhibits A and M-1 through M-3 bear a "received" stamp of BIA, dated April 22, 1971 (3 Tr. 11-14). BLM Exhibit 10 does not bear a BIA date stamp, yet it was certified by BIA on April 10, 1972, and forwarded to BLM. BLM received it on April 13, 1972 as evidenced by a date stamp on its face.

(Decision at 3-5).

Based upon this evidence, Judge Clarke ruled that the Melgenak application was timely filed. His reasoning is set forth below:

The record contains sufficient evidence to permit the court to conclude that Melgenak's application was filed with an agency of the Department prior to December 18, 1971, notwithstanding the fact that BLM Exhibit 10 is the only copy of the application which does not bear a date stamp prior to that date. BIA received applications from some 7,500 Natives from 1970 to 1971. Included with each application was one or more signed forms, as well as a trace map description of the land. Melgenak's typed application was accompanied by an additional typed duplicate (the two typed versions were not identical), at least three signed and witnessed blank forms, a trace map, and an affidavit of use and occupancy (Ex. C). Six of the seven documents were date stamped by BIA. Given the large numbers of applications and other documents which arrived at BIA each day, it is not unlikely that some of these may not have been stamped "received" when they arrived. It is also possible, as testified to by Mr. Bunch, that applications might not be stamped as they arrived, but would be stamped later (3 Tr. 95-96). Just why the application forwarded to BLM has no BIA date stamp is of little import. The applicant will not be penalized for acts or omissions of an agency subsequent to filing. This is an obstacle over which Melgenak had no control (Compare 43 CFR 1871.1-1 (1984)). There is sufficient evidence of timely filing found upon the faces of the other documents from Melgenak's application file. Those documents were all received by BIA on April 22, 1971, nearly eight months prior to the deadline date of December 18, 1971. Whatever the reason for the lack of a BIA date stamp on the certified application sent to BLM, the court

finds the application to have been timely filed and hence pending on December 18, 1971.

Id. at 5-6.

Judge Clarke then turned his attention to whether Melgenak had met the use and occupancy requirements of the Native Allotment Act of 1906. His detailed summary of the evidence and testimony adduced at the hearing is set forth below:

A. Prior to 1912

Professor Lydia Black testified from church records that contestee was born in 1877 or 1879 at the village of Old Savonoski, on the Savonoski River, some 22 miles from Brooks Camp. About 1897 she married her first husband, American Pete, who witnessed the eruption of Mt. Katmai in 1912. The eruption caused the residents of Old Savonoski to relocate their village at New Savonoski on the Naknek River between King Salmon and Naknek. Subsequently, her husband and their children died, probably from the flu.

Melgenak's allotment application indicates that she actually resided at Brooks Camp from birth until 1912. The court finds this assertion unlikely. If Melgenak was born in 1879, she was probably unable to use the land within the meaning of the Allotment Act for at least several years, due to infancy. Additionally, evidence was taken showing that contestee and her first husband ran a store at Old Savonoski until the eruption of Mt. Katmai in 1912 (Ex. 2 pp. 368-369). It is unlikely that she commuted from Brooks Camp to Old Savonoski to operate her store. It would be unjustified to draw an inference that contestee maintained year-round residency at Brooks Camp prior to 1912.

Dr. Donald Dumond, Professor of Anthropology at the University of Oregon, testified to use of the Brooks Camp area by Alaska Natives based on archaeological surveys conducted by Dumond begun in 1960. He stated that while conducting his studies "[w]e were not particularly interested in anything that occurred in very recent times." The main focus of Dumond's project was on the time before the arrival of the Europeans (7 Tr. 19, 28, 35-36). Based on his excavations and research of the area, Dumond concluded the Brooks Camp area had seen Native use from approximately 2500 B.C. to 1000 A.D., with a break from about 1000 B.C. to 400 B.C. or 300 B.C. (7 Tr. 33).

Dumond stated that from 1800 until 1912 there was a gap in Native use of the area he surveyed (7 Tr. 39). The court has difficulty believing Dumond's testimony in this area for several reasons. First, Dumond's group was not concerned with recent times.

Second, according to Dumond, a lot of the students who worked for him were "allergic" to anything that looked like glass or had any European character and would tend to stay away from those sites (7 Tr. 35). Naturally, this meant his workers avoided sites bearing evidence of use from after 1800. Third, there are documented accounts of Native activity at Brooks Camp during the period of "non-use" claimed by Dumond. Dumond himself noted the 1880 census of Alaska. Ivan Petroff's report indicates that with all likelihood a group of Natives fished below the waterfall on Brooks River (7 Tr. 46-47; Ex. 2 p. 266). The court fully believes that the Brooks Camp area was used for fishing purposes up to the eruption of Katmai volcano in 1912, notwithstanding Dumond's testimony to the contrary. There was, of course, no direct testimony to the effect that contestee used Brooks Camp for fishing prior to 1912, simply because none of the witnesses were old enough to so testify.

It is not unlikely, however, that contestee did fish at Brooks Camp at least seasonally, prior to the Katmai eruption. Trefon Angasan, Sr. testified that he was born in 1910 at Old Savonoski, and that he went to Brooks Camp with contestee. Although he referred to the cabin where he stayed as Nick and Palakia's, he then stated that the cabin was Pete's, and that it was the same cabin (4 Tr. 5).

In their Offer of Proof, NPS attacks the credibility of Angasan's testimony through use of his allotment application, by attempting to persuade the court that Angasan therein stated he was born on his own allotment, and not at Old Savonoski as he testified. Yet even the application shows that Angasan was born "At the easterly end of Naknek Lake." (Ex. 162). His allotment is at the westerly end of Naknek Lake (actually on the Naknek River itself). NPS's directional confusion does not rebut Angasan's testimony. Old Savonoski is at the easterly end of Naknek Lake (Iliuk Arm).

Although Angasan's testimony cannot conclusively establish substantially continuous use and occupancy of the land prior to 1912 by contestee, it may be inferred that she and her husband Pete had a cabin at Brooks Camp prior to the eruption. Pete was chief (or toyon) at Old Savonoski (7 Tr. 105; Ex. 2 p. 369). Pete died in 1918 (Ex. J). After the eruption, the land was unusable for eight to ten years (7 Tr. 49-53). If Angasan stayed at Pete's cabin, he must have done so prior to 1912. It is quite possible that contestee and Pete built and used the cabin from the time they were married in 1897.

B. 1912-1931

Testimony from Dr. Dumond indicated that for eight to ten years subsequent to the eruption of Mt. Katmai, the Brooks

Camp/Old Savonoski area was uninhabitable (7 Tr. 51-52). Uninhabitable, however, is not synonymous with unusable. Even assuming contestee did not fish at Brooks Camp prior to 1912, there was some evidence that contestee's first husband, American Pete, returned to that area to hunt before 1918 (Ex. 2 p. 369). It is quite likely that seasonal fishing had commenced at Brooks Camp by that time.

After American Pete died in 1918, contestee married Nick Melgenak, also known as "One-arm Nick." Nick was the new chief at New Savonoski. They were married in 1919 (Ex. J). Trefon Angasan, Sr. was born in 1910. He went to live with Pete and contestee after his mother died. He also lived with contestee and Nick after Pete died. Angasan went to Brooks Camp with both Nick and Pete. He would stay with Nick and contestee in the cabin at Brooks Camp. At Brooks Camp, they would fish for Red Salmon and pick various types of berries. When they traveled in the fall they would go by kayak and boat (4 Tr. 3-8). On winter trips, they would use dog sleds. Winter activities consisted mainly of trapping. They would stay in the cabin in winter (4 Tr. 9-10).

Mike McCarlo testified in his Native language through a translator. Born in 1911, McCarlo lived at Old Savonoski until 1912, when that village relocated to New Savonoski. He remembers going to Brooks River with Nick and contestee when he was a young boy (about three feet tall) (5 Tr. 5-12). He stayed in a tent not far from contestee's cabin, which had been rebuilt by Nick after it had caved in (5 Tr. 12-13, 43). They would go up in September and stay until October to catch Red Fish and to dry them on racks (5 Tr. 18). The cabin was rebuilt by Nick before Vera Angasan was born in 1924 (5 Tr. 44). This testimony is consistent with the estimate of Dr. Dumond, who felt the cabin was built after 1912 (7 Tr. 70-73), but not earlier than the 1920's (7 Tr. 73-74). The testimony and the inferences allowed to be drawn therefrom lead the court to conclude that contestee was on the land known as Kittiwick well before the 1931 withdrawal and was clearly using and occupying it with her husband Nick. Without a doubt, their cabin there, plus their fishing and hunting activities demonstrate use and occupancy of the land for at least seven years prior to 1931. A contrary conclusion could not be justifiably be reached.

Because the court finds contestee to have met the requirement of use and occupancy prior to 1931, the withdrawal of Brooks Camp for park purposes in that year does not preclude the granting of an allotment to contestee (See 43 CFR 2561.0-8(c)).

C. 1931-1953

Contestant does not seriously contend that contestee did not use the land from 1931-1953. NPS recognizes that the evidence

supports her use of the area after 1931 (NPS Brief, pp. 51, 52, 54). The entire record supports the conclusion that contestee made extensive use of the land at Brooks Camp during this period of time * * *.

D. 1953-1971

Contestant asserts that contestee did not use or occupy Kittiwick in a substantially continuous manner after the death of her second husband in 1953, and that the use activities from 1953 on were those of the Angasans, not contestee (NPS Brief, p. 57). Several factors militate against contestant's assertion.

The first of those factors is the testimony of witnesses who place contestee on the land up until the early 1960's. Katherine Groat, Ted Angasan, Vera Angasan and Trefon Angasan, Jr., all recall contestee's last physical presence at Kittiwick (4 Tr. 100; 3 Tr. 119-121; 6 Tr. 87-91; 4 Tr. 197). On this trip, contestee visited her cabin and indicated to Ted Angasan that she wanted trees marked because pretty soon white men were going to come and take the land. Contestee wanted her land marked. There was other testimony which placed contestee on the land between 1953 and approximately 1963 (4 Tr. 95-102; 6 Tr. 35-38; 8 Tr. 159; 5 Tr. 72). The court is convinced that the contestee did not return to the Brooks Camp area after 1963.

The second factor addresses use of the Kittiwick fishing facility by the Angasans. NPS cites State of Alaska (1985) 85 IBLA 196, 204, as authority for the proposition that the intervening use by the Angasans renders the application invalid. Essentially, NPS argues that contestee abandoned the land. The evidence adduced does not support NPS's conclusion. United States v. Flynn (1981) 53 IBLA 208, dealt with abandonment of an allotment, the application for which was subsequently rejected in favor of approval of a trade and manufacturing site. While factually distinguishable from the present case, Flynn points out important components of abandonment which are not present here. That case dealt with a nine year period of non-use prior to the application being filed by the Native, Orook. In that intervening period, however, Flynn filed an application for a trade and manufacturing site. This court found that Flynn had no knowledge of Orook's prior use or occupancy of the claim. On appeal, IBLA held that any cessation of use or occupancy must be for such a period of time sufficient to remove any evidence of a present use, occupancy or claim to the land (Flynn, supra, 53 IBLA 208, 238).

Flynn examined the facts of Herbert H. Hilscher (1960) 67 I.D. 410, which also involved conflicting applications. The Solicitor in Hilscher found that a tract of land not used or occupied for 15 years would not support approval of an allotment application (Id., at p. 416).

In the instant case the court believes that, despite assertion to the contrary, NPS and the concessionaires had actual knowledge of Native seasonal fishing activities at the mouth of Brooks River. The exhibits presented by NPS contain color photographs depicting hundreds of fish hanging on racks, Natives splitting fish, and other activities dealing with the type of uses described by contestee's witnesses.

Also in the present case there are no conflicting claims to the land by private entrymen. The absence of conflicting claims is consistent with testimony received to the effect that other Natives who fished at Kittiwick believed the land to belong to contestee (4 Tr. 77; 5 Tr. 23; 9 Tr. 130).

An additional factor relating to abandonment deals with use and occupancy by the heir of contestee and his family. It has been repeatedly held that an applicant may not tack the use of his ancestors to satisfy the use and occupancy requirement. However, no case discovered has ever held that use by heirs of an applicant may support a claim of abandonment or non-use. NPS asserts that "[s]ince 1953 use and occupancy is based upon the Angasan's activities at the area and not the contestee's." (NPS Brief, p. 57).

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 (43 CFR 2561.0-5(a)). It was well established during the hearings that much of the activity at Kittiwick by contestee's heirs was for the livelihood and well-being of contestee. Although contestee was unable to go to her land, she sent her heir and family to bring her fish (4 Tr. 101, 200). She also had them bring her other objects from the land, such as water, dirt, and ashes, which she apparently believed would prolong her life (6 Tr. 80-81; 4 Tr. 18-19, 200-201). Clearly, the land continued to be used by contestee through her heir, on her behalf, and for her livelihood and well-being. It would be contrary to Congress' intent as expressed through 43 CFR Subpart 2561 to hold this use on contestee's behalf as abandonment such as would terminate her right to an allotment.

Contestants make much of the fact that the structures evidencing occupancy had fallen into a state of disrepair. NPS witnesses and exhibits demonstrated that contestee's cabin had deteriorated, and her fish racks and tent frames were no longer usable. Yet the court is required to view use and occupancy in the light of the seasonability of use customary to the Native way of life. (Allotment of Land to Alaska Natives (1964) 71 I.D. 340). It depends largely upon the mode of living of the Native, Native customs and the climate and character of the land. (John Nanalook (1974) 17 IBLA 353).

It was shown during the hearings that contestee used the land later and later during the year as a result of encroachment by sport fishermen and NPS activity at Brooks Camp. Also, due to the advent of the snowmobile in 1960, Native reliance on sled dogs diminished greatly. Consequently, the need for great numbers of fish for dog food dwindled (9 Tr. 167-168). Thus, with a change in mode of living of contestee went a change in the use pattern at Kittiwick. It was no longer necessary to put up thousands of salmon per year. Also, the useful time spent at the river was diminished due to the lateness of year of the trips. Instead of drying the fish at Kittiwick, they were taken home to dry. Thus, use of the fish racks was no longer necessary. It was also no longer necessary to keep up a cabin. Tent frames were set up on boats, rather than on shore. [Footnote omitted.]

The pattern of use and occupancy by contestee is entirely consistent with the guidelines set out in the above cited authorities. The land was used each year according to the needs and customs of contestee and her family. The court is unequivocally convinced and satisfied that the requisite use and occupancy requirement of 43 CFR 2561.0-5(a) and the authorities thereunder have been met. The great weight of the evidence adduced supports this finding.

(Decision at 6-11).

Having decided that Melgenak had met the use and occupancy requirements of 43 CFR 2561.0-5(a), Judge Clarke addressed the question, "To what land is contestee entitled?" (Decision at 15). In ruling that Melgenak met the use and occupancy requirement as to the lands claimed south of Brooks River, but not those north of Brooks River, he provided the following analysis:

[T]he majority of the testimony and exhibits showed contestee's use and occupancy to be contained on the south side of the river, opposite and separate from that area now occupied by NPS facilities and the current concessionaire. While the court is thoroughly convinced that contestee made extensive use of the south side, there was very little evidence of substantially continuous use and occupancy on the north shore of Brooks River, on what has been referred to as Parcel A in the allotment application file.

This court is not required to grant an allotment as to those lands to which substantial use and occupancy is not established by clear, credible, and convincing evidence. (Andrew Petla (1979) 43 IBLA 186). Although the record provides some evidence that the north portion of the lands applied for were [sic] used by contestee for berry picking, it was unclear to what extent or for what period of time those activities took place. In short, the court is unconvinced that contestee is entitled to any land north of Brooks River. To the extent the application describes land on the north side of the river, it is therefore rejected.

Insofar as the application describes lands on the south side of Brooks River, the allotment is approved. There is no doubt that contestee spent many years using that land to support her lifestyle. The improvements established by contestee were all located on that parcel, and the vast majority of her activities took place there.

(Decision at 15).

As noted, Judge Clarke's decision resulted in cross-appeals. In its statement of reasons (SOR), NPS contends that the allotment application "was never properly completed by Contestee, was not properly witnessed, and contained extensive, erroneous information" (NPS SOR at 6), and that Melgenak did not meet the use and occupancy requirements for the parcel of land south of Brooks River. However, NPS argues that Judge Clarke properly denied the application insofar as it described lands north of Brooks River. In his SOR, Angasan counters that Judge Clarke correctly rejected NPS' challenge to the form and content of the application, and that he correctly granted the application for lands south of Brooks River. However, in his SOR, Angasan contends that Judge Clarke incorrectly denied the application for lands north of Brooks River and that the testimony of several witnesses confirms that Melgenak made extensive use of both sides of the river. We will first evaluate Judge Clarke's rulings as to the sufficiency of the application, then turn to whether Melgenak satisfied the use and occupancy requirements for the claimed lands.

NPS states that its objections to Judge Clarke's decision are "identical to those presented in its Post-Hearing Brief, Findings and Conclusions" (NPS SOR at 6). In its Post-Hearing Brief, NPS maintained that "this application was never properly completed by Contestee and presented to the Department before the Contestee died as required by the regulations and the decisions of the Board of Land Appeals" (NPS' Post-Hearing Brief at 40). NPS complained that Melgenak was in her nineties when she signed eight blank and undated applications with an "x," two of which were later filled out by Theodore Angasan and sent to BIA. Id. at 40-41. Moreover, NPS asserts that "there has been no certification by BIA as required by 43 CFR 2561.1(d) that the Contestee has occupied and posted the lands as stated in the Application," and that this failure "renders the Application inchoate" (NPS Post-Hearing Brief at 45).

Before the Board, NPS contends that Judge Clarke "failed to recognize and justify the gross deficiencies in the application" (SOR at 6). Of particular concern to NPS is his "failure to account for the factual discrepancies between the information which was stated in the Application and the testimony which was adduced at the hearing." Id. Citing Nora Sanford, 43 IBLA 74, 80 (1979), NPS argues that "testimony throughout this entire proceeding demonstrated that the land claimed in this Application was an area of community use, thereby leading to the conclusion that the certifications which supported this part of the Application were false." Id. at 6-7.

Judge Clarke properly granted Angasan's motion to strike paragraphs 6(b) and 6(c) of the contest complaint to the extent they raised issues relating to the form of Palakia's application and the process through which it was completed and filed with BIA. In Katmailand, Inc., supra, the Board rejected such challenges to the application, stating that "BIA certification was not a requirement that the applicant could have fulfilled or for which the applicant should be held responsible;" that "[t]he application shows a prima facie entitlement to an allotment," with "[t]he sufficiency of her use and occupancy [being] a question to be resolved generally in the adjudication of the application and in this case at the hearing which may be pursued by her heir;" and that "[t]he alleged discrepancies in the factual statements [included in the application] * * * are not sufficient to support rejection of the application as not meeting the requirements of the Act." 77 IBLA at 356-57. Thus, we see no reason to further address arguments relating to the process through which Melgenak's application was completed and filed with BIA.

[1] In accordance with our directive in Katmailand, Inc., supra, Judge Clarke addressed whether Melgenak's application had been timely filed with the Department before December 18, 1971. His detailed summary of the evidence concerning the process through which Melgenak, as well as thousands of other Native allotment applicants, filed her application, is recounted above. Of particular concern was the fact that while the BIA file copy of the application bears a date stamp of April 22, 1971, the BLM file copy has no BIA date stamp. Upon reviewing the record, we agree with Judge Clarke that "[t]here is sufficient evidence of timely filing found upon the faces of the other documents from Melgenak's application file," and that "[t]hose documents were all received by BIA on April 22, 1971, nearly eight months prior to the deadline date of December 18, 1971" (Decision at 5-6). The Board has repeatedly held that filing with BIA on or before December 18, 1971, satisfies the requirement that an allotment application be pending before the Department on that date. E.g., Katmailand, Inc., supra at 354; Nora L. Sanford (On Reconsideration), 63 IBLA 335 (1982).

NPS advances several arguments as to why Judge Clarke's decision approving Melgenak's application for lands south of Brooks River should be reversed. Two of those arguments are of primary concern in considering whether Angasan, as Melgenak's heir, is entitled to an allotment under the Native Allotment Act and implementing regulations.

First, NPS claims that Judge Clarke erroneously determined that Melgenak initiated use and occupancy of the claimed lands before April 24, 1931, when the area around the mouth of Brooks River was made part of Katmai National Monument to protect "features of historical and scientific interest and for the protection of the brown bear, moose, and other wild animals." 47 Stat. 2453. NPS asserts that Judge Clarke "gives unprecedented credence to Trefon Angasan, Sr.'s and Mike McCarlo's testimony to support Contestee's use and occupancy of the area before this date," arguing that their testimony was too "flawed and unreliable to support substantial and continuous use and occupancy by the Contestee" (SOR at 9-10).

In further support of the argument that Melgenak failed to use and occupy the claimed lands prior to its withdrawal in 1931, NPS asserts that the "cabin which Contestee allegedly used and occupied since 1890 was built in the 1930's." Id. at 10-11. According to NPS, "Contestee's witnesses could not consistently or accurately locate or identify the '1890 cabin' which she claimed in her Application and allegedly used continuously since 1890." Id. NPS argues that its "testimony clearly demonstrated that the cabins which were identified were built in the 1930's and not in 1890." Id. After the hearing before Judge Clarke, NPS "ran a scientific study on one of the cabins which was identified by various witnesses for Contestee as the Contestee's '1890 cabin,'" which "demonstrates that the cabin which was identified and photographed by Vera Angasan (and others) was built after the area was closed to entry in April of 1931." Id. NPS submitted the results of this study to the Board as Exhibit AA, entitled "Age Determination of a Brooks Camp Cabin Ruin, Katmai National Park and Preserve." In NPS' view, "[w]hile this new evidence would necessitate a new hearing, the NPS submits that it is merely confirmatory evidence which supports its earlier contentions that the Contestee did not use the area before it was closed in 1931." Id. at 11-12.

Second, NPS maintains that Judge Clarke's "principal error in fact and in law is [his] holding that Contestee used and occupied the subject area substantially and continuously from the time of her husband's death in 1953 until she allegedly completed her Application in 1971." Id. at 12. NPS' primary complaint is that Judge Clarke "appears to have completely discounted all the testimony of the NPS's witnesses and given dispositive weight to the vague and ambiguous testimony of members of the Angasan family all of whom have a vested interest in the outcome of this case." Id. at 13. NPS concludes that Melgenak's one visit to the claimed lands after 1953, assuming arguendo that this visit took place, "falls short of intermittent use" and "cannot be considered to be legally sufficient to satisfy the statutory and regulatory requirements of the Allotment Act which requires 'substantial actual possession and use of the land.'" Id. at 13-14.

[2] We will first consider Judge Clarke's ruling that Melgenak initiated use and occupancy of the claimed lands prior to 1931, when the Brooks Camp area was withdrawn for park purposes. The Native Allotment Act of 1906, supra, 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 resides in Alaska and is the head of a family or is 21 years old. 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). The term "substantially continuous use and occupancy" has been defined by the Department to mean

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).

As indicated in his summary of the evidence, set forth above, Judge Clarke found convincing the testimony of Trefon Angasan, Sr., and Mike McCarlo, two individuals who were old enough to witness events taking place prior to 1931. Upon reviewing the record, we conclude that NPS has failed to substantiate its claim that Judge Clarke gives "unprecedented credence" to their testimony. As to NPS' complaint that Vera Angasan, wife of Trefon Angasan, Sr., acted as translator for Mike McCarlo at the hearing, and that his testimony was "filtered through" her, SOR at 9, we note that at the hearing Judge Clarke pointed out that NPS had an opportunity to obtain a translator of its own choosing to assist it during the hearing (5 Tr. 3).

Much of the dispute as to whether Melgenak's use and occupancy of the land prior to the 1931 withdrawal meets the requirements of the Native Allotment Act, supra, centers upon the "1890 cabin" (Angasan's Exhibit K), which, according to NPS' Exhibit AA, could not have been built until after 1931. In his answer, Angasan maintains that while the application refers to a cabin built in 1890, "[t]here was absolutely no testimony introduced at the hearing regarding a cabin built in 1890" (Answer at 10). Moreover, Angasan maintains that "of crucial importance is testimony given by Mike McCarlo at the hearing which confirmed that Melgenak had a cabin on her land long before 1931." Id. Angasan also filed a motion to strike Exhibit AA, contending that "NPS was given every opportunity during the hearing to present testimony and exhibits regarding the cabin discussed in Exhibit AA," and that "[i]t should not be allowed to introduce yet another exhibit on this cabin" (Motion to Strike Exhibit AA at 2).

By order dated May 11, 1988, we noted that "[a] preliminary review of the record makes it apparent that Exhibit AA and testimony concerning its contents would be important to proper consideration of the issues raised in this appeal." We referred to the Hearings Division for a hearing "the issue of when the cabin described in Exhibit AA was constructed," and requested that the Administrative Law Judge assigned to conduct the hearing "issue findings of fact on this issue and submit them to the Board." Administrative Law Judge Harvey C. Sweitzer presided over the hearing on August 30, 1989, and he issued findings of fact on January 4, 1990, noting that in his post-hearing brief, counsel for Angasan concedes that the cabin described in Exhibit AA 2/ was constructed sometime after mid-August 1931, and that a second cabin 3/ was constructed no earlier than the summer of 1936. Judge Sweitzer concluded that the evidence adduced at the hearing supported those findings (Findings of Fact at 2).

2/ This cabin is depicted in the photograph introduced as Exhibit K by Angasan at the hearing before Judge Clarke (see 6 Tr. 87-104), is discussed in NPS' Exh. AA to its SOR, and is identified as BC-1 on Exhibit 89-3 at the Aug. 30, 1989, hearing before Judge Sweitzer.

3/ This cabin was identified as BC-2 on Exh. 89-3 at the Aug. 30, 1989, hearing before Judge Sweitzer.

However, the fact that neither of the cabins addressed at the hearing before Judge Sweitzer on August 30, 1989, was constructed prior to 1931 does not negate Melgenak's claim to a Native allotment. We find merit in Angasan's argument that "the date on which a particular cabin was constructed does not prove when use and occupancy began" (Answer at 10-11). What becomes clear from reviewing the evidence is that Melgenak used more than one cabin. As Angasan notes, "[t]he NPS' own exhibit depicts a cabin where Melgenak lived at the Brooks river in 1940. Exhibit 1, p. 15" (Answer at 11). Mary Jane Nielson was shown two different locations for Melgenak's cabins (8 Tr. 188), and Dr. Dumond stated that it was common for families in the area to have more than one cabin (7 Tr. 88). Judge Clarke noted that Mike McCarlo, who was born in 1911, stayed as a young boy in a tent not far from Melgenak's cabin, which had been rebuilt by Nick after it had caved in (Decision at 8, citing 5 Tr. 12-13, 43). The cabin was rebuilt by Nick before Vera Angasan was born in 1924 (5 Tr. 44).

The fact that the cabin discussed in Exhibit AA might not be the same cabin remembered and described by Mike McCarlo does not negate Melgenak's Native allotment claim. Rather, we conclude that the record supports Judge Clarke's ruling that "contestee was on the land known as Kittiwick well before the 1931 withdrawal and was clearly using and occupying it with her husband Nick," and that "their cabin there, plus their fishing and hunting activities demonstrate use and occupancy of the land for at least seven years prior to 1931" (Decision at 8).

As to Melgenak's use and occupancy of the land from 1931 to 1953, Judge Clarke observed: "Contestant does not seriously contend that contestee did not use the land from 1931 to 1953. NPS recognizes that the evidence supports her use of the area after 1931 (NPS Brief, pp. 51, 52, 54)" (Decision at 8-9). We agree that "[t]he entire record supports the conclusion that contestee made extensive use of the land at Brooks Camp during this period of time." *Id.*

[3] However, the nature of Melgenak's use and occupancy of the lands claimed in her application from 1953 through the date of her application on April 22, 1971, raises a more troublesome question. NPS contends that Judge Clarke's "principal error in fact and in law is [his] holding that Contestee used and occupied the subject area substantially and continuously from the time of her husband's death in 1953 until she allegedly completed her application in 1971" (NPS SOR at 12). According to NPS, Angasan's witnesses "vaguely and ambiguously identified only one 'visit' to the area for a short period of time," and that "[t]his 'visit' does not even rise to the level of 'intermittent use.'" *Id.* at 12-13. NPS argued before Judge Clarke that "[h]er use and occupancy was not 'notorious, exclusive and continuous, and of such a nature as to leave visible evidence thereof so as to put strangers upon notice that the land in use is in the use or occupancy of another, and the extent thereof must be reasonably apparent'" (NPS Post-Hearing Brief at 57, quoting *U.S. v. 10.95 Acres of Land in Juneau*, 75 F. Supp. 841, 844 (D. Alaska 1948)). NPS maintained before

Judge Clarke, and again before the Board, that Melgenak's right to an allotment terminated in accordance with the following rule:

The Native Allotment Act was not intended to convey to Natives lands which they had not used, occupied, or needed for many years and one who abandoned the land is disqualified from entitlement to an allotment of the land. Evelyn Alexander, 45 IBLA 28, 37 (1980). Absent timely filing of an application, where a Native has completed the requisite 5-year use and then ceases to use and occupy that land, but 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, supra at 204.

In United States v. Flynn, supra, the Board reviewed a decision by Judge Clarke rejecting the Native allotment application of Henry Orock to the extent that it conflicted with the trade and manufacturing site application of Donald E. Flynn and approving Flynn's application. The Board ruled in Flynn that Judge Clarke erred in finding that Orock had not established a continuous 5-year period of use and occupancy, noting that the Board "has never ruled that all 5 years of the use and occupancy contemplated by the regulations must be consecutive," (emphasis in original) and finding that "there was more than sufficient testimony to establish that 5 years' consecutive use had, in fact, occurred." 53 IBLA at 223, 88 I.D. at 381. However, the Board rejected the parties' "assumption that upon completion of 5 years' use and occupancy a preference right would vest in the Native occupant." 53 IBLA at 224, 88 I.D. at 382. The Board engaged in a detailed analysis of the history of the Native Allotment Act and Departmental proceedings in answering the "question of what period of nonuse is sufficient to render nugatory prior qualifying use." 53 IBLA at 224, 88 I.D. at 382.

The Board observed that Judge Clarke was "clearly correct in finding that there was no 'abandonment' of [Orock's] claim within the context of Federal law," which "requires not only a relinquishment of occupancy or a failure to proceed with a claim, but also an intent to abandon." 53 IBLA at 235, 88 I.D. at 388. The Board then stated: "The problem, however, is that the concept of 'abandonment' is simply not applicable to the facts of this case." Id. Rather, "[w]hat is involved herein is not an abandonment of a claim, but the cessation of use and occupancy." Id. The Board set forth the following principles to be considered in determining whether subsequent nonuse of lands renders nugatory a Native's qualifying use and occupancy:

At the time Orock ceased returning to his cabin he had no "claim" to the land since he had not filed an application for an allotment. When an application was filed in 1969, the evidence clearly indicates Orock had not been using the land for at least 9 years. Until 1969, therefore, there was simply no "claim" which Orock

could abandon. In contradistinction, had Orock filed his application in 1959, having at that time completed 5 years' use or occupancy, and then removed himself, for whatever reason, from the land, the question of "abandonment" would properly be raised, and proof of his subjective intent to abandon would be prerequisite to nullifying his claim. Moreover, had Orock filed his application in 1959, or at any time prior to Flynn's settlement, that would have segregated the land in his favor, pending adjudication. 43 CFR 2561.1(e); Evelyn Alexander, 45 IBLA 28, 35 (1980). Absent an application, however, removal from land once occupied does not implicate legal concepts of "abandonment."

* * * * *

We hold, therefore, that absent the filing of an application for allotment, cessation of use or occupancy for a period of time sufficient to remove any evidence of a present use, occupancy or claim to the land, terminated all protected rights under both the allotment and permissive occupancy statutes and restored the land to its original status of vacant and unappropriated land, regardless of the existence of any "intent" to permanently abandon such use or occupancy. Such prior use or occupancy does not serve as a bar for the initiation of rights in the land by other individuals. [Footnote omitted; emphasis added.]

53 IBLA at 235, 238, 88 I.D. at 388-90.

Applying Flynn to the facts of the instant case, the evidence suggests that Melgenak's use of the land after her husband Nick's death in 1953 was quite limited. Judge Clarke summarized the evidence concerning her last trip to Kittiwick, which took place in the early 1960's (4 Tr. 100; 3 Tr. 119-21; 6 Tr. 87-91). She would have been in her eighties during this trip, and Ted Angasan "carried her around" (3 Tr. 119; 4 Tr. 100). Angasan "remember[ed] her distinctly saying pretty soon the white men are going to come and take this land so I want you to go mark some trees on the lake there" (3 Tr. 119). Judge Clarke was convinced that Melgenak "did not return to the Brooks Camp area after 1963" (Decision at 9).

Judge Clarke observed that in Flynn, during the 9 years when Orock did not use or occupy his Native claim, Flynn filed an application for a trade and manufacturing site, but in this case "there are no conflicting claims to the land by private entrymen." Id. at 10.

Judge Clarke quoted NPS' argument that "[s]ince 1953 use and occupancy is based upon the Angasan's activities at the area and not the Contestee's." (NPS Post-hearing Brief, Findings and Conclusions at 57). He responded:

An additional factor relating to abandonment deals with use and occupancy by the heir of contestee and his family. It has been repeatedly held that an applicant may not tack the use of his ancestors to satisfy the use and occupancy requirement. However, no case discovered has ever held that use by heirs of an applicant

may support a claim of abandonment or non-use. * * * It was well established during the hearings that much of the activity at Kittiwick by contestee's heirs was for the livelihood and well-being of contestee. Although contestee was unable to go to her land, she sent her heir and family to bring her fish (4 Tr. 101, 200). She also had them bring other objects from the land, such as water, dirt, and ashes, which she apparently believed would prolong her life (6 Tr. 80-81; 4 Tr. 18-19, 200-201). Clearly the land continued to be used by contestee through her heir, on her behalf, and for her livelihood and well-being.

(Decision at 10).

We observed in Katmailand, Inc., supra at 355, that "the Native applicant, personally, must meet all of the requirements of the Native Allotment Act and that an inheritable property right in an allotment is created only if an applicant fully complies with all of those requirements before his or her death." The question is not whether Melganek met the use and occupancy requirements -- we agree with Judge Clarke that she did--or whether she intended to abandon the lands she had used. Rather, as in Flynn, the issue is whether Melganek's nonuse rendered nugatory her prior use and occupancy. We conclude that it did. The filing of a conflicting application by a private entryman would be an indication in determining whether an applicant's nonuse terminated any rights to the land he or she had acquired through her prior qualifying use, but only one factor. Even though no such a conflicting application was filed in this case, there are other important factual similarities between Oroock's and Melganek's circumstances. When Oroock filed his application in 1969, he had not used the land for at least 9 years, and his cabin had disintegrated. When Melganek filed her application in 1971, she had not visited her land for at least 8 years and "NPS witnesses and exhibits demonstrated that contestee's cabin had deteriorated, and her fish racks and tent frames were no longer usable" (Decision at 11). In fact, the two cabins which were the subject of Judge Sweitzer's January 5, 1990, "Findings of Fact" appear to have collapsed. See Exhs. 89-1 and 89-3.

We think Judge Clarke's statements that "no case discovered has ever held that use by heirs of an applicant may support a claim of abandonment or non-use" and that "the land continued to be used by contestee through her heir" (Decision at 10) expressed his opinion that an heir or other agent of an applicant for a Native allotment can occupy and use the land applied for on the applicant's behalf to prevent the loss of the claim through the applicant's non-use. We need not reach the issue of whether the use of the lands by her heirs could be attributed to Melganek, however, because, as noted, the use and occupancy contemplated under the Native Allotment Act must be "notorious, exclusive and continuous, and of such a nature as to leave visible evidence thereof so as to put strangers upon notice that the land is in the use or occupancy of another, and the apparent extent thereof must be reasonably apparent." United States v. 10.95 Acres of Land in Juneau, supra at 844. The uses Melganek's heir and his family made of the lands on her behalf do not meet these requirements and would not be qualifying uses even if Melganek had made them personally. After Melganek could no longer visit the lands in the early 1960's she asked her heir and

his family to "bring her a little bit of water from the lake in a bottle" (4 Tr. 18) and "dirt from the area because it was her belief and a native belief, at that time, that you had to keep the soil from the area to prolong their life" (4 Tr. 18-19, 200-01). She also asked them to bring her roots and herbs and fish (4 Tr. 101, 200-01). They gathered the mud they took back to her from "[a]nywhere there was mud[,] [n]o particular area" (6 Tr. 80- 81). Even assuming these uses took place on the lands she claimed, we believe these uses are neither substantial nor potentially exclusive. See Angeline Galbraith (On Reconsideration), 105 IBLA 333, 338-39 (1988); United States v. Estabrook, 94 IBLA 38, 52-54 (1986).

Under Flynn, we conclude that Melgenak's cessation of use and occupancy, beginning about 1963, nullified any rights to the land she acquired by prior use and occupancy. We reverse Judge Clarke's decision to the extent he approved Melgenak's Native allotment application for the lands south of Brooks River.

Based on our review of the evidence in the record, we affirm Judge Clarke's decision to the extent he rejected Melgenak's application for lands north of Brooks River.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we reverse Judge Clarke's decision in part and affirm it in part.

Will A. Irwin
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge