

UNITED STATES  
v.  
HEIRS OF PAT P. PESTRIKOFF

IBLA 2002-378

Decided February 2, 2006

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer denying a motion to dismiss a Government contest challenging a Native allotment application, and denying the application and cancelling the entry. AA-7572.

Motion to dismiss granted; decision affirmed.

1. Administrative Procedure: Burden of Proof--Alaska: Native Allotments--Evidence: Burden of Proof--Evidence: Prima Facie Case--Rules of Practice: Government Contests

When the Government contests a Native allotment application, it bears the burden of going forward with evidence sufficient to establish a prima facie case that the Native allotment applicant did not satisfy the use and occupancy requirements of the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), whereupon the ultimate burden of persuasion rests with the applicant to overcome that case by a preponderance of the evidence. In determining whether the Government has established a prima facie case, an administrative law judge may properly consider the evidence offered by the Government in its case-in-chief together with the evidence presented by a Native village corporation, which, claiming an interest in the land at issue adverse to the applicant, had properly been allowed to intervene in support of the Government's position as a full party in the proceeding.

2. Administrative Procedure: Burden of Proof--Alaska: Native Allotments--Evidence: Burden of Proof--Evidence: Prima Facie Case--Rules of Practice: Government Contests

An administrative law judge properly denies a Native allotment application when he correctly concludes that the evidence presented by the Government and the intervenor at a hearing into the validity of the application, considered together, established a prima facie case that the applicant had not satisfied the use and occupancy requirements of the Native Allotment Act, where the applicant, with full knowledge of the potential consequences of the decision, declines to offer any evidence rebutting that case before the close of the hearing record.

APPEARANCES: Carol Yeatman, Esq., Anchorage, Alaska, for Dorothy Morrison; Robert H. Hume, Jr., Esq., Anchorage, Alaska, for the Ouzinkie Native Corporation; Regina L. Sleater, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Dorothy Morrison, one of the heirs of Pat P. Pestrikoff (the Heirs), has appealed from an April 26, 2002, decision of Administrative Law Judge Harvey C. Sweitzer, denying the Heirs' motion to dismiss the Government contest challenging Native allotment application AA-7572, and denying the application and cancelling the entry. <sup>1/</sup>

On April 12, 1971, Pestrikoff filed a handwritten Native allotment application (Ex. E), which he had executed on April 2, 1971, pursuant to the Act of May 17,

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<sup>1/</sup> The Heirs are identified in the record as Dorothy Morrison, Janet Lestenkof, Susie Charliaga, and Philip Torsen. Torsen died in 1999. At the time of the 2001 hearing in this case and thereafter, Torsen's interest in Pestrikoff's Native allotment application was, so far as we know, held by his Estate. The Ouzinkie Native Corporation (ONC), which is the Native corporation organized by the Native residents of the Native village of Ouzinkie, in the absence of any objection and for good cause shown, was permitted to intervene in the proceeding before Judge Sweitzer and appears now before the Board as a respondent, supporting the judge's decision.

1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (hereinafter referred to as the 1906 Act).<sup>2/</sup> The application was filed with the Bureau of Indian Affairs (BIA). In the application, Pestrikoff sought 80 acres of land “located in Icon Bay, [southeast] end of Spruce Island.”<sup>3/</sup>

A second typewritten version of the same application (Ex. D), also executed by Pestrikoff on April 2, 1971, was subsequently filed with the Bureau of Land Management (BLM) on April 10, 1972. That application contained an April 3, 1972, BIA certification, attesting to the fact that Pestrikoff was entitled to a Native allotment. In this second application, Pestrikoff sought approximately 80 acres of unsurveyed land in protracted sec. 28, T. 26 S., R. 19 W., Seward Meridian, Alaska.<sup>4/</sup> The claimed land is situated on the southeastern shore of Spruce Island, approximately five miles southeast of Ouzinkie, Alaska, which is near the southwestern corner of the island. See Ex. 1. It is entirely bordered by Icon Bay on the eastern side and partially by an unnamed lake on the western side. It is also immediately south of and adjacent

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<sup>2/</sup> 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).

<sup>3/</sup> Pestrikoff described the claimed land by metes and bounds, as follows: “[F]rom a Post on Beach front call Post #1, go due West 3/8 of mile to Post #2, from Post #2, follow along Lake shore 1/8 mile to Post #3, go 1/4 mile due South to Post #4, from [Post] #4 go due [East] 1/2 mile to Post #5, from Post #5, go 1/8 mile North to Post #6, from [Post] #6 follow meander of beach line 1/2 mile to starting point.” Attached to the application was a handdrawn map which purported to be a portion of the U.S. Geological Survey (USGS) Kodiak (D-2) Quadrangle map encompassing the southeastern corner of Spruce Island. The boundaries of the land claimed by Pestrikoff were depicted on the map.

<sup>4/</sup> Following its 1980 survey of the fractional township, BLM placed the land claimed by Pestrikoff in fractional secs. 27 and 28, T. 26 S., R. 19 W., Seward Meridian, Alaska. This is depicted on a Sept. 9, 1980, Master Title Plat (MTP), and subsequent MTP’s, of the township. BLM also surveyed all of the claimed land, which was found to encompass 79.95 acres of land in secs. 27 and 28, under U.S. Survey No. 12374, Alaska, in 1998. The survey was accepted by the Acting Deputy State Director for Cadastral Survey, Alaska, BLM, on Apr. 7, 2000, and the plat was officially filed on Apr. 26, 2000.

to the Native allotment applications, going west to east, of Peter Squartsoff (AA-5970-B) and Philip Katelnikoff (AA-7567).<sup>5/</sup> See Exs. BB and HH.

In both versions of his application, Pestrikoff, who was born on August 9, 1914, claimed that he had used and occupied the land for fishing and other subsistence purposes on a seasonal basis from June through September of each year starting in 1951.<sup>6/</sup> He listed no improvements on the land.

By letter dated March 11, 1974, BLM notified Pestrikoff that the claimed land had been withdrawn from entry under the public land laws on February 10, 1940, pursuant to Executive Order (EO) No. 8344, thus precluding any entry under the 1906 Act. BLM afforded him 30 days from receipt of the letter to inform BLM whether he had erred in reporting the initial date of use and occupancy of the land or in any other respect, and to explain the reason for any such error. By letter dated March 22, 1974, Pestrikoff informed BLM that, “[t]o the best of [his] recollection,” he had actually initiated use and occupancy of the land as a fishing and trapping camp “as early as June 1931,” prior to the 1940 withdrawal. He did not explain the reason for his earlier reporting of a 1951 initiation date.

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<sup>5/</sup> In this second application, Pestrikoff described the claimed land by metes and bounds, as follows:

“[B]eginning at Corner No. 1 on the shoreline of Monks Lagoon of Icon Bay on Spruce Island in common with the southeast corner of the Philip Katelnikoff Native Allotment, at approximate Lat. 57° 53' 51" N., Long. 152° 21' 18" W.; thence west 1,980 feet to Corner No. 2 on the east shore of an unnamed lake; thence south-westerly 900 feet along the lakeshore to Corner No. 3; thence south 1,056 feet to Corner No. 4; thence east 2,244 feet to Corner No. 5 on the shoreline of Icon Bay; thence northeasterly and northerly 1,980 feet along the shoreline to the point of beginning, bounded on the north in part by the Philip Katelnikoff Native allotment and in part by the Peter Squartsoff Native Allotment[.]”

Attached to the application was a portion of the USGS Kodiak (D-2) Quadrangle map encompassing Spruce Island. The boundaries of the land claimed by Pestrikoff, as well as the two adjoining and other Native allotments, were depicted on the map.

<sup>6/</sup> Pestrikoff's claimed use and occupancy predated the State of Alaska's Oct. 29, 1963, amendment of its selection application (A-056427), filed on Dec. 22, 1961, seeking the claimed and other lands on Spruce Island and elsewhere, pursuant to section 6(b) of the Act of July 7, 1958 (Alaska Statehood Act), Pub. L. No. 85-508, 72 Stat. 339, 340 (1958), as amended.

On September 24, 1974, Ouzinkie Native Corporation (ONC) filed a selection application (AA-6688-A, as amended Nov. 21, 1974), seeking the surface estate of all of the land claimed by Pestrikoff and other lands on Spruce Island, which had been withdrawn for such selection pursuant to section 12 of ANCSA, as amended, 43 U.S.C. § 1611 (2000). On August 3, 1977, BLM issued Interim Conveyances (IC's) Nos. 064 and 065 to ONC and Koniag, Inc. (Koniag), the Native regional corporation, thus transferring from Federal jurisdiction the surface and subsurface estates of approximately four acres of land claimed by Pestrikoff in fractional sec. 27, T. 26 S., R. 19 W., Seward Meridian, Alaska.<sup>7/</sup> The surface and subsurface estates of the remaining 76 acres of land in fractional sec. 28 of the township that Pestrikoff claimed were excluded from the IC's, and thus were not conveyed to ONC and Koniag.

On June 15, 1978, Carl E. Neufelder, a BLM realty specialist, conducted a field examination of the land claimed by Pestrikoff, reporting the results of the examination in an April 18, 1979, Field Report (Ex. L).<sup>8/</sup> In advance of the examination, Neufelder provided notice to ONC, which had selected the claimed land, and to the Russian Greek Eastern Catholic-Orthodox Church of North America (the Church), which held a July 27, 1914, patent (No. 423838) to a total of 2.40 acres of land, described as Tracts B and C of U.S. Survey No. 470, Alaska (USS 470), in the immediate vicinity of the claimed land.<sup>9/</sup> However, he states that he did not notify Pestrikoff, since “[a]ll efforts to locate Mr. Pestrikoff were futile.” (Ex. L at 2.)

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<sup>7/</sup> The effect of the IC's was to preclude the Department from adjudicating the validity of Pestrikoff's Native allotment claim to the affected four acres of land pursuant to the initiation of a Government contest. Rather, the Department was required to adjudicate the matter under the Aguilar Stipulated Procedures, with the aim of securing a reconveyance of the land to the United States for the purpose of satisfying the claim, should it prove valid. See, e.g., Lillian Pitka, 164 IBLA 50 (2004).

<sup>8/</sup> BLM had originally scheduled the examination during the period from June 16 to 26, 1977, and notified Pestrikoff, who informed BLM on May 31, 1977, that he desired to participate in the examination. The examination was cancelled because of weather and logistical problems and rescheduled for June 15, 1978.

<sup>9/</sup> The land patented to the Church (then known as the Russian Greek Church Mission Reserves) encompassed not only Tracts B and C, but also 0.83 acres in Tract A. The land had originally been surveyed in 1905, under a survey which was approved by the U.S. Surveyor General for Alaska on May 22, 1907. See Ex. AA (Plat of USS 470, Tract C); Ex. LL (Plat of USS 470, Tract B).

During the examination, Neufelder was accompanied by John Panamarioff, an ONC representative, and two other individuals, but not by Pestrikoff. Neufelder did not report finding any posts or other marks left by Pestrikoff to identify the boundaries of the claimed land. However, he located the boundaries, reporting: “Panamarioff identified the claimed lands which had been described correctly on the application.”<sup>10/</sup> (Ex. L at 3.) Neufelder “established” the northeast and northwest corners of the claim: “They are on (10-12[-inch]) Sitka spruce–blazed, tagged and painted orange.” *Id.* at 1. He concluded that Pestrikoff had not complied with all of the requirements of the 1906 Act because the examination had “failed to find significant physical evidence of substantial use and occupancy potentially exclusive of others,” based on the following findings:

The lands are claimed by the applicant for fishing. Resources necessary for the above activities can be found on the subject lands as well as on the surrounding lands. [<sup>11/</sup>] The claimed lands are similar to most of

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<sup>10/</sup> Neufelder described the claimed land by metes and bounds, as follows:

“Beginning at corner No. 1 on the shoreline of Monks Lagoon of Icon Bay; thence westerly [plus or minus] 30 chains to corner No. 2 on the east shore of an unnamed lake; thence meander southwesterly approximately 14 chains along the lakeshore to corner No. 3; thence [plus or minus] 16 chains southerly to corner No. 4; thence easterly [plus or minus] 34 chains to corner No. 5; thence meander northerly approximately 30 chains along the bay to corner No. 1, the [point of beginning].” (Ex. L at 1.) He also included an “Area Map,” which appeared to be a portion of the USGS Kodiak (D-2) Quadrangle map encompassing Spruce Island, on which was depicted the land claimed by Pestrikoff and other Native allotment applicants.

<sup>11/</sup> In an Aug. 28, 1986, Field Report with respect to Katelnikoff’s Native allotment application (Ex. JJ), the BLM realty specialist reported, at page 5:

“According to the Alaska Habitat Management Guide (State of Alaska, Department of Fish and Game, Division of Habitat, Juneau, Alaska, 1985) the area has abundant fish and wildlife resources. The surrounding ocean waters support shellfish (razor clams, crab and shrimp), ocean fish (pacific halibut, pacific herring, pacific cod and walleye pollock), and several varieties of salmon. The upland areas provide suitable habitat for bear, black tailed deer[,] beavers and otter.”

*See* Tr. 365-66, 423-24, 430, 496-99, 509-12, 532, 559-60. However, the record indicates that, while fishing occurs year-round, trapping is generally a fall/winter activity which generally starts in October. Accordingly, we agree with Judge Sweitzer that trapping is “unlikely” to have been undertaken by Pestrikoff during his indicated use period (June through September). (Decision at 16; *see* Tr. 287-88,

(continued...)

the lands used for this purpose. John Panamarioff was requested to show the field examiner any and all improvements on the Native allotment, i.e., fire pits, tent frames, fish racks, house, or any other improvements. The applicant claimed no improvements on the parcel. No improvements were located on the subject lands during field examination belonging to the applicant. \* \* \* No other physical evidence of use or occupancy commonly associated with the claimed activities was found on the parcel. [Emphasis added.]

Id. at 3, 4.

Pestrikoff died on October 17, 1978, and his application was pursued thereafter by the Heirs.<sup>12/</sup>

Questions later arose concerning whether Neufelder had correctly located or actually examined the land claimed by Pestrikoff. See Exs. N, Y, and Z. The questions arose because Neufelder both had reported a “conflict” with land surveyed as Tract C of USS 470, which was part of the land which had been patented to the Church, and, more importantly, had placed a Church building on the land claimed by Pestrikoff. (Ex. L at 3.) On a handdrawn map included with his Field Report (“Site Plot”), Neufelder had shown Tract C within the boundaries of Pestrikoff’s claimed land. Also attached to the Field Report, in addition to aerial photographs of Tract B of USS 470, was an aerial photograph labeled “USS 470 Tract C,” which shows a

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<sup>11/</sup> (...continued)

334-35, 484-85, 490, 512, 628-30.)

<sup>12/</sup> Because ONC filed a protest on May 28, 1981, challenging the validity of Pestrikoff’s Native allotment application, the application could not be legislatively approved by section 905(a)(1)(A) of the Alaska National Interest Lands Conservation Act (ANILCA), as amended, 43 U.S.C. § 1634(a)(1)(A) (2000). See 43 U.S.C. § 1634(a)(5) (2000). Rather, BLM was required to adjudicate the validity of the application under the 1906 Act, as amended.

building, described as a Church building, in a small clearing.<sup>13/</sup> See Field Report at 3.

A 1980 survey of the land in T. 26 S., R. 19 W., Seward Meridian, Alaska, disclosed that Tract C of USS 470 was actually situated 0.60 miles northeast of Pestrikoff's allotment claim, in sec. 22 of the township.<sup>14/</sup> See MTP for T. 26 S., R. 19 W., Seward Meridian, Alaska, dated Sept. 9, 1980; Ex. N. In an April 8, 1994, note to the file (Ex. M), Jerri Sansone, a BLM land law examiner, asserted that Neufelder's inclusion of Tract C in the claim was attributable to the fact that Tract C was "incorrectly plotted" on the MTP at the time of the June 15, 1978, inspection, "due to the inaccurate protraction diagrams." See Exs. N, P, and MM.

Carol S. Heath, a BLM realty specialist, conducted a supplemental field examination on May 17, 1995, preparing a June 12, 1995, Supplemental Field Report (Ex. P). She was accompanied neither by a representative of ONC, despite having notified it in advance of the examination, nor by any of Pestrikoff's heirs, having failed to notify them. However, the record is clear that the sole aim of the supplemental field examination was to verify whether the Church building, which Neufelder had indicated was on Pestrikoff's allotment claim, was, in fact, on the claim, since this might establish that Neufelder had "[in]correctly plotted" the claim, placing it northeast of its correct location and in conflict with Tract C. (Ex. N; see Ex. P at 1.)

Heath found the northeast corner of the claim as marked by Neufelder: "I located the NE corner in which the field examiners had blazed and painted a tree. The orange paint was not readily visible because of the passage of time." (Ex. P at 1.) However, she discovered no improvements, or a Church building, within the claim. She thus verified that Tract C did not fall within the claim boundaries, but was situated some distance to the northeast. See Ex. P at 1.

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<sup>13/</sup> The photograph of the Church building included in the Field Report was taken directly over the building, looking straight down. It is impossible to tell from the photograph where the building is located on Spruce Island, or where it is in relation to the boundaries of the land claimed by Pestrikoff, since the photograph discloses no distinguishing topographic or other features. However, because Neufelder placed Tract C on the claimed land, it can be assumed that he also located the Church building there. See Tr. 82-84.

<sup>14/</sup> The record contains a copy of the original plat of the 1980 survey of T. 26 S., R. 19 W., Seward Meridian, Alaska (Ex. DD), which was accepted by the Chief, Cadastral Survey, Alaska, BLM, on Jan. 9, 1980. The record indicates that the township survey plat was officially filed on Mar. 25, 1980.

Subsequent efforts by BLM to determine whether Pestrikoff's qualifying use and occupancy of the claimed land had been substantiated included a June 15, 1992, letter to BIA (Ex. V), <sup>15/</sup> and a December 18, 1996, letter to the Heirs (Ex. W). In each letter, BLM requested the submission of notarized witness statements and any other supporting evidence within 60 days from receipt of the letter, since it appeared from BLM's April 1979 Field Report that Pestrikoff had not satisfied the use and occupancy requirements of the 1906 Act. Each letter stated that, if no evidence was submitted or if the evidence was not sufficient to satisfy the statute and regulations, BLM would initiate a Government contest. BLM received no response from BIA or any of the Heirs, despite the fact that two of the Heirs (Dorothy Morrison and Susie Charliaga) actually received the December 1996 letter. See Tr. 20, 40-41.

On April 29, 1999, BLM filed a Government contest complaint against the Heirs charging that Pestrikoff had failed to satisfy the use and occupancy requirements of the 1906 Act and its implementing regulations (43 CFR Subpart 2561). It specifically stated that Pestrikoff had not made substantially continuous use and occupancy of the claimed land in a manner that was at least potentially exclusive of others for a period of 5 years. The Heirs filed an answer to the complaint denying the charges on June 3, 1999.

On January 22, 2001, ONC filed a motion to intervene in the Government contest proceeding as a full party, asserting that, by virtue of its ANCSA selection application, it has a property interest in the claimed land adverse to the interest of the Heirs and would accordingly be entitled to bring a private contest pursuant to 43 CFR 4.450-1. ONC also stated that it desired to present evidence establishing the Heirs' lack of entitlement under the 1906 Act, and supporting the Government contest. See Tr. 233-34. Judge Sweitzer granted the motion by order dated February 6, 2001, recognizing ONC "as a party intervenor."

A hearing was held before Judge Sweitzer on October 24, 25, 26, and 29, 2001, in Anchorage and Kodiak, Alaska. At the hearing, the Government presented its evidence first. The Government's case-in-chief consisted entirely of the testimony of Elizabeth Carew, a BLM land law examiner with over 20 years of experience (including adjudicating Native allotment claims), through whom the Government introduced Pestrikoff's Native allotment claim case file (Ex. 11). See Tr. 20-22. She also testified that the evidence in the file was not sufficient to show that Pestrikoff

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<sup>15/</sup> While BLM's practice, in the case of a deceased Native applicant, may have been to notify BIA, which would in turn notify the applicant's heirs, there is no evidence that the June 1992 letter at issue here was ever received by any of the Heirs. See Tr. 115.

had satisfied the use and occupancy requirements of the 1906 Act. (Tr. 42-43.) Neither Neufelder nor Heath was called as a witnesses.

At the conclusion of that presentation on October 25, 2001, after the Government had formally rested its case-in-chief, Judge Sweitzer afforded the Heirs an opportunity to present their evidence. (Tr. 188.) The Heirs, through counsel, instead moved to dismiss the contest on the basis that the Government had failed to establish a prima facie case that Pestrikoff had not satisfied the use and occupancy requirements of the 1906 Act, and that his application was accordingly invalid. See Tr. 187-88, 194. They did so orally, then submitted a written motion to dismiss.

The Heirs also waived their right to offer evidence rebutting the Government's case-in-chief, their counsel stating: "[I]n addition to this Motion to Dismiss, we are also informing the Court that we are not going forward. I have conferred with all of the Contestees, and the Contestees have all unanimously directed me not to go forward; to make the Motion to Dismiss, and if that dismissal is denied, that we will appeal." <sup>16/</sup> (Tr. 195, emphasis added.) Furthermore, the Heirs recognized that Judge Sweitzer was required to rule on the motion to dismiss before requiring them to decide whether or not to present evidence, but stated that they preferred that he take the motion to dismiss under advisement and rule on it after the submission of post-hearing briefing by all of the parties:

Because this is unusual, I propose that you allow us, meaning all of the Counsel involved in this case, to properly brief this issue and you take this matter under advisement.

I know the IBLA directs you not to take a Motion to Dismiss a Contest of Complaint under advisement, but to rule upon it as it has been made. However, because Contestees have decided not to go forward, it is my belief that it would be appropriate for you today to take the Motion under advisement, and allow all of the counsel in this case to properly brief this. [Emphasis added.]

(Tr. 195; see id. at 243; Motion to Dismiss at 9.)

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<sup>16/</sup> In their Oct. 25, 2001, Motion to Dismiss, counsel for the Heirs likewise stated, at page 9: "[A]fter conferring with all the Contestees, Counsel has been directed to make this motion to dismiss and not go forward with evidence as is routine in this type of Contest. If this motion is denied, Contestees have decided to appeal that denial but not go forward."

In response to a question by Judge Sweitzer concerning whether the present case was distinguishable from other cases decided by the Board where we have held that the presiding judge erred by not ruling on a motion to dismiss at the hearing, the Heirs averred that no precedent required a ruling on the motion when the contestees decide not to go forward. (Tr. 243.) The Heirs' counsel acknowledged that they were aware of the fact that, by standing on their motion to dismiss and not presenting any rebuttal evidence, they waived their right to present evidence at a later time. (Tr. 196; see id. at 242, 244-45.) They later suggested that Judge Sweitzer could, in the alternative, rule on their motion to dismiss at the hearing "and not take it under advisement," after permitting the other parties an opportunity to respond to the motion. (Tr. 211.) However, the Heirs returned to their stated preference that Judge Sweitzer take their motion to dismiss under advisement pending submission of written arguments by the parties. (Tr. 212.)

After a recess during which the other parties reviewed the written motion to dismiss, the Government and ONC agreed to Judge Sweitzer's taking the motion under advisement and stated their willingness to respond in writing to the motion as a part of their post-hearing briefing. See Tr. 214-16, 218. When the hearing resumed on October 26, 2001, ONC formally requested the opportunity to present evidence supportive of the Government's case-in-chief, asserting that it should be considered for purposes of determining whether the Government had established its prima facie case. (Tr. 231-35.) ONC's request was opposed by the Heirs on the ground that ONC's evidence might prejudice Judge Sweitzer's determination of whether the Government had established a prima facie case.<sup>17/</sup> (Tr. 236-39; see id. at 218-22.)

Judge Sweitzer declined to rule on the question and instead expressed his determination to take under advisement ONC's request that he consider ONC's evidence for purposes of deciding the existence of a prima facie case, along with the Heirs' motion to dismiss for failing to make a prima facie case. (Tr. 236-39.) He allowed ONC to present its evidence, but deferred ruling until after the hearing and the submission of post-hearing briefing by the parties. See Tr. 196-97, 211-12, 245-47, 249.

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<sup>17/</sup> During the discussion at the Oct. 25, 2001, session concerning the Heirs' motion to dismiss the Government contest because the Government had failed to make its prima facie case, the Heirs objected to any introduction of evidence by ONC, "since the Government has stated that it has rested its case and we are not going forward." (Tr. 212.) Judge Sweitzer initially responded: "[ONC] can [introduce evidence] because the Intervenor is a recognized party to the proceeding, and the fact that you choose not to present evidence doesn't preclude them from doing so." Id.

Following the presentation of ONC's evidence over the remaining 2 days of the hearing, and despite the fact that Judge Sweitzer might later consider such evidence for purposes of determining the existence of a prima facie case, the Heirs again declined to offer any rebuttal evidence. On Friday, October 26, they stated that they would not withdraw their motion and present their case. At the end of the hearing, they stated they were "going to stand on [their] Motion."<sup>18/</sup> (Tr. 712.) The hearing concluded on October 29, 2001.

Post-hearing briefs were submitted. Judge Sweitzer issued his decision on April 26, 2002. As a preliminary matter, Judge Sweitzer concluded that ONC's evidence was properly considered for purposes of determining whether the Government had established a prima facie case. He held that, since ONC had standing under 43 CFR 4.450-1 to bring a private contest challenging the Native allotment application and thus to intervene as a "full party" in the Government contest "as a matter of right," Decision at 11 (citing United States v. United States Pumice Co. (United States Pumice Co.), 37 IBLA 153, 157-60 (1978)), it could properly be treated as a "co-contestant" and as such be permitted to introduce evidence in support of the Government's case-in-chief. (Decision at 12 (citing United States v. Pittsburgh Pacific Co., 68 IBLA 342, 348, 89 I.D. 586, 590 (1982)).) Judge Sweitzer stated that permitting ONC to offer evidence in support of the Government's case-in-chief aided the Secretary of the Interior in fulfilling her duty to protect the interests of the Government and the public in the public lands and did not prejudice the interests of the Native applicant, who was afforded an opportunity at the conclusion of the presentation of evidence by the Government and ONC to offer evidence in rebuttal.

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<sup>18/</sup> The following exchange between Hume (counsel for ONC), Yeatman (counsel for the Heirs), and Judge Sweitzer occurred on October 26:

"MR. HUME: Just one other thing I just wanted to put on the Record, and that is this reflects on the Motion to Dismiss. After the conclusion of the testimony that we'll be putting on in Kodiak [on October 29] I'm going to be willing to offer to the Contestees to withdraw their Motion to Dismiss and to proceed if they wish.

"If they wish to stand on their Motion, that's fine. But I want to let them know that if they wish to pursue the Hearing and, and withdraw the Motion, that would be acceptable to Ouzinkie.

"THE COURT: Okay, I think you've made, already made your position clear on that[.] Ms. Yeatman[,] [d]o you have any change?

"MS. YEATMAN: No, Your Honor."

(Tr. 390-91.) At the conclusion of the October 29 hearing, counsel for ONC restated the offer "to allow the Pestrikoff heirs to withdraw their Motion to Dismiss and to put on whatever testimony they m[a]y wish[.]" (Tr. 711-12.) They again declined.

In his April 2002 decision, Judge Sweitzer also held that the evidence offered by the Government and ONC, considered together, established a prima facie case that Pestrikoff had not satisfied the use and occupancy requirements of the 1906 Act. (Decision at 13-16.) Judge Sweitzer accordingly denied the Heirs' motion to dismiss the contest for failing to establish a prima facie case. Further, in view of the absence of any contrary evidence offered by the Heirs, Judge Sweitzer held that they had failed to overcome that prima facie case by a preponderance of the evidence, and accordingly denied the Native allotment application and cancelled the entry.

Judge Sweitzer's decision was served on the Alaska Legal Services Corporation (ALSC), which had represented the Heirs throughout the proceeding before him, on April 29, 2002. See, e.g., Tr. 10. Under 43 CFR 4.411(a), the Heirs accordingly had 30 days from the date of service, or on or before May 29, 2002, to file a notice of appeal from Judge Sweitzer's decision. On May 28, 2002, on behalf of Dorothy Morrison, ALSC filed a notice of appeal with the Hearings Division, Office of Hearings and Appeals. On June 27, 2002, a statement of reasons (SOR) for appeal was filed with the Board, on behalf of Morrison, in which she requested the Board to reverse Judge Sweitzer's decision. (SOR at 1.)<sup>19/</sup>

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<sup>19/</sup> Morrison asserts that she was entitled to represent the "undivided interests" of herself and the other heirs in the allotment in taking the appeal. (Consolidated Reply at 8.) She argues that the Board is barred from ruling otherwise, since it lacks the authority necessary to "partition" the interests of the four individuals in the allotment. ONC has moved to dismiss the appeal to the extent it purports to constitute an untimely appeal on behalf of the other Heirs. None of the Heirs filed a timely notice of appeal from Judge Sweitzer's April 2002 decision. They also did not expressly join in Morrison's original appeal. Nor is there any evidence in Morrison's notice of appeal that she was acting on behalf of any of the other Heirs in filing the appeal, which she was entitled to do under 43 CFR 1.3. See Consolidated Reply at 8. To the extent that she purported to represent the other Heirs in filing her consolidated reply, that reply would clearly constitute an untimely notice of appeal by Lestenkof, Charliaga, and Torsen. See id. at 9. Accordingly, we grant ONC's motion to dismiss as to those persons, since, in the absence of a timely appeal, the Board lacks any jurisdiction to entertain the appeal. United States Forest Service (Sergius P. Williams), 124 IBLA 336 (1992); State of Alaska v. Heirs of Dinah Albert, 90 IBLA 14, 17 (1985). Accordingly, we will hereafter treat Morrison as the sole appellant.

In her SOR, appellant contends that Judge Sweitzer erred in holding that evidence submitted by ONC could be included in the Government's case-in-chief for purposes of establishing a prima facie case. She argues:

If Intervenor's [ONC's] evidence is included in the determination of whether the Government made its prima facie case, that would effectively elevate the Intervenor to a co-contestant rather than an intervenor. In order for ONC to be a contestant, it is required to follow the [F]ederal regulations governing private contests, which are found at 43 C.F.R. Section 4.450. However, ONC has not complied with the contest regulations.

(SOR at 6, 9.) Appellant further argues that if he had considered only the evidence presented by the Government, Judge Sweitzer would have concluded that it had not established a prima facie case of invalidity, because it failed to show that Pestrikoff's use and occupancy was not potentially exclusive of others, especially given its two assertedly deficient field examinations. See SOR at 11-14, 19-24. In the alternative, Morrison asserts that, even considering the evidence offered by both the Government and ONC, they had, together, failed to establish a prima facie case of invalidity based on the absence of potential exclusivity. (SOR at 14-18.) She asks the Board to reverse Judge Sweitzer's decision and grant the Native allotment application.

[1] When the Government contests a Native allotment application, it ordinarily bears the burden of going forward to present evidence sufficient to establish a prima facie case that the applicant failed to satisfy the use and occupancy requirements of the 1906 Act and its implementing regulations (43 CFR Subpart 2561), whereupon the ultimate burden of persuasion rests with the applicant to overcome that case by a preponderance of the evidence. See, e.g., United States v. Heirs of Thomas Bennett, 144 IBLA 371, 381 (1998); United States v. Heirs of David F. Berry, 127 IBLA 196, 205 (1993). Where no prima facie case is established, no burden falls upon the applicant.

No Board decision, so far as we are aware, has ever addressed whether an administrative law judge may consider evidence presented by an intervenor (appearing in support of the Government's position in a Government contest proceeding) for purposes of determining whether the Government has established a prima facie case of invalidity of a Native allotment claim. Thus, we can agree with appellant that no Board precedent specifically supports the proposition that an intervenor's evidence may be included in the Government's case-in-chief for purposes of establishing a prima facie case of invalidity (SOR at 6); at the same time, no

precedent holds that it may not be included. This is a case of first impression, which we now proceed to adjudicate.

We start, as Judge Sweitzer did, with the fact that ONC is clearly entitled, as a matter of right, to intervene as a full party in the present Native allotment proceeding before Judge Sweitzer and this Board. (Decision at 11, citing United States Pumice Co., 37 IBLA at 157-60.) Intervention, whether or not as a matter of right, is not specifically provided for by applicable Federal statute or Departmental regulation. In United States Pumice Co., we held that “intervention, as a matter of right, exists only in those cases where the individual seeking to intervene could independently maintain the action in which he seeks to participate.” 37 IBLA at 157 (emphasis added). We also noted that the question of whether an individual could independently maintain an action is determined by the particular proceeding in which intervention is sought. Id. at 158 n.3. The proceeding at issue in United States Pumice Co. was a Government contest, and thus the right to intervene was determined by whether the individual seeking to intervene had standing under 43 CFR 4.450-1 to bring a private contest. Id. at 157-59. Further, we stated that standing to bring a private contest would arise where the individual seeking to intervene “claimed ‘title to or an interest in land adverse to any other person claiming title to or an interest in such land.’” Id., quoting 43 CFR 4.450-1. In accordance with this longstanding Board precedent, ONC’s right to intervene arises from the fact that it has standing under 43 CFR 4.450-1 to bring a private contest, and would therefore have standing under 43 CFR 4.450-1 to bring a private contest challenging the allotment application. ONC is claiming an “interest in land” adverse to Pestrikoff (and now his Heirs), because it has an outstanding application selecting the same lands claimed by Pestrikoff and seeks to ensure that the Department does not issue a final decision approving the Native allotment application. See 37 IBLA at 159 n.4.

Appellant misconstrues our decision in United States Pumice Co., as relied upon by Judge Sweitzer. He did not hold that a party seeking intervention must satisfy all of the criteria of 43 CFR 4.450-1 for initiating a private contest. Rather, he stated that the case stood for the proposition that a party “with a sufficient interest to bring a private contest” may intervene as a matter of right. (Decision at 11, emphasis added.) While noting that ONC might not have been entitled to actually bring a private contest, see Decision at 12 n.3, he concluded that ONC was, by virtue of its claim of an interest in the land covered by Pestrikoff’s Native allotment application, entitled to intervene as a matter of right. 43 CFR 4.450. His analysis accords with our United States Pumice Co. holding.

Since it was entitled to intervene as a full party, ONC was entitled to participate fully in the Government contest proceeding, which meant examining

witnesses offered by the Government and the Heirs, and offering its own evidence. See United States v. Kosanke Sand Corporation (On Reconsideration), 12 IBLA 282, 302-03, 80 I.D. 538, 548 (1973). We have long held, in the case of Native allotment applications, that “conflicting applicants [such as the State and Native corporations] should be given notice and an opportunity to participate in any contest proceedings initiated [by the Government].” John Moore, 40 IBLA 321, 325 n.2, 86 I.D. 279, 280 n.2 (1979). Accordingly, we agree with Judge Sweitzer that, given its right to intervene in the Government contest proceeding, ONC was entitled to have evidence that it presented considered for purposes of determining whether the Government had met its burden of going forward to establish a prima facie case that Pestrikoff, and thus his Heirs, was not entitled to a Native allotment.

We find it necessary to comment on the procedures followed by Judge Sweitzer in this case. At a hearing, a determination whether a prima facie case has been established is ordinarily made at the conclusion of the Government’s case-in-chief. This can occur through the introduction of a motion by the applicant to dismiss the Government contest. See, e.g., United States v. The Heirs of David F. Berry, 127 IBLA at 198. That occurred here. At that point, the administrative law judge is generally called upon to rule on the motion. What distinguishes the present case, however, is the fact that Judge Sweitzer did not rule on the Heirs’ motion to dismiss, but instead took the motion under advisement and proceeded to allow the intervenor to present its evidence. The proper procedure would have been for Judge Sweitzer to allow both the Government and the intervenor to present evidence before entertaining the contestee’s motion to dismiss, or before calling on the contestee to present its case in rebuttal. Upon Judge Sweitzer’s ruling on the motion to dismiss, the contestee could then “be fairly forced to choose between presenting additional evidence or standing on the motion and running the risk that he or she will never be afforded the opportunity to present evidence supportive of the claim.” United States v. Galbraith, 134 IBLA 75, 107 (1995).<sup>20/</sup>

<sup>20/</sup> We have long held that the judge presiding at an administrative hearing is required to rule on a contestee’s motion to dismiss made at the conclusion of the presentation of the Government’s case-in-chief, at which point, if the motion is denied, the contestee must decide whether to present its case in rebuttal. United States v. Miller, 138 IBLA 246, 268-69 (1997), citing United States v. Galbraith, 134 IBLA at 106-07. As we said in Galbraith: “[A] contestee cannot fairly be forced to decide whether to present his or her own evidence or rely on the failure of the Government to present a prima facie case in the absence of a ruling by the judge on the motion to dismiss.” Id. at 107 (emphasis added).

In concluding that the intervenor’s evidence could be used to establish the  
(continued...)

In any event, the Heirs clearly recognized at the hearing that they had a right to insist upon a ruling by Judge Sweitzer on their motion to dismiss. (Tr. 195.) However, they asked Judge Sweitzer to take the motion to dismiss under advisement until after the hearing.<sup>21/</sup> The Government and ONC agreed with this approach. Further, the Heirs did so knowing that ONC would be permitted to introduce evidence, and that Judge Sweitzer might later decide to consider ONC's evidence in determining whether the Government had made its prima facie case. As it happened, the Heirs also effectively renewed their motion to dismiss even after ONC had presented its evidence, standing by their election to not have Judge Sweitzer rule on their motion to dismiss, effectively waiving the protection from having to decide whether to go forward with its case in rebuttal without knowing whether the Government had made a prima facie case in the first instance. Since the Heirs

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<sup>20/</sup> (...continued)

Government's prima facie case here, Judge Sweitzer relied on our statement in Pittsburgh Pacific Co. that the administrative law judge, in that Government mining claim contest (which involved a mineral patent application), had "properly assigned to the [Government] and the intervenor the burden of establishing a prima facie case." 68 IBLA at 348, 89 I.D. at 590; see Decision at 12. In that case, we had, in a prior opinion, remanded several issues concerning the validity of the mining claims at issue to the judge for a rehearing and new decision, and permitted a State to intervene and present evidence on one issue involving the costs of compliance with Federal and state environmental protection laws. See United States v. Pittsburgh Pacific Co., 30 IBLA 388, 404-05, 84 I.D. 282, 290-91 (1977), aff'd sub nom., State of South Dakota v. Andrus, 462 F. Supp. 905 (D. S.D. 1978), aff'd, 614 F.2d 1190 (8th Cir.), cert. denied, 449 U.S. 822 (1980). The quoted statement appears in a subsequent Board ruling on an interlocutory appeal from the judge's prehearing order. The statement is consistent with our notion that the evidence submitted by the intervenor may be considered together with that submitted by the Government in determining whether the Government has established a prima facie case.

<sup>21/</sup> Judge Sweitzer stated that the Heirs' request that their motion to dismiss be taken under advisement constituted a "large distinction" from cases such as Galbraith, which required a judge to rule on a contestee's motion to dismiss at the hearing, before requiring the contestee to decide whether to present its evidence. (Tr. 241.) The Heirs acknowledged the distinction, but persisted with their request, despite the fact that, were the motion to dismiss to be denied, they would be barred from presenting any evidence at a further hearing: "We cannot go forward with evidence in this Contest after making the Motion to Dismiss and standing on it. There won't be a Hearing to address that. We have waived those rights. That's the Rule, and we know it and everybody knows it." (Tr. 244; see id. at 242-45.)

expressly waived their right to a ruling during the hearing on motion to dismiss, we hold that there was no error in his closing evidence while taking the motion under advisement until after the hearing, even though doing so effectively foreclosed the Heirs from offering any evidence showing that the claim was valid.<sup>22/</sup>

We find no basis to conclude that, by allowing ONC to submit evidence supportive of the Government's case-in-chief, the Heirs' "due process rights to proper notice of the Government's charges against them" were violated. (SOR at 10.) We agree with Judge Sweitzer that no violation occurred since "the evidence presented by ONC was clearly within the scope of the issues raised by the Government" in its contest complaint. (Decision at 12.) The Heirs raised no objection at the hearing on the basis that ONC's evidence was outside the scope of the Government complaint, and they do not now identify any such evidence, or seek to demonstrate how it gave rise to charges not in the complaint. Thus, we do not agree that ONC was allowed to bring "entirely new and different charges at the eleventh hour of the hearing process[.]" (Consolidated Reply at 5.) Nor do we find anything that occurred in the present case that is at odds with Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978), which adopted Government contest procedures for purposes of achieving procedural due process compliance in the case of the Departmental adjudication of Native allotment claims.

[2] We turn to the question of whether the evidence offered by the Government and ONC was sufficient to establish a prima facie case that Pestrikoff was not entitled to a Native allotment because he failed to satisfy the use and occupancy requirements of the 1906 Act. Critical in deciding whether a prima facie case was established in this case is the fact that, since a Native applicant is required to "affirmatively show that he or she has met the requirements of the [1906] Act and its implementing regulations," it need only be shown that the evidence in the record "does not affirmatively show compliance with all of the statutory and regulatory requirements necessary to obtain title to a Native allotment under the 1906 Act." United States v. Galbraith, 134 IBLA at 101.

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<sup>22/</sup> The Heirs could have also sought a continuance to prepare rebuttal testimony and documentary evidence once Judge Sweitzer permitted the introduction of ONC's evidence in support of the Government's case-in-chief. See, e.g., United States v. Mineco, 127 IBLA 181, 189-90 (1993). They chose not to do so, and thus cannot now complain that they were not afforded "time for finding rebuttal witness[es] or any other preparation that may be necessary." (Consolidated Reply at 5; see United States v. Robinson, 21 IBLA 363, 389-90, 82 I.D. 414, 426 (1975).)

Section 3 of the 1906 Act 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). Regulation 43 CFR 2561.0-5(a) states that 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 possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.” (Emphasis added.) In order to demonstrate that the land was used and occupied to the potential exclusion of others, prior to the filing of a Native allotment application, it must be shown that others knew or should have known that the applicant asserted a superior right to the land because he actually used or occupied the land and/or left behind physical evidence of such use or occupancy, sufficient to put others on notice of the assertion of such a right, or because others acknowledged that assertion in some way. United States v. Pestrikoff, 134 IBLA at 288-89, 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 [and occupancy] of his land by others. Rather, his use [and occupancy] must be shown to have been potentially exclusive of others, meaning that his use [and occupancy] has (or should have) resulted in a public awareness and acknowledgement of his superior right to the land, even in circumstances where others used [and occupied] it.

BLM’s June 15, 1978, field examination of the land claimed by Pestrikoff found no improvements belonging to Pestrikoff or any physical evidence of use and occupancy commonly associated with his claimed fishing and trapping. The examination failed to confirm the existence of any qualifying use and occupancy, or that there existed on the land any physical evidence which would have provided notice to others that the land was subject to the assertion of a superior right. Nor was any evidence disclosed that other members of the public had ever acknowledged the assertion of a superior right by Pestrikoff. Further, Neufelder was unable to confirm that qualifying use and occupancy had persisted for the requisite 5 years. Having failed to find “significant physical evidence of substantial use and occupancy potentially exclusive of others,” Neufelder concluded that Pestrikoff “has not complied with all requirements of the Native Allotment Act of May 17, 1906.” (Field Report at 4.)

This case is substantially buttressed by other evidence presented by ONC, which consisted of the testimony of various Natives in the local community who visited or observed the claimed land over the years, but never saw Pestrikoff or physical evidence of his use and occupancy and/or were not aware of his claim to the land. See United States v. Mack, 159 IBLA at 91-92. ONC offered other evidence that Pestrikoff did not use or occupy the claimed land to the potential exclusion of others. ONC filed a November 28, 1977, affidavit of Panamarioff (Ex. S), who stated that he had lived on Spruce Island his entire life, except for the years when he was in the U.S. military (1946 to 1949), that he was familiar with the area of land claimed by Pestrikoff, and that to his knowledge “Pat Pestrikoff has never used this area to the exclusion of anyone else from Ouzinkie.”<sup>23/</sup> See Tr. 125, 149-50. In addition, Panamarioff generally stated, in another November 28, 1977, affidavit (Ex. CC) regarding Squartsoff’s asserted use and occupancy of his adjacent Native allotment claim for fishing and berry picking: “He may have, but so did everyone else in Ouzinkie. Unlike traplines, specific areas have not been recognized as any one individual’s area for fishing and berry picking.”<sup>24/</sup> This indicates that Pestrikoff’s use and occupancy of his claimed land for fishing would likewise not have been to the potential exclusion of anyone else.

Further, ONC offered the testimony of a number of longtime residents of Ouzinkie, who, as Judge Sweitzer noted, generally “spoke of Ouzinkie being a small community where ‘every[body] knows everybody else, so they know what’s going on.’ (Tr. 306; see also Tr. 336, 452, 463-64).”<sup>25/</sup> (Decision at 8.) On appeal, ONC

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<sup>23/</sup> Panamarioff also noted that Pestrikoff was a commercial fisherman, but that the inland lakes and streams of the island were closed to commercial fishing during the period of time from June through September, when Pestrikoff reportedly was fishing, and thus engaged in his qualifying use. However, like Judge Sweitzer, we do not find this evidence probative of lack of qualifying use by Pestrikoff, since he asserted that his fishing was for personal subsistence purposes, and thus was not commercial in nature. See Decision at 5; Tr. 57-59, 124-25.

<sup>24/</sup> Panamarioff also signed a June 8, 1977, letter to BLM on behalf of the President of ONC (Ex. R), which stated, at page 1, that it was the “opinion of the Ouzinkie Native Corporation Board of Directors that all of the lands applied for [by Pestrikoff and others on Spruce Island] have been traditionally utilized by all of the people of our community[.]” See Tr. 108-09.

<sup>25/</sup> Fred Chernikoff, Sr., was questioned and testified as follows:

“Q [Hume (counsel for ONC)]. If, if Pat had gone out to the Monk’s Lagoon area to fish or trap, would you expect that you would have heard about that one way  
(continued...) ”

generally described its witnesses as “elders who have lived in Ouzinkie substantially all their lives, are familiar with the affairs of Ouzinkie residents, and knew Pestrikoff personally.”<sup>26/</sup> (Answer at 20.) Spruce Island is also described as a “small island,” crisscrossed by trails, where “[i]t doesn’t take long to go anywhere.” (Tr. 458; see id. at 466-68.)

Such witnesses testified that, despite the fact that they had known Pestrikoff for many years, they were not aware that he had used and occupied the land at issue. In fact, they stated that they had never seen him using and occupying the land or any physical evidence of such use and occupancy, although they had been to the land and surrounding lands at various times from 1924 to the late 1970’s, including during all or part of the summer months.<sup>26/</sup> (Tr. 261-62, 264-67, 301, 321-23, 325-27,

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<sup>25/</sup> (...continued)

or another?

A. I think I should have, you know. It, like I say, I, pretty well up with whatever went on, you know, on Spruce Island, and, I mean, there isn’t that much to know, because the amount of people that are there, you know, you more or less, not that you want to keep tabs on everybody, but somebody knows that whoever’s, whatever this guy’s doing. I mean, with a small community like that, you know, it’s common knowledge all over of what, what one would be doing. [Emphasis added.] (Tr. 336.) He also reported that “about 200 people \* \* \* lived year-round in the village, and this would swell in the summer to, you know, maybe 400 people, maybe 500, because people would come from Afognak and Kodiak and Lower 48.” Id. at 325.

<sup>26/</sup> These witnesses were Marie Anderson (born 1935), Floyd Anderson (born 1934), Gene Anderson (born 1944), Claudia Torsen (born 1932), William Torsen (born 1927), Fred Chernikoff, Sr. (born 1927), Tim Panemariof (born 1908), Arthur Haakanson (born 1931), Nicholas Squartsoff (born 1940), and Ed Opheim (born 1910). See Tr. 250, 294-95, 320, 402, 456, 487, 507, 593-94, 625, 699. Panemariof is said to be closely related to John Panamarioff, although the spelling of the last name differs.

<sup>27/</sup> Witnesses also placed Pestrikoff’s relocation of his primary residence from Afognak, Alaska, where he was born, to Ouzinkie, anywhere from the very late 1930’s to the 1950’s, indicating that it may have been preceded by summers spent working in the cannery in Ouzinkie. See Tr. 301-02, 324-25, 406-07, 416, 462, 513, 654, 673, 704; Ex. A. Haakanson, who seemed the most knowledgeable, stated that Pestrikoff’s relocation occurred “in the late ‘40s.” (Tr. 462; see id. at 654 (“Maybe in the ‘40s” (Opheim)).) Afognak is approximately 12.5 miles, by ocean, from the  
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330-31, 333, 355, 380-81, 403-06, 409-12, 415, 436-39, 450-52, 459-65, 487-89, 491-92, 496-97, 501, 508-15, 517-520, 526-29, 532, 536, 542-43, 557-62, 594-95, 598, 608-15, 621-22, 625-27, 637, 646-47, 652-54, 657-58, 661, 670, 673-84, 689-97, 704-05.)

ONC's witnesses included Marie Anderson and Ed Opheim. Anderson, who was Katelnikoff's daughter and related to Pestrikoff by marriage, lived on Pestrikoff's claimed land (in a cabin which was later moved off the claim) and then Katelnikoff's adjacent claimed land (in a cabin), during all or part of the year, starting in 1944 and continuing, before and after the change in her residence in 1949, until the late 1970's. (Tr. 256, 258-61, 264-67, 269, 273-77, 286-87, 290, 307, 332-33, 337-39, 382, 413, 508-09, 526-29, 557-58, 644, 647-50, 669; Exs. FF, 10-A, 10-C, and 10-H; Ex. II at 1; Ex. JJ at 3, 8.) Opheim lived on land approximately two miles northwest of Pestrikoff's claimed land on the southern shore of Spruce Island for most of each year almost every year starting in 1924. (Tr. 625-27; Ex. 10-H.) On many occasions he fished in the lake adjacent to the claim, towed logs past the claim back to his sawmill (which he operated starting in the early 1930's), and traveled to the Monk's Lagoon area for purposes of herding cattle owned by his father and later by him.<sup>28/</sup> (Tr. 480, 628, 630-32, 634-37, 661, 664-65, 673-84, 692-97, 709; Ex. 10-H; Ex. JJ at 4.)

Such witnesses further reported that they were not aware that Pestrikoff had claimed or asserted a superior right to any land at the southeastern end of Spruce Island, prior to the filing of his allotment application in 1971.<sup>29/</sup> (Tr. 262, 264-65,

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<sup>27/</sup> (...continued)

claimed land. Thus, it is quite possible, as Judge Sweitzer surmised, that Pestrikoff was correct, in his original allotment application, in reporting 1951 as the year he began to use and occupy the land, or at least to do so in a qualifying manner.

See Decision at 15.

<sup>28/</sup> Monk's Lagoon is specifically referred to in the testimony as the small cove just northeast of the slightly larger cove adjacent to Pestrikoff's claimed land. However, the Monk's Lagoon area seems to generally refer to both coves along the shore of Icon Bay. See Tr. 253-54, 298-301, 322-23, 419-21, 494-95, 595, 606; Exs. 10-B, 10-C, 10-E, and 12.

<sup>29/</sup> Particularly telling is the testimony of Panemariof who purported to know Pestrikoff "ever since he moved to Ouzinkie": "I used to visit him, you know, all the time, so never heard him mention anything about land, you know, in Monk's Lagoon. I never did. Never ever. He was my friend, you know. He used to visit me quite  
(continued...)

267, 295-96, 306-07, 330-32, 406, 411-12, 414, 416, 451-53, 461, 463-65, 490-92, 501-02, 513, 515-17, 596-98, 650-51, 655, 671, 701-03, 705.) These witnesses included Fred Chernikoff, Sr., who worked with Pestrikoff in the cannery in Ouzinkie each spring and summer from sometime after 1942 to 1964.<sup>30/</sup> (Tr. 323-25, 342-43, 369-70.)

Appellant contends that these witnesses “never even knew Mr. Pestrikoff[.]” (SOR at 12.) She also argues that ONC’s witnesses “were too young to have clear memories,” and that “all but two of [the] witnesses would not have known of Mr. Pestrikoff’s use of his land because they were many years younger than Mr. Pestrikoff; ranging from thirty-nine years younger to thirteen years younger.” *Id.* at 12, 15. Each of the witnesses testified only as to what he or she actually knew regarding any qualifying use and occupancy of the claimed land, to the extent that he or she was alive and old enough to be aware of such activities. Such testimony encompassed all or part of Pestrikoff’s total use period (from 1931 to 1971). In addition, what is important is that none of the witnesses, including the two who were older than Pestrikoff (Panemariof and Opheim), could confirm any qualifying use and occupancy by Pestrikoff of the claimed land, during any portion of that use period. The age of ONC’s witnesses does not alter the fact that, despite having known Pestrikoff to various degrees and for various lengths of time, none of the witnesses could state that they were ever aware that he claimed the land at issue or any land at the southeastern end of Spruce Island.

Nevertheless, ONC’s evidence did not encompass the entire period of Pestrikoff’s alleged qualifying use and occupancy of the claimed land, and thus did not eliminate the possibility that he had used and occupied the land, at some point,

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<sup>29/</sup> (...continued)

often, so I never heard him say anything about naming the land over in Monk’s Lagoon. I never did.” (Tr. 406.)

<sup>30/</sup> Chernikoff also asserted that work in the cannery generally consumed 7 days during July and August, and often 5 to 6 days before and after that time frame. *See* Tr. 342-43, 369-70. He was not able to pinpoint the starting date of Pestrikoff’s work at the cannery, but stated that he knew Pestrikoff “for a long time,” and that the work lasted every summer until 1964, when a tidal wave destroyed the cannery. (Tr. 325.) All this indicates that Pestrikoff likely had little or no time during the summer, throughout much of his purported use period (from 1931 to 1971) to engage in any use and occupancy of the claimed land.

for the requisite 5 years.<sup>31/</sup> However, such evidence provides some verification that Pestrikoff did not engage in qualifying use and occupancy for the required 5 years, since it would be expected that, had he done so, someone, at some point, would have seen, or heard, of such use and occupancy, or at least observed physical evidence of such use and occupancy. Further, no one acknowledged that Pestrikoff had ever asserted a superior right to the land. Thus, as ONC correctly points out: “[N]ot a single witness was aware of Pestrikoff using the claimed parcel or Pestrikoff claiming the parcel as his own.” (Answer at 21; see id. at 31-32; ONC Post-Hearing Brief at 48.)

We affirm Judge Sweitzer’s holding that the evidence submitted by the Government and ONC as to the validity of Pestrikoff’s Native allotment application established a prima facie case that Pestrikoff had not engaged in substantial actual possession and use of the claimed land, which was potentially exclusive of others, for the requisite 5 years, and failed to comply with the use and occupancy requirements of the 1906 Act.<sup>32/</sup> The burden devolved to the Heirs to overcome that case by a preponderance of the evidence. However, given that the Heirs did not introduce any rebuttal evidence at the hearing, and given that the record is otherwise devoid of evidence supportive of Pestrikoff’s allotment application, we hold that the contestee did not overcome the Government’s prima facie case by a preponderance of the evidence.

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<sup>31/</sup> The claimed land is “heavily wooded,” thus impeding a view of the interior of the claim. (SOR at 15 (citing Tr. 543).) However, Marie Anderson testified that there were fewer trees on the claim during her period of residence in the area. (Tr. 279-80.) In any event, since Pestrikoff’s alleged use of the land is for fishing, it seems reasonable to assume that, had he been engaged in such activity, he would have been visible to those passing by the claim, since it would have occurred on the edges of the claim next to the bay or the lake.

<sup>32/</sup> Morrison argues that a prima facie case was not established because the Government, either alone or together with ONC, failed to demonstrate that the community or anyone else used the claimed land in a manner which predated Pestrikoff’s use, was more extensive than his use, or at least conflicted with his use or wishes, precluding a finding of potential exclusivity. See SOR at 11-12, 14 (citing Kootznoowoo, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128, 135 (1989)). A Native applicant’s failure to satisfy the regulatory requirement of potential exclusivity is not shown only by the applicant’s failure to assert exclusive control over the land at issue in the face of conflicting Native use. It is sufficient, as here, that evidence was presented which demonstrated that the applicant’s use was not considered to be potentially exclusive of others, even in the absence of any conflicting Native use.

Pestrikoff asserted in his application, as supplemented by his March 1974 letter, that he used and occupied the land every year during the period from June to September starting in 1931 for subsistence fishing and trapping purposes. However, he provided no witness to such activity. The record is devoid of any other written statement or oral testimony attesting to the fact that he used and occupied the land for any purpose at any time between 1931 and 1971, and specifying the nature of his activities or when, where, or how they occurred. We agree with Judge Sweitzer that “[t]he only evidence of his use are the vague statements in his application and letter that he used the land from June to September for fishing and trapping.” (Decision at 16.) Nor has BLM been able to confirm such activity.

Pestrikoff’s statements could be regarded as probative, to some degree, of his qualifying use and occupancy. However, the application, supplemented by the letter, only alleged that his use and occupancy started in June 1931, occurred “every year,” and “BEGAN” in June and “ENDED” in September, and thus were “[s]easonal” in nature. Whether such use and occupancy, in fact, constituted substantial actual possession and use of the land to the potential exclusion of others, which persisted for the requisite 5 years, is not established by the application alone. Further, any evidence regarding 5 years of qualifying use and occupancy afforded by an application has long been regarded as demonstrating only the applicant’s “prima facie entitlement” to a Native allotment. Katmailand, Inc., 77 IBLA 347, 356 (1983). It is not sufficient, however, to prove entitlement, once the evidence is “disputed or disproved” by BLM’s field examination or otherwise, whereupon the applicant “has the burden of proving entitlement in fact.” Mary Olympic, 47 IBLA 58, 64 (1980), rev’d on other grounds, Olympic v. United States, 615 F. Supp. 990 (D. Alaska 1985). Thus, we hold, in the present case, that this proof is not sufficient, by itself, to overcome the prima facie case and thereby establish Pestrikoff’s qualifying use and occupancy for the 5-year period by a preponderance of the evidence. <sup>33/</sup> See, e.g., United States v. Rastopsoff, 124 IBLA 294, 295, 304-07 (1992).

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<sup>33/</sup> Morrison asserts that Pestrikoff’s allotment application, together with his March 1974 letter, supplied “the same information that this Board held [in Forest Service (Paul Edwards), 144 IBLA 217 (1998),] as satisfactory evidence of use and occupancy entitling the applicant to an allotment.” (Consolidated Reply at 9.) We concluded in Edwards that the applicant had established his entitlement to a Native allotment, by a preponderance of the evidence in the record. See 144 IBLA at 218-19. However, we find the case distinguishable. Allegations in the application at issue there were corroborated by the statements of those who observed or knew of the applicant’s qualifying use and occupancy. Further, there was no countervailing evidence by the Government, since the case involved an appeal from a BLM decision approving the application.

Most importantly, the record contains no evidence verifying that Pestrikoff engaged in use and occupancy that was potentially exclusive of others, such that he used and occupied the land in a manner that put others on notice, or such that others acknowledged that he asserted a superior right to the land. Nowhere in his allotment application or elsewhere in the record did Pestrikoff assert that he placed improvements on the land or that he engaged in use and occupancy which was of such a visible nature that it would have put others on notice. Rather, all the evidence tends to establish that his use and occupancy was not to the potential exclusion of others.

We, therefore, conclude that Judge Sweitzer, in his April 2002 decision, properly denied the Heirs' motion to dismiss the Government contest, challenging Native allotment application AA-7572, and denied the application and cancelled the entry. To the extent not addressed herein, all other arguments of fact or law offered by Morrison have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, ONC's motion to dismiss the appeal filed by Morrison on behalf of Lestenkof, Charliaga, and Torsen is granted, and the decision appealed from is affirmed.

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James F. Roberts  
Administrative Judge

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<sup>34/</sup> We do not regard the "Statement of Waiver," signed by Edward N. Opheim on June 6, 1971, and submitted with Pestrikoff's typewritten allotment application, as evidence of an "acknowledg[ment] by the community" of Pestrikoff's "use of his land and his right to claim it for an allotment," thus supporting potential exclusivity. (SOR at 12.) In his statement, Opheim only "petition[ed]" BLM, pursuant to 43 CFR 4131.2-7(e) (1970), to "withdraw from my [grazing] lease the lands covered in the Native allotment application[] of \* \* \* Pat Pestrikoff." He thus recognized only that the lands were "covered" by the application, which had, in fact, been signed by Pestrikoff on Apr. 2, 1971, before the statement was executed. See Tr. 666 ("I signed it because \* \* \* I want to see [other people] get their lands").

I concur:

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David L. Hughes  
Administrative Judge