

UNITED STATES
v.
VIOLET N. MACK AND
HEIR OF CHARLIE BLATCHFORD, JR.

IBLA 99-350

Decided May 20, 2003

Appeals from a decision of Administrative Law Judge Harvey C. Sweitzer rejecting Native allotment applications. AA-8149-A & AA-8184.

Affirmed.

1. Alaska: Native Allotments

A Native allotment application made pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), is properly rejected where the applicant fails to overcome, by a preponderance of the evidence in a contest proceeding, the Government's prima facie case that claimant had failed to substantially use and occupy the land claimed, to the potential exclusion of others, for 5 years.

APPEARANCES: Marcia Rom, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for Violet N. Mack; Harold J. Curran, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for the Heir of Charlie Blatchford, Jr.; Laura C. Bottger, Esq., Office of the Attorney General, State of Alaska, Anchorage, Alaska, for the State of Alaska; W. Findlay Abbott and Gretchen T. (Abbott) Bersch, pro sese and for Alice P. Abbott; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Violet N. (Blatchford) Mack and the Heir of Charlie Blatchford, Jr., ^{1/} have separately appealed from a May 28, 1999, decision of Administrative Law Judge Harvey C. Sweitzer, issued after a hearing, rejecting their respective Native allotment applications, AA-8149-A and AA-8184, for certain lands on Yukon Island in southern Alaska. The hearing was initiated by Government contests filed against the allotment applications. These contests were initiated on remand from a prior Board decision. State of Alaska, 85 IBLA 196 (1985). Because the appeals involve similar factual and legal issues, they are hereby consolidated for review by the Board.

The State of Alaska, appellant in the prior Board appeal, which had conflicting State selection applications filed in 1962 for all vacant, unappropriated, and unreserved land on the Island, intervened at the hearing in opposition to the Mack application. (Tr. 584, 591–93.) The right of the Abbot family, including Alice P. Abbott, W. Findlay Abbott, and Gretchen T. (Abbott) Bersch, to intervene in the contest proceeding was also recognized at the hearing. (Tr. 329–31.) ^{2/} Land owned by Alice Abbott consists of a 10.64-acre trade and manufacturing (T&M) site (U.S. Survey No. 4984, Alaska), adjacent to the land claimed by Mack. (Ex. 2.) That land had been patented (Patent No. 50-73-0126) to her husband in 1973, and is part of a larger 140-acre homestead entry (A-050795) (hereinafter, Abbott Homestead), which had been initiated by him on November 7, 1959, and later relinquished. (Tr. 48–49, 52–53, 84, 188, 197; Ex. WWW (Letter to BLM from W.F. Abbott, Sr., dated Oct. 23, 1964) at 1; Ex. 6 at 1–2.) The record indicates that Alice Abbott sought to regularize her access to the fresh water spring on the Mack claim by filing an application for a right-of-way (AA-59529) on September 5, 1986, which would authorize construction, maintenance, and operation of a buried pipeline. It appears that this application may still be pending before BLM, awaiting resolution of this contest. (Abbott Ex. A (Letter to A.P. Abbott from BLM, dated Oct. 20, 1987) at 22–23 .) Since each of the intervenors below is clearly a "party to [the] case" who might be "adversely affected" by the Board's resolution of the appeals challenging Judge Sweitzer's May 1999

^{1/} Charlie Blatchford, Jr., died on Oct. 7, 1990.

^{2/} The Abbots sought to intervene in order to protect their interest in fresh water obtained from a spring on the land sought by Mack and a right-of-way across the land to carry the water by means of a flexible hose to lands now owned by Alice Abbott, widow of William F. Abbott, Sr., and mother of Findlay Abbott and Bersch. (Tr. 14, 16, 18–20, 199–200, 314; Abbott Ex. A at 2 (Survey Map), 13, 16–17 (Motion for Summary Judgment, dated Feb. 17, 1997), 22 (Letter to A.P. Abbott from BLM, dated Oct. 20, 1987); Abbott Protest (Mack) dated May 19, 1981, at 4; Abbott Opposition to Motion to Dismiss, dated July 30, 1981, at 2 (Mack's claimed allotment is situs of a "spring house" built by Findlay Abbott in 1970).)

decision, they are properly recognized as intervenors on appeal. Nevada Division of Wildlife v. BLM, 138 IBLA 382, 390–91 (1997).

Mack and Charlie Blatchford, Jr., who were siblings, timely filed Native allotment applications, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970),^{3/} and its implementing regulations (43 CFR Subpart 2561). They sought contiguous parcels of land located at the south end of Yukon Island, an island of close to 700 acres situated in Kachemak Bay off the Kenai Peninsula, within protracted Tps. 7 and 8 S., R. 13 W., Seward Meridian, Alaska. In her application, dated May 7, 1971, Mack, who was born January 13, 1936, claimed qualifying use and occupancy of close to 35 acres of land (identified as "Parcel A"), for hunting, fishing, and berrypicking, during the months from April to August of each year since 1949.^{4/} She also noted construction of a "Shelter Camp" in 1959. In his application, dated May 4, 1971, Blatchford, who was born August 4, 1942, claimed qualifying use and occupancy of close to 160 acres of land, for hunting, fishing, clam digging, and berrypicking, during the months from June to October of each year since 1960.

The two parcels of land are located across the Bay from Homer, Alaska, where Mack and Blatchford resided at all relevant times. It is undisputed that Mack and Blatchford moved, with their mother (Jenny Blatchford) and three siblings (Joseph, Andy, and Alan Blatchford), to Homer in the fall of 1949, following the death of their father in 1948. (Tr. 234–35, 738–39.) At the time, Homer was a small community of less than 1,500 people, including 4 or 5 Native families. (Tr. 178, 236–37; Census of Population: 1960 (Alaska) (Ex. D attached to Blatchford Reply to Abbott Second Response, dated Apr. 12, 2000) at "Table 8.") "The Mack Allotment lies on the southern coast of the island and the Blatchford Allotment runs through the center of the island from the eastern shore[, bordering the Eldred Passage,] to the western shore." (Decision at 4 (citing Ex. 2).) Thus, both parcels have ready access to the Bay and the applicants reached them by a boat trip of a little over one hour across the Bay from the tip of the Homer Spit, a distance of close to six miles. (Tr. 705, 719; Ex. 1.)

^{3/} The 1906 Act was repealed effective Dec. 18, 1971, subject to pending Native allotment applications, by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (2000).

^{4/} Mack also sought another parcel of land (Parcel B) containing close to 96 acres of land situated in sec. 16, T. 6 S., R. 14 W., Seward Meridian, Alaska, between the Sterling Highway and Cook Inlet, close to four miles northwest, up the coast, from Homer, Alaska. She claimed qualifying use and occupancy of that land, which is located approximately two miles from her home, for about 10 months every year since 1949, especially during the winter, for hunting, clam digging, coal gathering, and berrypicking. (Tr. 293–94, 308, 355–57.) That parcel is not at issue here.

On June 13, and November 19, 1962, and February 18, 1963, the State filed State selection applications (A-057389, A-058326, and A-058732) for the surface and mineral estates of all vacant, unappropriated, and unreserved land on the Island, including all of the land subsequently claimed by Mack and Blatchford, pursuant to sec. 6(b) of the Act of July 7, 1958 (Alaska Statehood Act), Pub. L. No. 85-508, 72 Stat. 340 (1958), as amended. (Tr. 53-54; Ex. 2; Ex. 6 at 2.) The filing of the applications, which were regular on their face, had the effect of segregating that land from entry under the 1906 Act, subject to valid existing rights.^{5/} 43 CFR 76.16 (1963) (now 43 CFR 2627.4(b)); James M. Wright, 95 IBLA 387, 389 (1987); State of Alaska, 73 I.D. 1, 6-8 (1966), rev'd, Kalerak v. Udall, No. A-35-66 (D. Alaska Oct. 20, 1966), rev'd, 396 F.2d 746 (9th Cir. 1968), cert. denied, 393 U.S. 1118 (1969).

In addition, on July 9, 1962, the National Park Service (NPS), U.S. Department of the Interior, applied for withdrawal (A-032306) of the entire Island, including all of the claimed land, from all forms of appropriation under the public land laws, including entry under the 1906 Act, subject to valid existing rights, for protection and preservation of any and all archaeological and historical values of the Island.^{6/} (Tr. 47-48.) Notice of the requested withdrawal was published in the Federal Register. 27 FR 8323 (Aug. 21, 1962). Noting receipt of NPS's application on BLM's "tract books" had the effect of segregating the land from entry under the 1906 Act, subject to valid existing rights. 43 CFR 295.11(a) (1963); Peter Panruk, 43 IBLA 69, 70-72 (1979); Medina Flynn, 23 IBLA 288, 289 (1976).

Then, on November 26, 1963, the Assistant Secretary of the Interior granted NPS's request, withdrawing the entire Island, including all of the claimed land, from all forms of appropriation under the public land laws, including entry under the 1906 Act, subject to valid existing rights, pursuant to Public Land Order (PLO) No. 3275 (28 FR 12821 (Dec. 3, 1963)), which created the "Yukon Island Archaeological Reserve." (Tr. 48; Ex. 6 at 1.) The primary area where archaeological resources have already been identified, known as the "Yukon Island Main Site," which partially falls within Mack's Native allotment claim, was later designated a National Historic Landmark on August 9, 1965, and included in the National Register of

^{5/} BLM tentatively approved the two State selection applications (A-057389 and A-058326) on Jan. 13, and 15, 1964, but excluded all of the land now sought by Mack and Blatchford's Heir. (Tr. 54; Ex. 6 at 2.) The applications are still pending as to this land. (Tr. 54; Ex. 2.)

^{6/} The withdrawal was subject to a 35.86-acre homestead entry (U.S. Survey No. 1507, Alaska), which had been patented (Patent No. 1051151) to Ulysses S. Ritchie on Oct. 26, 1931. (Tr. 48.) That land, which encompasses much of the southeastern tip of the Island, is now owned by the Abbott family, having been purchased in the mid-1950's. (Tr. 48, 119, 133, 225-28; Exs. 2 and 3; Ex. 6 at 1; Ex. T (Letter to BLM from the Abbotts, dated Nov. 3, 1983) at 1.)

Historic Places on October 15, 1966. 44 FR 7415, 7421 (Feb. 6, 1979). (Tr. 48, 58, 417–18, 571–72, 579, 613; State Ex. 1; Ex. 2; Ex. 6 at 1; Ex. 9 at 5, 7, 12; Ex. 14 at Attachment 3 (Site Plot).) Such inclusion rendered the site subject to protection under section 106 of the National Historic Preservation Act (NHPA), as amended, 16 U.S.C. § 470f (2000), and its implementing regulations (36 CFR Part 800).

Also, on December 16, and 17, 1975, and June 30, 1976, Cook Inlet Region, Inc. (CIRI), a Native regional corporation, filed selection applications (AA-8098-08, AA-11153-23, and AA-11808), for all of the land on the Island, pursuant to sections 12(b) and 14(h) of ANCSA, as amended, 43 U.S.C. §§ 1611(b) and 1613(h) (2000). (Tr. 56–57; Ex. 6 at 3.)

Finally, the southerly end of the Island has been the situs of three homestead entries made by William Abbott, Sr. (A-050795), Claude G. Horton, Jr. (A-052657), and Pekka K. Merikallio (A-052658), on November 7, 1959 (Abbott), and July 1, 1960 (Merikallio and Horton). (Tr. 48–51; Ex. 3.) These entries were allowed by BLM on December 17, 1959 (Abbott), and July 19, 1960 (Merikallio and Horton). All of the homestead claims conflicted, at one time, with the Native allotment claims of Mack and/or Blatchford. (Tr. 59–60; Exs. 2 through 4; Ex. 6 at 3; Ex. 9 at 6, 11; Ex. 14 at 4–5, Attachment 3 (Site Plot), Attachment 14 (Sketch Map).) However, that conflict was later eliminated with the relinquishment, abandonment, or cancellation of the entries, in relevant part, on November 5, 1964 (Abbott), December 30, 1965 (Horton), and June 8, 1966 (Merikallio). (Tr. 52–53, 197; Ex. 2.) It is undisputed that Mack and Blatchford never objected to any of the three homestead entries, either formally (by means of a protest or contest) or informally. (Ex. 9 at 8.)

On July 27, 1979, Lance Lockard, a BLM realty specialist, accompanied by Mack, examined the parcel of land claimed by her, both from the air and on the ground. (Tr. 92, 96, 104.) The results of that examination were set forth in a December 11, 1979, Field Report (Ex. 9), which was approved by the District Manager, Anchorage District, Alaska, BLM, on December 20, 1979. Lockard reported that, although the corners had never been posted by Mack, her identification of the parcel from the air generally conformed to the description in her application. (Ex. 9 at 7; see also Tr. 731–32, 902.) However, he also noted that, once on the ground, Mack "was only familiar with the area along the beach," identifying it as the area of her use and occupancy. (Ex. 9 at 7; see also Tr. 104–05, 112–13.) In addition, Lockard stated that, despite being afforded ample opportunity, the only improvement or evidence of use and occupancy identified by Mack was a campsite on the beach, which was found to consist of driftwood logs partially encircling a rock fire pit, which appeared to be fairly new, especially since the beach area was subject to periodic flooding. (Ex. 9 at 6–8; see also Tr. 96–97, 102–03, 108, 152–54, 306.) Lockard noted that he did not find any other physical signs of use by Mack. (Ex. 9 at 8; see also Tr. 97–98.) Lockard, who talked to Bersch in conjunction with his examination,

also stated that Mack "[wa]s not well known in the area and ha[d] only been recently seen on the island by area residents." (Ex. 9 at 8; see also Tr. 106.) Based on his examination, Lockard stated that he could not conclude that Mack was entitled to a Native allotment, because there was no "solid" evidence that she had engaged in substantially continuous use and occupancy of the land, potentially exclusive of others, for the requisite 5 years. (Ex. 9 at 8.)

On August 24, 1982, Janet Sosnowski, a BLM realty specialist, accompanied by Blatchford, examined the parcel of land claimed by him, both from the air and on the ground. (Tr. 500, 502, 505, 507-09.) The results of that examination were set forth in an April 13, 1983, Field Report (Ex. 14), which was approved by the District Manager on April 18, 1983. Sosnowski reported that, although the corners had never been posted by Blatchford, she was able to identify the parcel of land claimed by him. (Ex. 14 at 3; see also Tr. 504, 508.) She noted that no improvements were claimed by Blatchford, and none were found by her at the time of the examination. (Ex. 14 at 5; see also Tr. 510.) She also reported that Blatchford never identified any specific areas he had used for camping, cutting firewood, depositing garbage, or other purposes, or which would yield evidence of his use:

I gave him several opportunities * * * to show me any areas that he had used. And I came up with negative information on each effort. * * * I asked [Blatchford] on two separate occasions if he had any areas that he could show me that would indicate that he had been there. And he basically did not * * * have anything.

(Tr. 511, 562; see also Tr. 508, 510-11, 515, 517-18, 567-68.) Sosnowski did not find any physical signs of use by Blatchford. (Ex. 14 at 5, 8; see also Tr. 508-09.) She also found Blatchford's knowledge of his claimed allotment to be general and vague. (Ex. 14 at 5; see also Tr. 504, 506, 518; Ex. 2.) Based on her examination, Sosnowski concluded that, absent supporting evidence, Blatchford was not entitled to a Native allotment, since he had failed to engage in substantially continuous use and occupancy of the land, potentially exclusive of others, for the requisite 5 years. (Ex. 14 at 8; see also Tr. 515.)

Despite the negative field reports, BLM initially approved the two Native allotment applications, by decisions dated September 9 (Blatchford), and November 28, 1983 (Mack), rejecting the applications of the State and CIRI, to the extent they conflicted therewith. However, on appeal by the State, we concluded in our prior decision, State of Alaska, supra, that the record was insufficient to support the BLM determinations that Mack and Blatchford had satisfied the use and occupancy requirements of section 3 of the Act of May 17, 1906, as amended, 43 U.S.C. § 270-3 (1970), and 43 CFR 2561.0-5(a), thus entitling them to Native allotments under that

Act. Accordingly, we set aside BLM's 1983 decisions and remanded the case to BLM for initiation of a Government contest. 85 IBLA at 202. ^{Z/}

^{Z/} Since the record failed to substantiate whether the two Native allotment applications, filed with BLM on July 27 (Mack), and Sept. 18, 1972 (Blatchford), were pending before the Department on Dec. 18, 1971, when the 1906 Act was repealed, we found that this matter should be addressed in the course of the Government contest, because Mack and Blatchford would otherwise be barred from entitlement under that Act. 85 IBLA at 203. Judge Sweitzer concluded, in his May 1999 decision, that both applications were "clearly" filed with the Bureau of Indian Affairs (BIA) on Nov. 19, 1971, and were thus pending before the Department on Dec. 18, 1971. (Decision at 17.) This is borne out by the hearing record, which reflects BIA date-stamps, of that date, on both applications (Exs. Y and BB).

Further, we directed that the contest address the issue of whether Blatchford's Dec. 4, 1972, amendment of his original application, following repeal of the 1906 Act, properly described the land which he had originally intended to claim, as required by section 905(c) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(c) (2000). 85 IBLA at 203–04. This matter was resolved by agreement of all of the parties, to the satisfaction of Judge Sweitzer, thus accepting the land surveyed as Blatchford's claimed allotment under U.S. Survey No. 8730, Alaska, as the land he had originally intended to claim. (Decision at 3 (referring to Tr. 543–49); see also Tr. 500, 503–04, 529–30, 561; Ex. 2; Ex. 14 at 3, 8, Attachment 3 (Site Plot), Attachment 6 (Corrected Legal Description of Land).) This resolution, which eliminated any conflict with Mary Blatchford's Native allotment claim (AA–8187), Mack's Native allotment claim (AA–8149), and the patented Merikallio 5-acre homesite (A-052658), all immediately to the south, is challenged by the Abbotts. (Answer at 7; see also Tr. 61–62.) However, since this matter could only be raised in the context of an appeal by the Abbotts from the decision rather than an answer, it will not be addressed here.

Finally, we stated that the contest should consider whether, assuming that Mack had engaged in qualifying use and occupancy for the requisite 5 years, she ceased such use and occupancy before filing her application, thus terminating her entitlement to an allotment. 85 IBLA at 204; see United States v. Melgenak, 127 IBLA 224, 241–44 (1993) (citing United States v. Flynn, 53 IBLA 208, 235, 238, 88 I.D. 373, 388–90 (1981)). Since he concluded that Mack had failed to establish, by a preponderance of the evidence, that she had engaged in qualifying use and occupancy for the requisite 5-year period, Judge Sweitzer did not consider whether, having done so, she then ceased such use and occupancy, thus terminating her entitlement under the 1906 Act. (Decision at 23.) Because we affirm on the basic question of qualifying use and occupancy, we need not consider the issue of cessation.

BLM surveyed the two parcels of land at issue here in 1987.^{8/} The parcel sought by Mack, which was found to encompass 34.98 acres of land, was surveyed, in its entirety, under U.S. Survey No. 8628, Alaska, which was accepted August 30, 1988, and officially filed on September 22, 1988. The parcel sought by Blatchford, which was found to encompass 159.96 acres, was surveyed as Lot 1, under U.S. Survey No. 8730, Alaska, which was accepted October 27, 1988, and officially filed on November 22, 1988.

On January 5, 1995, BLM, acting on behalf of the United States, issued a contest complaint, challenging the two Native allotment applications on the basis that both Mack and Blatchford had failed to satisfy the requirements of section 3 of the Act of May 17, 1906, and 43 CFR 2561.0-5(a), by engaging in substantially continuous use and occupancy of the land, at least potentially exclusive of others, for a period of 5 years. Answers were filed, denying the charges, and the matter was assigned to Judge Sweitzer for a hearing and decision. Prior to the hearing, the judge, accompanied by all of the parties, viewed the site of the claims on June 1, 1998. (Tr. 12-13, 29-32.)

Following a 4-day hearing on June 2-5, 1998, before Judge Sweitzer in Homer, Alaska, and the receipt of briefs from all of the parties, the judge issued his May 1999 decision, rejecting the Native allotment applications of Mack and Blatchford. After fully considering all of the evidence of record, Judge Sweitzer concluded, in the case of each application, that they had failed to overcome, by a preponderance of the evidence, BLM's prima facie case that the applicant had not engaged in 5 years of qualifying use and occupancy of the land claimed, as required by the 1906 Act and 43 CFR 2561.0-5(a), prior to the December 18, 1971, repeal of the Act, and was thus not entitled to a Native allotment under that Act. These appeals have been brought from Judge Sweitzer's May 1999 decision.

[1] Section 3 of the Act of May 17, 1906, requires that, in order to qualify for an allotment of up to 160 acres of land, a Native applicant must submit satisfactory proof that he has engaged in "substantially continuous use and occupancy of the land for a period of five years." 43 U.S.C. § 270-3 (1970). Under the relevant regulation, such use and occupancy

contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well! being and that of his family. Such use and occupancy must be substantial actual

^{8/} These surveys, in conjunction with original and amended Township surveys, confirmed the location of Mack's Native allotment claim in sec. 4, T. 8 S., R. 13 W., Seward Meridian, Alaska, but placed Blatchford's claim in secs. 33 and 34, T. 7 S., R. 13 W., and secs. 3 and 4, T. 8 S., R. 13 W., Seward Meridian, Alaska. (Ex. 2.)

possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

43 CFR 2561.0-5(a). In order to demonstrate that the land was used and occupied to the potential exclusion of others, prior to the filing of a Native allotment application, it must be shown that others knew or should have known that the applicant asserted a superior right to the land because he actually used or occupied the land and/or left behind physical evidence of such use or occupancy, sufficient to put others on notice of the assertion of such a right, or that others acknowledged in some way that assertion. See United States v. Pestrikoff, 134 IBLA 277, 288–89 (1995), and cases cited therein. As we said in United States v. Heirs of Jake Yaquam, 139 IBLA 376, 384 (1997):

To establish [qualifying] use and occupancy, an applicant need not have barred the use of his land by others. Rather, his use must be shown to have been potentially exclusive of others, meaning that his use has (or should have) resulted in a public awareness and acknowledgement of his superior right to the land, even in circumstances where others used it.

When the United States contests a Native allotment application, it has the burden of presenting sufficient evidence to establish a prima facie case that the applicant failed to comply with the use and occupancy requirements of section 3 of the 1906 Act and 43 CFR 2561.0-5(a), or was otherwise not entitled to a Native allotment under the 1906 Act, whereupon the burden falls upon the applicant to overcome that case by a preponderance of the evidence. United States v. Heirs of Thomas Bennett, 144 IBLA 371, 381 (1998).

Initially, we affirm Judge Sweitzer's finding that BLM established, through its witnesses and documentary evidence, a prima facie case that both Mack and Blatchford had not engaged in substantial actual possession and use of their claimed land, which was potentially exclusive of others, for the requisite 5 years. (Decision at 18.) He particularly noted that BLM demonstrated that Mack and Blatchford had each failed to engage in the kind of use and occupancy (e.g., erecting structures or installing improvements) which would have put others on notice that the land was subject to the assertion of a superior right, or that other members of the public acknowledged such assertion.

The lack of qualifying use and occupancy was well documented by Lockard and Sosnowski, in their field reports, which were based on their examinations of relevant portions of the claimed parcels of land identified by Mack and Blatchford, as well as conversations with the claimants and others. This evidence, which disclosed no improvements or other physical signs of use and occupancy or even any other proof

corroborating the claimants' qualifying use and occupancy, was sufficient, by itself, to establish a prima facie case, thus requiring the claimants to prove their entitlement. United States v. Pestrikoff, 134 IBLA at 284–85.

Various individuals who were in a position to observe use and occupancy of one or both parcels during much of the period of time they were alleged to have been used and occupied (which was generally during the summer), asserted that neither Mack nor Blatchford, nor any signs of their use and occupancy, were observed on the land. (Tr. 116–20, 122–26, 128–29, 133–140 (Alice Abbott, who visited the Ritchie property, with her brother-in-law Charles B. Abbott), several times from July through October 1952, and visited the Abbott Homestead at times during the summer of 1960, residing there from 1961 to the fall of 1962); Tr. 223–27 (Phyllis Abbott, wife of Charles Abbott, who homesteaded on nearby island and visited Yukon Island from 1956 on); Tr. 371–81 (Phillip Brudie, who, starting in June 1957 and through 1958 and summers thereafter until 1965, often went from his stepfather's homestead on nearby Cohen Island south to the Ritchie property, which was owned by his stepfather (Charles Abbott), and also observed boat traffic in Eldred Passage); Tr. 133–34, 394 (Gretchen Bersch, who in 1952 went as a youngster (8 years old), with her grandmother to the Ritchie property); Ex. 14 at Attachment 7 (Map No. 5 attached to Letter to BLM from Merikallio, dated Dec. 26, 1974, Attachment 14 (Sketch Map)); Tr. 451–56, 459–63, 715, 717 (Clem Tillion, who kept crab pots, which were tended daily, off the southeastern point of the Island and regularly fished in the area from early spring to July 4th of each year, during the 1950's and 1960's); Tr. 469–80, 483–84 (Morry Porter, who stopped at or passed by the southeastern corner of the Island many times from the 1950's through the 1960's, in connection with regular summer visits to his site northeast of the Island across Eldred Passage).)

We find this failure by others to observe either Mack or Blatchford, or signs of their use and occupancy, particularly telling, because, since much of the land claimed by them was densely forested, their use and occupancy was substantially limited to the beach areas, where others who were also restricted to those areas or who were traveling by sea would have seen them:

With the exception of Seal (west and northerly) beach, the Yukon Island shoreline consists of high impassable cliffs with a few access[i]ble beaches located on the souther[ly] part of the island. * * * [T]he interior of the island is * * * steep, hilly terrain, swamps and deep gullies, covered with thick forest and underbrush (spruce, alder, devils club, berry bushes, stumps, dead snags, windfalls, etc.).

(Letter to BLM from Merikallio, dated Mar. 6, 1980, at 1–2; see also Tr. 98, 118, 144, 151–52, 199, 255–56, 506–07, 521; Ex. 5; Ex. 14 at Attachment 15; Abbott Ex. D (Frederica de Laguna, The Archaeology of Cook Inlet, Alaska (1975)) at 3; Abbott

Ex. F (BLM Land Examination Report dated Oct. 8, 1962) at 9; Land Report (Mack) dated Dec. 11, 1974, at "Photo #6"; Land Report (Blatchford) dated Apr. 13, 1983, at "Photo #8.")

Thus, the key issue on appeal is whether Mack and/or the heir of Blatchford overcame BLM's prima facie case of lack of entitlement under the 1906 Act. We will address the question as to each Native applicant separately.

Violet N. Mack

Judge Sweitzer concluded that Mack demonstrated, by a preponderance of the evidence, that she had engaged in qualifying use and occupancy for four years, but not the requisite 5 years. He specifically noted that she showed that she had used and occupied her claimed parcel on the Island, generally for "berry picking, fishing, picking greens, catching crabs, and camping under a tent or tarp, * * * on average, each weekend from early May to the first of September during 1953, 1954, 1955, and 1956." (Decision at 19.) The temporary shelter constructed by Mack, using a tent or tarp, was identified by her as the "Shelter Camp" constructed in 1959, referred to in her original application. (Tr. 248, 251–52.) Recognizing that her use and occupancy did not leave much physical evidence, Judge Sweitzer found her use was of "sufficient frequency and duration" to have put others on notice that she asserted a superior right to the land. (Decision at 19.) There is evidence in the record to support this finding. (Tr. 239–50, 255, 273, 297–99, 348, 363–64, 700–07.) The record shows that Violet Mack first went to the allotment parcel on her honeymoon in 1952. (Tr. 237.)^{2/} She was married in August 1952. She testified to use of the parcel for fishing, clamming, seal hunting, picking greens for cooking. (Tr. 240.) She and her former husband, Paul Jones, went to the Island frequently on weekends when they had time off from her work at the cannery and his work with the State Roads Commission, Violet Mack testified. (Tr. 247.) She noted they often spent the night, using a tent or tarp on the beach for shelter. (Tr. 248.) Paul Jones testified that usage of the parcel generally occurred from early May until the first of September. (Tr. 701, 705.) Their first child was born in January 1957 and they went to the island less frequently after that because of the difficulty in taking small children in an open boat. (Tr. 296–97, 709–10.) It appears from the record that Mack's activities were confined to the beach area, which was wider in the late 1950's and early 1960's before subsidence caused by the 1964 earthquake. (Tr. 240, 248–49, 255, 273, 420–21, 704, 706, 836–37, 891; Ex. 9 at 7; Ex. H at 1.)

However, Judge Sweitzer was unable to find sufficient evidence that Mack's use and occupancy either before 1953 or after 1956 was substantial and potentially

^{2/} She acknowledged that her statement on her Native allotment application that she first used the land in 1949 was a misstatement. (Tr. 238.)

exclusive of others. Rather, he noted that she failed to demonstrate that her use and occupancy was other than intermittent and/or insufficient to put others on notice that she asserted a superior right to the land (or, at least, was acknowledged as such by other members of the public). He thus concluded: "The weight of the evidence does not show that Mrs. Mack used and occupied the allotment in a qualifying manner for a fifth year." (Decision at 21.)

Concerning the period before 1953, Judge Sweitzer noted that, while she had asserted in her application that she had initiated independent use and occupancy in 1949, she acknowledged, at the June 1998 hearing, that it did not actually begin until 1952, the year she was married. (Decision at 4 (citing Tr. 236–37, 290–92, 704); see also Tr. 238–39, 741.) He found, however, that, while Mack initiated her use and occupancy of the land in the spring or late summer of 1952, she failed to demonstrate that such use and occupancy was substantial. (Decision at 20.) The judge also noted that Mack especially failed to overcome the inference that her use and occupancy was not substantial, which was drawn from evidence that she and her husband (Paul Jones), who married in August of 1952, had really spent a considerable amount of time, beginning in the spring or around the time of their marriage in late summer, exploring a lot of other areas in the Bay before finally settling on the parcel of land at issue here. (Decision at 20.)

Mack does not challenge the fact that most (if not all) of her time from early spring to late summer of 1952 was spent searching for a suitable site for sustained activity: "That spring, we spent all our time going back and forth. We discovered the whole bays. Every chance we got we went to another bay." (Tr. 237, 292 ("We went from the head of the bay, clear around to this side of Seldovia[, Alaska]. * * * That's a lot of bays.")) Further, when asked when she "start[ed] going to Yukon Island," she immediately replied: "As soon as Paul and I — that was our honeymoon [following her marriage in August]." (Tr. 237; see also Tr. 292, 332–33.) She did not refer at all to the period of time prior to August. Further, Jones testified that they first went to the Island "pretty close to our honeymoon [in August]." (Tr. 704.) Rather, Mack argues that the evidence offered by herself and Jones is that, following the time when they were married in August, they "continued to go [to the Island] and stay for an average of once a week until September [of 1952]," sometimes staying for a weekend. (Statement of Reasons (SOR), dated Nov. 1, 1999, at 2; see also Mack Reply, dated Mar. 14, 2000, at 2–3 (citing Tr. 704); Tr. 705 ("[W]e didn't * * * go there after * * * about September 1st"); Tr. 732.)

Accepting this testimony, it is clear that in 1952, Mack, at best, used and occupied her claimed allotment only a few times. We, thus, conclude that Judge Sweitzer properly found that Mack had not engaged in substantial actual possession and use of the land in 1952. United States v. Pestrikoff, 134 IBLA at 286–88 (on average, 10 annual visits, each lasting from about 2 hours to half a day, in connection

with year-round subsistence gathering); National Park Service (Lewis Vanderpool), 117 IBLA 247, 250–52 (1991) (one annual visit lasting about two weeks or less than three weeks); State of Alaska (Thomas Abbott), 113 IBLA 80, 82, 84 (1990) (several annual visits, each lasting a few days); Angeline Galbraith (On Reconsideration), 105 IBLA 333, 334–35, 340 (1988) (one annual visit for a few days); United States v. Estate of George D. Estabrook, 94 IBLA 38, 45–47, 52–54 (1986) (using land as base camp for hunting, from two to five times per year for from a few days to two weeks); compare with United States v. Heirs of Alec Dolchok, 140 IBLA 45, 54–55 (1997) (trapping throughout the winter); United States v. Edward N. O'Leary, 125 IBLA 235, 240–41, 243–44 (1993) (hunting trips during the fall, lasting from several weeks to several months). With respect to uses such as berrypicking, fishing, and hunting which may not leave physical evidence of use and occupancy as in this case, the question of substantial use hinges on the quantum of use. United States v. Pestrikoff, *supra* at 288; Angeline Galbraith (On Reconsideration), *supra* at 338.

Mack argues, on appeal, that the judge erred, as a matter of law, in assessing whether she satisfied the use and occupancy requirements of section 3 of the 1906 Act in 1952 or any time prior to 1956, since such requirements were not enacted by Congress until 1956, with the passage of the Act of August 2, 1956, Pub. L. No. 931, 70 Stat. 954, which amended the 1906 Act, and can only be applied prospectively, absent express Congressional authorization. (SOR at 3–5.) We disagree with this analysis.

Mack overlooks the fact that, while not a part of the 1906 Act until 1956, the general requirement to engage in use and occupancy for 5 years had been adopted by the Secretary of the Interior, pursuant to his authority under the 1906 Act, as originally enacted, to allot lands "in his discretion and under such rules as he may prescribe." 34 Stat. 197 (1906). It constituted a Departmental interpretation of the Act, which was longstanding well before enactment of the 1956 statutory amendment. See Allotments of Public Lands in Alaska to Indians and Eskimos (Circular No. 1359), 55 I.D. 282, 285 (1935) (codified at 43 CFR 67.13 (1938)). Thus, there is simply no question of retroactive application of the 1956 statute. The general use and occupancy requirement was well established in the regulations at the time of Mack's pre-1956 activity. United States v. Bennett, *supra* at 382 n.7; United States v. Heirs of Jake Yaquam, 139 IBLA at 383.

We acknowledge that the specific requirements of substantiality and potential exclusivity were not expressly incorporated into the Department's regulations until 1965. See 43 CFR 2212.9-1(c)(1) (1966) (now 43 CFR 2561.0-5(a)). However, we find that this standard can be used to determine whether Mack is now entitled to a Native allotment, by virtue of her pre-1965 activity, since it has long been the Department's interpretation, as a matter of adjudication, that qualifying use and occupancy under the 1906 Act, which accorded allotments to Natives, and under

section 8 of the Act of May 17, 1884, ch. 53, 23 Stat. 24, 26, which protected their possessory rights, includes such requirements: "[P]ermissive Native occupation under the [two] Acts was required to 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.'" United States v. Flynn, 53 IBLA at 227, 88 I.D. at 383 (quoting from United States v. 10.95 Acres of Land in Juneau, 75 F. Supp. 841, 844 (D. Alaska 1948)); see, e.g., United States v. Melgenak, 127 IBLA at 243; Ira Wassillie, 103 IBLA 112, 119 (1988); Herbert H. Hilscher, 67 I.D. 410, 416 (1960)). Thus, there is no issue of whether the standard of substantiality and potential exclusivity embodied in the 1965 regulation can properly be applied retroactively. (Mack SOR at 5–7.) These requirements were well established, as a matter of Departmental adjudication, at the time of, and applied with equal force to, Mack's pre-1956 activity.

Concerning the period after 1956, Judge Sweitzer was likewise unable to find sufficient evidence that Mack's use and occupancy was qualifying.^{10/} He noted that her use and occupancy, which occurred during the same time frame (early May to September 1st) and encompassed the same subsistence activities, had admittedly "decreased" following the birth of her first child (Larry Jones) in January of 1957, which was followed by three more children (Brenda (1959), Roland (1961), and Alfred (1963)), and that she failed to show that it was substantial and potentially exclusive of others thereafter. (Decision at 20; see also Tr. 709–10, 722.) Thus, what had been largely weekend use during the summer declined even more.

The judge noted first that Mack failed to specify at all the frequency and duration of her use during the years of 1957 and 1958, and thus failed to establish that it was substantial. We agree. Little or no testimony was offered regarding that time period, and documentary evidence related to Mack's use and occupancy after 1956 is expressed in general terms, either making plainly inflated claims regarding or failing to specify the extent of her use and occupancy during that time period.

^{10/} Mack contends that the judge's determination that she failed to engage in qualifying use and occupancy after 1956, which coincided with the birth of her first child, violated her substantive due process rights under the Fifth Amendment of the U.S. Constitution, since it infringed upon her fundamental liberty right to raise a family, without serving any legitimate Government interest. (SOR at 7–13.) As a quasi-judicial body within the Department of the Interior, the Board has no authority to adjudicate whether Mack's constitutional rights have been violated or to afford any relief therefrom. Laguna Gatuna, Inc., 131 IBLA 169, 173 (1994). We note, however, that it does not appear that there has been any substantive due process rights violation because the judge found, based on a careful review of the facts of record, that, regardless of the cause, Mack did not achieve the level of use and occupancy for the full 5-year period which is required in all cases by the 1906 Act and 43 CFR 2561.0-5(a).

(Tr. 259 ("We went quite often"), 294 ("I went all during our children's lives"), 706 ("It was somewhat less later in the time"), 709–10, 722; Ex. E (Declaration of Paul Jones, dated May 6, 1985) at 1 ("Violet and I[,] * * * during the time we were married[,] * * * would spend most of our time out there in the summer. We went out there in early spring and stayed until * * * fall."); Ex. I (Affidavit of Roehl, dated June 12, 1985) at 1 ("I am personally acquainted with [Mack's] use of her land from the years 1957 through 1964. * * * I remember that Violet and her family were out there very frequently. It seems to me like they went there every weekend, and they would sometimes stay a week or two at a time. I recall them being there from May through September."); Ex. Z at 2 ("I know that[,] for as long as they were together, [Mack and Jones] went to Yukon [Island] every weekend from spring until fall.))

Concerning the period from 1959 onward, the judge stated that Mack, at best, demonstrated that, after she and her husband began commercial fishing in 1959, her use and occupancy was, if not intermittent, infrequent: "[T]hey only went 'periodically' to the allotment during June and July each year because they fished steadily then. In the spring they went 'a lot[,] sometimes staying as long as a week, and in August they went a 'few' times." (Decision at 20 (quoting from Tr. 250–51).) To the extent that any witnesses were specific regarding Mack's use and occupancy in the period after 1958, we think that the record supports Judge Sweitzer's conclusion that it was generally infrequent, occurring mainly during the spring before the commercial fishing season began, and even then was not substantially continuous.^{11/} (Tr. 259, 270, 294, 362–63, 481, 706, 712, 733–34, 736, 789–91, 799, 837 (testimony by Mack's daughter, born in 1959, that her mother went to her claimed allotment "quite often" on summer weekends from 1963 onward), 857 (testimony of friend of Mack's daughter that, from 1961/62 onward, Mack went to her claimed allotment, with her family, "quite a bit during the summers"), 883–85 (testimony of friend of Mack's children that, prior to 1963/64, Mack went to her claimed allotment, on day-trips, at least two or three times each summer).) See United States v. Pestrikoff, 134 IBLA at 286–88.

Absent any evidence that Mack left improvements or other physical signs of her use and occupancy on the Island, the factual question whether her use and occupancy

^{11/} A number of other witnesses simply were not aware of the frequency with which Mack went to her claimed allotment or the length of time she generally spent there, or at least did not offer any evidence to that effect. (Tr. 786–88 (Mack's son), 865–67, 871 (daughter of Mack's guest), 876–79 (Mack's nephew); Ex. A (Declaration of Dora Mulch, dated May 6, 1985); Ex. B (Declaration of Edward Jones, dated May 6, 1985); Ex. C (Declaration of Larry Jones, dated May 6, 1985); Ex. D (Declaration of Eli Mulch, dated May 6, 1985); Ex. J (Affidavit of Blatchford, dated July 24, 1980) at 2.)

was substantial hinges on the "quantum of [her] use." United States v. Pestrikoff, 134 IBLA at 288. Clearly, she failed to demonstrate that it was sufficient in the period after 1958. After 1968, when Mack separated from and then divorced her husband and moved to Kenai, Alaska, she visited the Island only "[o]nce in a while, not real often." (Tr. 272, 252 ("After [19]68, I kind of left — went there periodically"), 294, 304, 699, 705–06.) Plainly, this was not qualifying use and occupancy.

Further, Judge Sweitzer noted that, above all, Mack failed to show that her infrequent use and occupancy, in 1952 and after 1956, was potentially exclusive of others. The judge stated that she did not demonstrate that her use and occupancy was sufficient to put others on notice that she asserted a superior right to the land (or was acknowledged as such by other members of the public). With respect to whether other members of the public acknowledged her assertion of a superior right to the land, he found the evidence equivocal, with some Natives asserting that they viewed the land as belonging to her, while others refused to express such a view, even when directly asked at the hearing. (Decision at 20–21.)

The fact that Mack's infrequent use, after 1956, could not be considered potentially exclusive of others is not challenged by Mack on appeal, since she focused on the judge's determination that she had not engaged in qualifying use and occupancy in 1952. In any event, we affirm Judge Sweitzer's finding in this respect, since it is supported by a preponderance of the evidence in the record. (Tr. 271–72, 345, 360, 372, 844.) Mack did not place any improvements on the allotment. (Tr. 252.) Fish racks used on the beach were portable. (Tr. 343, 363–64.) Claimant did not post the corners of her allotment.^{12/} (Tr. 902.) We do not find that the evidence establishes, given the absence of any physical indicia of Mack's continuing use and occupancy of the land, that she sought to exercise authority or control, either explicit or implicit, over use of the land by others, or that her assertion of dominion over the land was acknowledged by other than a handful of individuals, as required by 43 CFR 2561.0-5(a). United States v. Pestrikoff, 134 IBLA at 288–89; United States v. Rastopsoff, 124 IBLA 294, 305–07 (1992) (contrasting Kootznoowoo, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128 (1989)); Ira Wassillie, 103 IBLA at 117–19; compare with United States v. Heirs of Alec Dolchok, 140 IBLA at 56; United States v. Heirs of Jake Yaquam, 139 IBLA at 381, 385; National Park Service (Jack Paul Brown), 135 IBLA 88, 92 (1996); United States v. The Heirs of David F. Berry, 127 IBLA 196, 209 (1993). We cannot conclude that Mack established that there was (or should have been) a "public awareness and acknowledgement of h[er] superior right to the land," rather than simply her use and occupancy of the land. United States v. Heirs of Jake Yaquam, 139 IBLA at 384 (emphasis added).

^{12/} This contrasted with her cabin homesite on Tutka Bay where the corners were posted. (Tr. 907.)

The judge noted that Mack's evidence was particularly deficient with respect to the period beginning in 1961, when members of the Abbott family (along, at times, with other non-Natives) began using the neighboring land "nearly every year for the entire summer." (Decision at 20.) William F. Abbott, Sr., his wife (Alice Abbott), and/or his family, in particular, resided on the Abbott Homestead continuously from 1961 until the fall of 1962, constructing a residential structure and other improvements, in an effort to satisfy the homestead requirements, and spent all or parts of every summer from 1961 onward there. (Tr. 122–23, 125–26, 128–29, 134–37, 174–77, 394–95, 413, 423, 900–01; Ex. DD (Field Examination of T&M Site (Abbott), dated Oct. 21, 1966); Ex. WWW at 1–3; Abbott Ex. A at 19 (Letter to BLM from the Abbotts, dated May 5, 1994) ("In the early sixties, our settlement on the island included * * *: a 16' by 40' main house, a 20' by 24' guest house, a 20' by 48' scientific laboratory, school room and library, a 7.5 K.W. [kilowatt] White diesel generator, sheds, a barge, boats, motors and more"); Abbott Ex. F at 11; Abbott Ex. I.) Further, the Abbotts' residence was close to and overlooked the beach, thus affording a good view of activity on the nearby portion of the beach used by Mack, which was, for a time, claimed as part of the Abbott Homestead. (Tr. 100, 123–24, 137, 139–40, 164–65, 168, 170–73; Exs. 5, 12, and 13; Ex. WWW at 1 ("I have built in 1960 and 1961 a main residence located near the midpoint of th[e] [southern] beach"); Abbott Ex. I.) The judge found that Mack failed to overcome evidence supplied by the Abbotts and other non-Natives that her use and occupancy was not potentially exclusive of others, since they did not see her or any evidence of her use and occupancy on the land claimed by her, and did not even know of her claim to the land: "None of the inhabitants of the island or other non-Natives making use of the surrounding waters and lands became aware of Mrs. Mack's use or claim to the land until after she filed her Native allotment application." (Decision at 20; see, e.g., Tr. 123–24, 138–41, 372–74, 379–80, 398, 445, 456, 470, 472.)

We note the fact that, according to the record, Mack never formally or informally objected to either of the Abbott and Horton homestead entries, before they were extinguished in the mid-1960's, despite their clear conflict with the land claimed by her, to which she allegedly asserted a superior right. She indicated, in her testimony, that it was because she never knew of these other claims. This refutes the potential exclusivity of her use and occupancy since the claims physically intruded upon her land in the form of the Horton cabin and the Abbott water line.^{13/} (Tr. 255.)

^{13/} Lockard reported that, when the cabin which Horton had built in the wooded area of Mack's claimed allotment north of the beach was pointed out to her, she told him, during the July 1979 field examination, that she was not familiar with that area, having not used and occupied it, and did not even know who owned the cabin. (Ex. 9 at 8, 13, 14; see also Tr. 98–100, 112–13, 145–46, 168, 255, 303; Ex. 14 at Attachment 7 ("Map No. 5").) Since the record indicates that Horton built the cabin
(continued...)

Accordingly, we hold that Judge Sweitzer properly concluded that Mack failed to carry her burden of proving, by a preponderance of the evidence, that she engaged in substantial actual possession and use of the land claimed by her, to the potential exclusion of others, for the requisite 5 years.

Heir of Charlie Blatchford, Jr.

Judge Sweitzer noted that, while Blatchford had asserted in his application that he had initiated independent use and occupancy in 1960, Mack and Joseph Blatchford, one of his other siblings, both testified, at the June 1998 hearing, that it actually began in 1956, when he no longer went to the Island with Mack and her husband. (Decision at 4 (citing Tr. 279–81, 310, 743, 746–47, 765); see also Tr. 364–65, 765–66.) The judge concluded, however, that the Heir failed to demonstrate, by a preponderance of the evidence, that Blatchford engaged in qualifying use and occupancy at any time during the period from 1956 to December 18, 1971.

The judge noted first that the record was "nearly devoid" of evidence regarding the frequency of Blatchford's use and occupancy of the specific parcel of land at issue which would establish that it was substantial. (Decision at 22.) This is true, since much of the documentary evidence offered referred only to use and occupancy generally on the Island.^{14/} (Ex. RR (Declaration of Roehl, dated Aug. 17, 1983) at 1; Ex. SS (Declaration of Mack, dated Aug. 16, 1983) at 1; Ex. TT (Declaration of Nada N. Roehl, dated Aug. 17, 1983) at 1; Ex. UU (Declaration of Francis L. Anawrok, dated June 2, 1983) at 1; Ex. WW (Declaration of Eva Seymore, dated May 14, 1983) at 1; Ex. XX (Declaration of James E. Graham, Jr., dated Apr. 27, 1983) at 1; Ex. YY (Declaration of Brenda L. Gregoire) at 1.)

The judge found that the best evidence regarding the frequency of Blatchford's use and occupancy of the land was provided by his older brother Joseph, who was born in 1940. This evidence, however, demonstrated that Blatchford camped on the

^{13/} (...continued)

in 1960–61, shortly after initiating his homestead entry, Ex. 14 at 4, and Abbott Ex. F at 11, Mack's lack of knowledge in 1979 regarding the cabin certainly calls into question her use and occupancy of any of the interior portion, if not the entirety, of her claimed allotment, during the period from 1960 onward.

^{14/} The paucity of evidence regarding the frequency of Blatchford's use and occupancy of the land claimed by him over the years, as well as the absence of a campsite and other physical indicia of his activities on the ground, distinguishes the present case from United States v. The Heirs of David F. Berry, supra, relied upon by the Heir. See 127 IBLA at 201–02, 208.

land overnight several times (two to four) while he was hunting seal. (Decision at 22 (quoting from Tr. 752).) He held that this was not substantial actual possession and use of the land.

It appears from the record that Blatchford hunted seals, on behalf of himself and his family, around the Island and elsewhere in the Bay. (Tr. 177, 245, 256, 279–81, 457, 477–78, 519–20, 717–18, 746–49, 751–52, 756–57, 783–84, 808–09, 812–13, 816–18, 841, 847–49.) Seal meat and oil was considered the mainstay of the Blatchford family diet. (Tr. 746, 752.) In addition, Blatchford participated in the commercial hunting of seal, collecting a bounty and selling their hides for close to \$50 per hide. (Tr. 279–81, 754–55.) Indeed, when asked whether she was personally aware of Blatchford going over to the Island on his own, Mack replied: "He went over on his own a lot of times. He used to hunt seal with — commercial hunt seal. We had a big factory in Anchorage[, Alaska] then." (Tr. 279.) ^{15/}

Most of Blatchford's claimed activity on the Island involved setting up a camp, which he used and occupied during a portion of the day, in the course of his seal hunting. (Tr. 747–49, 752, 760.) The camp was located on the beach, which runs along the eastern shore of the Island, and thus was protected from the open waters of the Bay. (Tr. 277–78, 308–09, 462, 747, 749–50, 761; Ex. 2.) It was used because seal activity on the rocks directly across Eldred Passage could be observed from that vantage point. (Tr. 749–50.) While he was camping on the Island, using a tarp for protection, Blatchford would prepare and eat seal, using a fire prepared from wood on the Island to cook. (Tr. 753, 755–56, 758–59, 764–65.) He also, at certain times of the year, fished and gathered greens from the Island. (Tr. 750–51, 763–64.) However, he rarely picked berries. (Tr. 763.) He never used any fish or meat-drying racks, but skinned seals and saved the seal meat for his family's use back in Homer. (Tr. 742–43, 751–52, 758, 760–62.) However, because there was no source of water at the site, it had to be transported across the Passage in a five-gallon can, which would last three or four days. (Tr. 753–54.) On occasion, Blatchford's stays on the Island were extended for two to four days, depending on how long it took to find and kill a seal and, during the winter, whether conditions on the Bay were hazardous, thus delaying a return to Homer. (Tr. 752–53, 755.)

In 1969/70, after serving in the military from 1966 through 1969, Blatchford moved to Anchorage, returning to the Island when he had occasion to be in Homer. (Tr. 821, 850; Ex. EE at 2; Ex. SS at 2.) No evidence regarding the extent of his use

^{15/} We note that Mack testified that Blatchford went over to the Island on his own "a lot of times." (Tr. 279.) However, since she did not specify the time period she was talking about, we cannot judge the frequency with which Blatchford went to his allotment.

and occupancy of the Island during his military service, or thereafter, was provided at the hearing.

Concerning the frequency of Blatchford's use and occupancy of his claimed allotment prior to 1966, the Heir makes much of the fact that Joseph Blatchford reported that Blatchford used the allotment "all the time" from 1957 through the 1960's, as a campsite and staging area for hunting seals off the Island and elsewhere in the Bay. (Tr. 765.) Thus, appellant argues: "[E]ven if [Blatchford] did not camp over night all the time, [he] would make camp with a fire year round on the Eldred Passage beach of [his] allotment. [He] did this all the time from 1957 through the [19]60s." (SOR at 7, emphasis added.) However, it is clear that Joseph Blatchford's testimony regarding his brother's constant use concerned not the entire allotment, or even a significant portion of it. Rather, he testified only to use of the campsite:

Q. [Heir's Attorney] * * * In the [19]50s and [19]60s, are you aware of any time that he didn't use that campsite?

A. [J Blatchford] He always used it in the [19]50s and [19]60s. I mean, like from [19]57 on through the [19]60s he used it all the time. My brother was a hunter, you know. [Emphasis added.]

(Tr. 765.)

Further, this statement plainly does not mean that Blatchford returned to the Island on a daily basis throughout the 10-year period from 1956 to 1966, since this is plainly an overstatement, which is not supported by other evidence in the record. Indeed, it is clear from the record that Blatchford did not spend much time on the Island, but rather, during the course of his year-round seal hunting, he camped at times during the day on the Island, and only occasionally stayed overnight on the Island.

Much of Blatchford's activity during the year clearly occurred off the Island, while he hunted for seals. In addition, despite his assertion that Blatchford used his campsite all the time, Joseph Blatchford could only personally attest to his camping overnight at the site on, at most, three or four occasions, over the course of the 10-year period:

Q. [Heir's Attorney] When you would come across — when you would camp at that site or stay at that site, observe seal for hunting purposes, did you ever have occasion to camp there?

A. [Joseph Blatchford] We camped there. Couple of times. Three, four, I don't know how many times we camped, but we used to

camp over there. Because sometimes we couldn't catch no seal. It would take us two or three days to even catch a seal or sometimes we'd catch five or six seal, you know.

(Tr. 752.) It appears from the record this was because camping overnight was only necessary when Blatchford was unable to return to Homer with his catch, which was used to provide for the Blatchford family, and because he stayed at other sites during the course of his seal hunting excursions. (Tr. 382–83, 464–65, 742–43, 746, 748–52, 754, 758, 760–62, 792, 816–17, 848–49, 910–11; Ex. 1.)

We are unable to find that the record supports the Heir's assertion that Blatchford regularly used and occupied this campsite. In addition, any use and occupancy was clearly confined to a narrow beach area situated at the southeast corner of his claimed allotment, which was backed by fairly steep cliffs and regularly covered by water at high tide: "I can't quite envision a camp on that beach. It's not really a beach, it's a rocky thing that probably doesn't have any beach to the cliff at high tide. * * * It's not a beach as much as it is just a rocky rubble, you know, boulder strewn shore." (Tr. 411–12 (Findlay Abbott); Tr. 43–44, 142, 201, 277–78, 309–10, 375–76, 410–12, 446–48, 478–80, 506–07, 510, 519, 528–29, 562–63, 567, 747, 760–61, 789–90, 818, 834–35; Exs. 2 and 5; Ex. 14 at 9–11, "Photo #7", "Photo #8", "Photo #9", Attachment 15 (Aerial Photograph, dated Dec. 16, 1963); Abbott Ex. F at 9; Abbott Ex. G.) Thus, any use and occupancy of the campsite would necessarily have been occasional and short-term.

We also take particular note of the testimony of Blatchford's eldest son (Charlie Blatchford III), who stated, referring to Blatchford's declarations to him generally regarding his early days of seal hunting and "Seal Beach," which according to the testimony (Tr. 127, 375, 756; Ex. 2) is not encompassed by Blatchford's Native allotment claim: "And he usually went — he always talked about that beach going in there. And making that his day camp or staying for a day or two." (Tr. 849.) Further, in identifying where Blatchford had said he camped on his claimed allotment, the son refers to the beach on the western, not the eastern, side of the Island. (Tr. 850–51; see also Tr. 127, 375, 382–83, 457.) There is no mention of the beach campsite on the southeast corner of Blatchford's claimed allotment. In addition, we find it significant that, despite the importance now attributed to this campsite by the Heir, the BLM field examiner reported that Blatchford made no particular mention of the campsite, during the course of the August 1982 field examination, even after being prompted to show areas which he had used and occupied. (Tr. 508, 510–11, 515, 517–18, 562, 567–68.)

The judge also noted that the Heir failed to demonstrate that Blatchford engaged in any use and occupancy of the land which could be considered potentially exclusive of others. He stated that there was no evidence that Blatchford left any

physical signs of his use and occupancy of the land or that he used and occupied the land with such frequency that it would have put others on notice that he asserted a superior right to the land. (Decision at 22–23.) This is supported by the record. (Ex. 14 at 5; see also Tr. 349; Ex. RR at 2; Ex. SS at 2; Ex. TT at 2; Ex. UU at 2; Ex. VV (Declaration of Joseph Blatchford, dated May 1, 1983) at 2; Ex. WW at 2; Ex. XX at 2; Ex. YY at 2.) The judge also noted that there was no evidence that any members of the public (Native or non-Native), other than members of Blatchford's family, acknowledged the assertion of such right.^{16/} (Decision at 23.) This, likewise, is supported by the record. (Tr. 762 (Joseph Blatchford); Ex. UU at 3; Ex. VV at 3; Ex. WW at 3; Ex. YY at 3.) Compare with United States v. The Heirs of David F. Berry, 127 IBLA at 202, 209–10.

Ultimately, we do not think that use and occupancy of a small portion of a parcel of land, almost 160 acres in size, for part of a day, followed by return home or travel to other sites where an individual generally stayed overnight, even where this occurred on a number of occasions throughout the year, constitutes the substantially continuous use and occupancy contemplated by the 1906 Act. United States v. Pestrikoff, 134 IBLA at 286–88; see National Park Service (Lewis Vanderpool), 117 IBLA at 250–52; State of Alaska (Thomas Abbott) 113 IBLA at 82, 84; Angeline Galbraith (On Reconsideration), 105 IBLA at 334–35, 340; United States v. Estabrook, 94 IBLA at 45–47, 52–54; Herbert H. Hilscher, 67 I.D. at 411–13, 416 (using a beach for landing and storing a boat). By no means can it be considered to have occurred with such regularity that it took place with a "customary seasonality." 43 CFR

^{16/} We are not persuaded that the fact that Blatchford would have been clearly visible on the beach to any member of the Abbott family or any other member of the public fishing or boating in the waters to the east establishes that they should have known that he asserted a superior right to the land. (Blatchford SOR at 23–24; see, e.g., Tr. 769–70.) Even assuming that members of the Abbott family or other members of the public had actually seen Blatchford on any part of his claimed land, such evidence would not demonstrate that they should have known that he also asserted a superior right to the land. It is equally consistent with his transitory use of the land. (Blatchford SOR at 26 ("It is unlikely that even if [the witnesses offered by BLM] saw a [N]ative hunter using his land, that such use would register as a claim for the land.)) Further, there is no evidence that they were aware of or acknowledged Blatchford's claim.

In any event, we agree with BLM that the record does not establish a frequency of use by Blatchford such that would support a claim of right to the land: "[A]ssertions that Joe Blatchford frequently saw certain local residents, primarily Gretchen Bersch, pass the allotment by boat, are completely refuted by the fact that he was not frequently on the site and the testimony of those local residents that they never saw Charlie Blatchford on his claimed allotment (Tr. 140–141, 223–224, 375, 455, 470–471)[.]" (Answer to Blatchford SOR at 10.)

2561.0-5(a). Rather, such use and occupancy constitutes intermittent use of the land "in the same fashion as any other fisherman or hunter who returns to a particularly favorite site during the course of a season," which has been deemed not qualifying. Gregory Anelon, Sr., 21 IBLA 230, 232 (1975). Nor do we think that it demonstrates that the individual is asserting a superior right to any part, and certainly the entirety, of the parcel of land, to the potential exclusion of others.

We, thus, hold that Judge Sweitzer properly concluded that the Heir failed to carry her burden of proving, by a preponderance of the evidence, that Blatchford engaged in substantial actual possession and use of the land originally claimed by him, to the potential exclusion of others, for the requisite 5 years. Accordingly, we find that Judge Sweitzer, in his May 1999 decision, properly rejected the Native allotment applications of Mack (AA-8149-A) and the Heir of Blatchford (AA-8184) for land situated on Yukon Island. ^{17/}

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.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

^{17/} Because we agree with Judge Sweitzer that Mack and the Heir of Blatchford are not entitled to Native allotments under the 1906 Act, there is now no need for BLM to decide whether it should exercise its discretion under that Act, to reject, in whole or in part, or condition approval of a Native allotment, so as to avoid or minimize adverse effects on historic properties deemed eligible for inclusion or included in the National Register, in accordance with section 106 of NHPA and 36 CFR Part 800. See 85 IBLA at 204-05.