



UNITED STATES v. JAKE R. SHERMAN

179 IBLA 252

Decided June 25, 2010



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

UNITED STATES
v.
JAKE R. SHERMAN

IBLA 2010-90

Decided June 25, 2010

Appeal from a decision of Administrative Law Judge Andrew S. Pearlstein finding that appellant's use and occupancy of the lands claimed in Alaska Native veteran allotment application F-93484 had not been potentially exclusive of others as required by 43 C.F.R. § 2568.90(a)(5).

Affirmed; adopted as decision of the Board.

1. Alaska: Alaska Native Veteran Allotment: Generally--Rules of Practice: Evidence--Rules of Practice: Government Contests

In order to demonstrate that the land was used and occupied to the potential exclusion of others as required by 43 C.F.R. § 2568.90(a)(5), a Native veteran allotment applicant must show 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.

2. Alaska: Alaska Native Veteran Allotment: Generally--Evidence: Burden of Proof--Rules of Practice: Evidence--Rules of Practice: Government Contests--Rules of Practice: Appeals: Burden of Proof

In a Government contest of an Alaska Native veteran allotment application, the contestant bears the burden of presenting sufficient evidence to establish a prima facie case of ineligibility and, if a prima facie case is established, the Native veteran applicant bears the

burden of proving by a preponderance of the evidence that the requirements of the Native Allotment Act have been satisfied. On appeal from the decision of an administrative law judge denying an application, the appellant has the burden of proving that the judge erred.

APPEARANCES: Carol Yeatman, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for appellant; Steven Scordino, 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

Jake R. Sherman has appealed from a decision of Administrative Law Judge Andrew S. Pearlstein finding that Sherman did not prove, by a preponderance of the evidence, use and occupancy of the land claimed in his Alaska Native veteran allotment application, F-93484, in a manner that was substantially continuous and independent, and at least potentially exclusive of others, for five or more years as required by 43 C.F.R. § 2568.90(a)(5). For the reasons that follow, we affirm Judge Pearlstein's decision and adopt it as the decision of this Board.

BACKGROUND

On December 5, 2001, Sherman filed his Alaska Native veteran allotment application with BLM pursuant to the Alaska Native Veterans Allotment Act (ANVAA), *as amended*, 43 U.S.C. § 1629g (2006), which allows Alaska Natives who were on active military duty for at least 6 months between January 1, 1969, and December 31, 1971, to apply for an allotment under the Alaska Native Allotment Act of 1906, Ch. 2469, 34 Stat. 197, *codified as amended at* 43 U.S.C. §§ 270-1 through 270-3 (1970), *repealed subject to pending applications*, 43 U.S.C. § 1616(a)(2006), as that Act was in effect before December 31, 1971. Sherman applied on a form approved for that purpose, providing proof of his qualifying military service and certification of his status as an Alaska Native. *See* 43 C.F.R. § 2568.50. His individual qualifications are not in dispute. His claimed allotment encompasses four adjacent areas separated by water-channels of Safety Sound—with a total of about 160 acres, in sec. 19, T. 11 S., R. 29 W., Kateel River Meridian, Alaska. *See* ALJ Decision at 3-5.

The present matter involves application of the regulations promulgated on June 30, 2000, to implement the ANVAA. *See* 65 Fed. Reg. 40961 (June 30, 2000). Specifically, Judge Pearlstein held that Sherman was not eligible for the land claimed in his allotment because he failed to “prove by a preponderance of the evidence that [he] used and occupied [the claimed land] in a substantially continuous and

independent manner, at least potentially exclusive of others, for five or more years.” 43 C.F.R. § 2568.90(a)(5).¹

On January 20, 2009, the Alaska State Office, Bureau of Land Management (BLM), filed a Complaint alleging that Sherman had not made substantially continuous use and occupancy of his claimed allotment for at least 5 years that was potentially exclusive of others. On February 9, 2009, Sherman filed an Answer denying the substantive allegations of the Complaint and requested a hearing. The hearing convened in Nome, Alaska, on May 4, 2009.

DISCUSSION

[1] Judge Pearlstein sustained the Government’s Complaint, finding that Sherman had not made substantially continuous use and occupancy of the land that was at least potentially exclusive of others. He noted correctly that under the regulations implementing the ANVAA, Sherman must satisfy the substantive requirements applicable to other Native allotment applications considered by the Department. *See* 43 C.F.R. §§ 2568.21, 2568.90(a)(5).

Under the Department’s rules, an allotment will not be granted unless the applicant “has made satisfactory proof of substantially continuous use and occupancy of the land for a period of five years by the applicant.” 43 C.F.R. § 2561.2(a). That use and occupancy must be “at least potentially exclusive of others”:

The term *substantially continuous use and occupancy* contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, *at least potentially exclusive of others*, and not merely intermittent use.

43 C.F.R. § 2561.0-5(a); *see United States v. Longley*, 175 IBLA 60, 64-65 (2008); *United States v. Peterson*, 170 IBLA 231, 234-35 (2006).

¹ The same restrictions applicable to Native allotment applications submitted under the Alaska Native Allotment Act apply to veteran allotment applications submitted during the 18-month period. *E.g., Irving P. Sheldon*, 169 IBLA 276, 282 (2006). The eligibility requirements to receive an Alaska Native veteran allotment are set forth at 43 C.F.R. subpart 2568, which incorporates the general Native allotment requirements of 43 C.F.R. subpart 2561. *See* 43 C.F.R. § 2568.21.

As noted by Judge Pearlstein, in *United States v. Heirs of Pestrikoff*, 167 IBLA 361, 379 (2006), the Board stated, with regard to the standard embodied in 43 C.F.R. § 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 because others acknowledged that assertion in some way.

He then quoted the following discussion from *United States v. Longley*, 175 IBLA at 68, which provides specific guidance as to whether an applicant's use and occupancy is "at least potentially exclusive of others":

[A]n applicant's use and occupancy of the land must be shown to have resulted in public awareness and acknowledgment of the applicant's superior right to the land, even in circumstances where others used it. . . . [A] variety of evidence may be used to show potentially exclusive use, including physical changes to the land, the presence of physical structures or artifacts, and statements of witnesses about observing the applicant using the land. The defining standard, however, is whether the evidence establishes that the applicant's use created, or should have led to, a public awareness and acknowledgment of his superior right to the land. *See also United States v. Peterson*, 170 IBLA 231 (2006); *United States v. Estate of George D. Estabrook*, 94 IBLA 38, 53 (1986).

[2] As Judge Pearlstein noted, Native allotment contest proceedings are governed by the procedural rules applicable to Government contests in general. *See* 43 C.F.R. § 4.451, *et seq.* The contestant bears the burden of going forward to establish a prima facie case that the applicant failed to meet the use and occupancy requirements, or that he is otherwise ineligible to receive an allotment. Once the Government has established a prima facie case, the burden shifts to the applicant to overcome that case by a preponderance of the evidence. *E.g., United States v. Heirs of Thomas Bennett*, 144 IBLA 371, 381 (1998); *United States v. Heirs of Pestrikoff*, 134 IBLA at 283-84; *United States v. Galbraith*, 134 IBLA 75, 100-101 (1995); *United States v. Heirs of David F. Berry*, 127 IBLA 196, 205 (1993); *United States v. Estate of Estabrook*, 94 IBLA at 51-53. Proof by a preponderance of the evidence means that "there must be a showing that something is more likely so than not." *United States v. Heirs of David F. Berry*, 127 IBLA at 207. Judge Pearlstein

characterized the allocation of the burdens of proof in the following terms: “As a practical matter, a hearing on a Native allotment contest offers a procedural means by which an applicant is given an opportunity to provide proof that he is entitled to issuance of an allotment where the file before the Department does not establish such entitlement.” ALJ Decision at 13 (citing *Sarah F. Lindgren (On Reconsideration)*, 54 IBLA 181, 183 (1981)).

Judge Pearlstein found that BLM established its prima facie case through the testimony of five witnesses. He concluded:

BLM . . . established a prima facie case showing that Mr. Sherman’s use and occupancy of the Allotment was not potentially exclusive of others. Mr. Sherman left no postings or other physical signs of his claim to the Allotment other than parking his vehicle or boat there when actually on the land, just as did all other users. BLM’s witnesses testified that they were unaware of Mr. Sherman’s claim to the land which they considered to be communally used. . . . These facts support the proposition that Mr. Sherman’s use and occupancy of the site was not potentially exclusive of others. BLM presented a prima facie case that Mr. Sherman’s use of the land did not “create, or should have led to, a public awareness and acknowledgment of his superior right to the land.” *Longley, supra* at 68.

ALJ Decision at 15.

Although Judge Pearlstein acknowledged that “Sherman and his witnesses presented considerable credible evidence showing that, over the years, he has made substantial and continuous use of the Allotment,” he noted “a number of inconsistencies and some lack of corroboration that indicate his use may not have been quite as extensive as alleged.” *Id.* at 16. “Most significant,” in Judge Pearlstein’s view, was Sherman’s failure to “show that his use of the Allotment was potentially exclusive of others.” *Id.* He found that there “was the lack of evidence, even from some of Mr. Sherman’s own witnesses, of community awareness of his claim to the land, a key indicator of whether his use was at least potentially exclusive of others.” *Id.* at 18. He deemed it “questionable whether [Sherman’s] pre-withdrawal use of the land in 1968, the first year he went to the Allotment alone, was substantial.” *Id.* He concluded, however, that “it is not necessary to definitively resolve that issue . . . because the preponderance of the evidence in this proceeding establishes that at no time could Mr. Sherman’s use and occupancy of the Allotment be considered to have been potentially exclusive of others.” *Id.*

Judge Pearlstein provides a thorough review and summary of the evidence adduced at the hearing and rendered the following ruling:

BLM established a prima facie case that Mr. Sherman's use of the Allotment was not potentially exclusive of others. Mr. Sherman failed to overcome that prima facie case by a preponderance of the evidence. The evidence in this case did not establish "that the applicant's use [of the land] created, or should have led to, a public awareness and acknowledgment of his superior right to the land." *United States v. Longley, supra*, 175 IBLA 60, 68 (2008). Therefore, this decision finds that Mr. Sherman did not meet the use and occupancy requirements to be eligible to receive patent to the Allotment.

ALJ Decision at 21.

In his statement of reasons (SOR) for appeal, submitted by the Alaska Legal Services Corporation, Sherman provides a thorough review of the evidence and testimony, and states that all of his "witnesses were . . . consistent, sincere and truthful," and "gave corroborating and cumulative evidence of [his] use with a good amount of detail and certainty." SOR at 34. Sherman contends that "[b]ased on the evidence on the record, [he] began his use of the allotment before it was selected by the State of Alaska, in a substantial manner by being on the land for at least 2 weeks to a month in a year, starting in 1967 and continuously using the land for over forty years." SOR at 34. Sherman suggests that the decision reflects a failure on Judge Pearlstein's part to properly appreciate the "demeanor" of his witnesses, *i.e.*, "their voice intonations, lack of negative expression or gesture show[ing] that they strove to be forthright and truthful." *Id.* at 35. According to Sherman, their testimony "corroborates major events in his life and fully explains the evidence contained in the record," and is strengthened by BLM's "failure to produce a witness who can give the best evidence which is thought to seriously affect the credibility of a party who does offer the testimony." *Id.* at 36 (citing *Foote v. McMillan*, 22 I.D. 280, 283 (1896)).

Sherman argues that Judge Pearlstein disregarded his testimony and that of his witnesses. Contrary to Judge Pearlstein's decision, Sherman asserts that he "left physical evidence on the land which would apprise others of the existence of his claim to the land even when he was not present at the allotment." *Id.* at 41. Sherman is of the view that his witnesses, who are members of the Nome community near his claimed allotment, "knew that he occupied those lands," and that "the evidence proves more likely than not the absence of conflicting community use." *Id.* at 42. Based upon the evidence, Sherman argues that BLM "failed to establish the community's use of [his] allotment," and that "[n]one of the testimony defeats [his] potentially exclusive use because it fails [to] show that the Native community's use predated the applicant's use, or the community's use was more extensive than his use, or the community's use conflicted with the applicant's use or wishes." *Id.* at 44 (footnote omitted).

In response, BLM states that the Field Report prepared by Boyce Bush, BLM's Realty Specialist, documents use of the claimed land by other people in the community. Ex. B-6; ALJ Decision at 13-14. BLM emphasizes that Judge Pearlstein found that Sherman's cross-examination of Bush did not damage the key finding of the Field Report, *i.e.*, "that Mr. Sherman had not shown that his use of the Allotment was potentially exclusive of others." ALJ Decision at 14. BLM states that "the testimony of these witnesses and the applicant's own witnesses identified at least 58 people as having used this very popular hunting area." Answer at 2; ALJ Decision at 15; Government Post-Hearing Brief at 9-10. This evidence led Judge Pearlstein to conclude that Sherman's claimed land "was freely and frequently used by at least dozens of others in the Nome hunting community who were not aware of any superior claim to the land by Jake Sherman." ALJ Decision at 18. BLM argues that Judge Pearlstein properly ruled that BLM had established a *prima facie* case that Sherman's use of the claimed land was not potentially exclusive of others. Answer at 3.

BLM argues further that Sherman failed to meet his burden to prove by a preponderance of the evidence that his use and occupancy was at least potentially exclusive of others. BLM states that "[t]he testimony provided by Mr. Sherman's witnesses did not help his case." *Id.* BLM points out that three of Sherman's witnesses never actually saw Sherman camp at the parcel; that one witness hunted on the land with friends about 20 times before he first hunted there with Sherman; that the Realty Service Provider thought the land was a community use area; that four witnesses did not know about Sherman's claim until he told them, after he filed his application; and that one witness testified about the wrong land. One of Sherman's witnesses, Garret Mathias, stated that "he saw everybody and their brother [there] for the last 11 years" Tr. 672.

Applying the standards previously quoted from *United States v. Heirs of Pestrikoff*, 167 IBLA at 379, and *United States v. Longley*, 175 IBLA at 68, BLM asserts that "it is clear that Mr. Sherman did not make potentially exclusive use." BLM concludes that "[t]he plethora of evidence of others using the parcel strongly supports the ALJ's finding that 'Mr. Sherman's use of the land did not *create or should have led to, a public awareness and acknowledgment of his superior right to the land.*'" ALJ Decision at 15 (quoting *United States v. Longley*, 175 IBLA at 68)).

We have thoroughly reviewed the record of this case and the arguments advanced by the parties. The record is clear that Judge Pearlstein's ruling did not turn upon a finding that Sherman's witnesses were not credible, as Sherman suggests. His ruling was based upon Sherman's failure to overcome BLM's *prima facie* case by a preponderance of the evidence. The evidence presented by Sherman did not establish that it was more likely than not that his use and occupancy of the claimed land was at least potentially exclusive of others.

Sherman has not shown error in Judge Pearlstein's decision, which provides a full consideration of the testimony, the relevant evidence, and applicable law. We agree with his findings and conclusions and adopt his decision as the decision of the Board. A copy of his decision is attached.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed and adopted as the decision of the Board.

_____/s/_____
James F. Roberts
Administrative Judge

I concur:

_____/s/_____
Christina S. Kalavritinos
Administrative Judge



United States Department of the Interior
Office of Hearings and Appeals

Departmental Hearings Division
405 South Main Street, Suite 400
Salt Lake City, Utah 84111

February 2, 2010

UNITED STATES OF AMERICA,)	F-93484
Contestant)	
)	Alaska Native Veteran Allotment
v.)	Claim
)	
JAKE R. SHERMAN,)	Containing approximately 160 acres
Contestee)	situated in Sec. 19, T. 11 S., R. 29 W.,
)	Kateel River Meridian, Alaska

Decision

Appearances: Steven Scordino, Esq., U.S. Dept. of the Interior, Office of the Solicitor, Anchorage, Alaska, for Contestant.

Carol Yeatman, Esq., Alaska Legal Services Corp., Anchorage, Alaska, for Contestee.

Before: Andrew S. Pearlstein, Administrative Law Judge

Summary

The Contestee in this proceeding, Jake R. Sherman, did not make satisfactory proof, by a preponderance of the evidence, of substantially continuous use and occupancy of his claimed Native Veteran Allotment, for at least five years, that was potentially exclusive of others, as required by 43 C.F.R. § 2568(a)(5). Although Mr. Sherman did use the site for bird hunting and other subsistence activities for many years, his use was not potentially exclusive of others. Numerous other hunters in the Nome area frequently used the Allotment land in a similar manner, without seeking or obtaining permission from Mr. Sherman, indicating a general lack of community awareness of his claim to the land. Therefore, this Decision finds that the Bureau of Land Management ("BLM") properly denied Mr. Sherman's application No. F-93484, which is declared null and void.

Proceedings

On January 20, 2009, the Alaska State Office of the United States Bureau of Land Management (“BLM” or “Contestant”) filed a Complaint against Jake R. Sherman, of Nome, Alaska, the Contestee, concerning his application for an Alaska Native Veteran Allotment, No. F-93484. The Complaint alleged that Mr. Sherman did not make substantially continuous use and occupancy of his claimed Allotment land for at least five years that was potentially exclusive of others, and that his claimed Allotment included a campsite used by someone else. Mr. Sherman had applied for his Allotment on December 5, 2001, pursuant to the Alaska Native Veterans Allotment Act, 43 U.S.C. § 1629g, and the Alaska Native Allotment Act of 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970). The eligibility requirements to receive an Alaska Native Veteran Allotment are set forth at 43 C.F.R. Subpart 2568, which incorporates the general Native Allotment regulations at 43 C.F.R. Subpart 2561. *Cf.* 43 C.F.R. § 2568.21.

The Alaska Native Veterans Allotment Act provided an open season for eligible Native Alaska veterans to apply for a Native allotment. Mr. Sherman was eligible to apply for a Native allotment as a veteran who served during the 1969 to 1971 period before the deadline to apply for an allotment under the Alaska Native Allotment Act expired on December 18, 1971.¹ Under the Act, an eligible veteran may receive title to federally owned land that was vacant, unappropriated, and unreserved at the time the applicant first occupied it. 43 C.F.R. § 2568.90(a)(1,2). Such use and occupancy must have begun before December 14, 1968, the date when Public Land Order 4582 withdrew all public lands in Alaska from all forms of appropriation and disposition under the public land laws. 43 C.F.R. § 2568.90(a)(4). The veteran must also meet the same requirements for substantial use and occupancy of the allotment for at least five years, at least potentially exclusive of others, as other applicants under the Alaska Native Allotment Act of 1906. 43 C.F.R. § 2568.21, 2568.90(a)(5).

¹ The eligibility requirements for Native Alaska veterans to be able to apply for Native allotments, set forth in 43 U.S.C. § 1629g(b), include certain additional minimum service criteria. The general right to apply for Native allotments under the Alaska Native Allotment Act of 1906 expired on December 18, 1971, subject to pending applications, when that Act was repealed by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a).

On February 9, 2009, Mr. Sherman filed an Answer in which he denied the substantive allegations of the Complaint and requested that a hearing be held in Nome, Alaska. The hearing then convened in Nome on May 4, 2009, before the undersigned Administrative Law Judge and continued for three days to its conclusion on May 6. Both parties were represented by counsel named in the appearances above. BLM called 5 witnesses and Mr. Sherman called 13 witnesses who testified at the hearing. The record of the hearing consists of a stenographic transcript of 1155 pages (“Tr.”) and 25 exhibits offered and admitted into evidence (“Ex.”). BLM filed its post-hearing brief on August 10, 2009. The record closed upon receipt of Mr. Sherman’s post-hearing brief on September 9, 2009.

Findings of Fact

- Location and Description of Allotment

On December 5, 2001, Mr. Sherman filed his application (No. F-93484) for an Alaska Native Veteran Allotment with BLM on the form approved for that purpose, with proof of his qualifying military service and certification of his status as a Native Alaskan. His claimed Allotment is located about 28 miles east of Nome, near milepost 28 on the Nome-Council Road, which is usually open from May or June until it is closed again by snow in October. When the road is closed, the Allotment may be reached by snow machine. The Allotment has beach frontage along Norton Sound, an arm of the Bering Sea, and extensive shoreline along Safety Sound, a shallow waterway between the barrier island where the road is located and the mainland. The Allotment is also therefore accessible by boat after ice breakup. (Ex. B-2).

Mr. Sherman’s Allotment claim² encompasses four adjacent areas separated by water – channels of Safety Sound – with a total area of about 160 acres. It is located in Section 19 of Township 11 N, Range 29 W, Kateel River Meridian. Lot 1, or the “campsite,” consists of about 27 acres, bisected by the Nome-Council Road, on the spit or barrier beach bordered by Norton Sound on the south and channels of Safety Sound on the north. Lot 2, or the “western island,” consists of about 17 acres

² In the interest of brevity, this Decision will often refer to the Allotment as “Mr. Sherman’s Allotment” although at this stage it is really only “claimed Allotment.”

on the eastern end of an island in Safety Sound. A third lot, or the “eastern island” consists of an entire island within Safety Sound, about 72 acres in area, situated north and northeast of Lot 1. The fourth lot consists of about 44 acres on the mainland north of the islands, on the south slope of a hill in an area known locally as “Sunrise” or “Sunrise Hill.”³ (Ex. B-6 at 6; Tr. 106-109).

Lot 1 of the Allotment, along the road, is bordered on the west by a Native Allotment property patented to the late John Fagerstrom. He and his wife Minnie formerly occupied a cabin on that property. The cabin is now used seasonally by their daughters, Myrtle and Carrie Johnson, and their families. Mr. Sherman’s sister, Peggy Fagerstrom, is married to John and Minnie Fagerstrom’s nephew, Chuck Fagerstrom. On the east, Mr. Sherman’s claimed Allotment is bordered by another Native Allotment patented to Shirley Nickalasky of the Trigg family, who is the mother-in-law of Mr. Sherman’s niece, Barbara Aukon. Barbara Aukon and her husband, Danny Aukon, seasonally occupy a cabin on that Allotment. Mr. Sherman himself has a cabin on land owned by his half-brother Lloyd Hardy at Nuk, near Cape Nome, about 12 miles west of the Allotment, near milepost 16 on the Nome-Council Road. (Ex. A-9-1; Tr. 174-175, 280, 364-366, 798, 812-814, 833, 845).

The Allotment vegetation consists of low-lying tundra bushes and grasses that also produce abundant berries and greens in some areas. There is a double-tread track, apparently made by vehicles, leading north about 200 yards from the Nome-Council Road to a boat launch site with a gradual slope into the Safety Sound channel. Most of the shoreline along Safety Sound is characterized by a five-foot high bank. The gentle slope into the water on Mr. Sherman’s claim is one of only a few locations in the area suitable for launching larger boats into the Sound. (Ex. A-10; Tr. 498-499)

Mr. Sherman’s Allotment is located in a prime bird hunting area, popular particularly during the spring and fall migrations. The entire Safety Sound area is

³ There was some confusion concerning the exact boundaries and lot divisions of Mr. Sherman’s claimed Allotment. BLM’s field examiner, Boyce Bush, re-drew the boundary of Lot 1 or the “campsite” lot, to exclude an area where an outhouse and boat launch area were located, as discussed later in this Decision. He also did not consistently label the four lots with lot numbers. In this Decision, the quoted descriptive names will generally be used to denote the four lots that comprise the Allotment. (Ex. B-6; Tr. 106-109).

heavily used by hunters seeking crane, geese, and ducks during spring and fall hunting seasons. The Allotment also provides access to fishing, by both net and rod and reel, for tomcod, whitefish, salmon and other species. Big-game species such as moose and reindeer may also be hunted from the Allotment, although they are not common there, except perhaps on the mainland portion on Sunrise Hill. Also present are smaller wildlife species such as fox, rabbits, and weasels. The location of the Allotment on Norton Sound also provides access to the sea where marine mammals may be hunted. (Exs. B-6, B-10; Tr. 1081-1086).

Mr. Sherman's claimed Allotment is located within lands selected by the State of Alaska under the Alaska Statehood Act and the Alaska National Interest Lands Conservation Act, although it has not yet been conveyed to the State. The State of Alaska may voluntarily relinquish such selection, but in this case it has filed a notice of its intention not to do so. If Mr. Sherman demonstrates the validity of his Native Veteran Allotment application, and the State does not relinquish its selection, Mr. Sherman would be entitled to select an alternative parcel for his allotment. (Exs. B-4, B-7, B-8; Tr. 21-23, 31, 46-51).

- Mr. Sherman's Use of the Allotment

Jake R. Sherman was born in Candle, Alaska, about 130 miles northeast of Nome, on November 14, 1951. He moved with his family to Nome in 1963 or 1964. With his father and older brothers often absent, Jake became a provider for his family when in his teen-age years. Subsistence hunting and gathering at that time provided a significant proportion of most Nome residents' sustenance, as it still does today. Many in the community help provide subsistence for the elderly and other residents in need. (Ex. A-1; Tr. 490-493, 873-874).

Mr. Sherman first visited the Allotment shortly after he first moved to Nome. A relative, Tommy Toomiak, showed him the Allotment as a good bird-hunting area. Mr. Sherman then first visited the Allotment on his own when he first obtained his driver's license and a used Plymouth Valiant, at the age of 16 in 1968. He used the car to drive to the Allotment. He returned to the Allotment seasonally to hunt birds, fish, and pick berries in 1969, 1970, and 1971 before he entered the Army in November of that year. Mr. Sherman entered the U.S. Army in November of 1971, and served in Vietnam as a tank driver. He was discharged in March of

1974 and returned to the Allotment that summer and fall. He returned again in 1975. (Ex. B-2; Tr. 881-892, 1058, 1090).

In 1976 and 1977 Mr. Sherman worked on the Trans-Alaska Pipeline and was absent from Nome those two years, precluding any visits to the Allotment. He returned to Nome and again visited the Allotment in season for subsistence activities from 1978 to 1982. After marrying in 1982, Mr. Sherman and his wife Glenda moved to Unalakleet, where Glenda Sherman worked for the school district. Unalakleet is located on Norton Sound, about 140 miles southeast of Nome. While living in Unalakleet, Mr. Sherman visited the Allotment a couple of times during trips to Nome. He and Glenda moved back to Nome in 1987, and have lived there since. Mr. Sherman works as a heavy equipment operator. (Tr. 893-896, 1109-1111).

Mr. Sherman has lived in Nome continuously since 1987 and has visited the Allotment to conduct subsistence activities every year since. He has followed a pattern of using the Allotment regularly for bird hunting whenever he could get away in the spring and fall, as well as in the summer for additional activities including fishing, berry picking, and hunting other game. Over the years, Mr. Sherman drove to the Allotment and often borrowed a small boat for use in bird hunting from the islands in Safety Sound, until he acquired his own skiff in the early 1990's. He acquired an airboat around 2000, which he often leaves parked on the Allotment. He has camped on the Allotment for a few days to a week at a time, more often in the early years, and has spent up to about 30 days per year on the Allotment. In the early years, he sometimes slept in his car. Later, he used a white canvas tent. His usual camping spot is located near the track leading to the boat launch area, just north off the Nome-Council Road. In recent years, Mr. Sherman stays most of the summer in his cabin at Nuk and travels to the Allotment on day trips. He also hunts in the Nuk area near his cabin. (Ex. B-14; Tr. 884-885, 897, 903 - 910, 1014-1018, 1067, 1086-1087).

Mr. Sherman spends about half or more of his time on the Allotment bird hunting in spring and fall, often with companions such as Don Stiles, Garret Matthias, and Darren Otton. His wife Glenda often accompanied Mr. Sherman during the summer, though she no longer camps on the Allotment due to arthritis. While Jake Sherman was hunting, Glenda Sherman would pick berries and stay in camp reading. When bird hunting, Mr. Sherman sets up temporary blinds in areas

near shore on the islands and mainland, depending on where the birds are flying. Mr. Sherman also fished, sometimes with a net and sometimes with rod and reel, on both the sound and ocean sides of the Allotment. He and Mrs. Sherman also gathered berries, eggs, and greens throughout the Allotment when available. While some of these foods were eaten at the time, most were preserved and taken back to Nome for later consumption, or given to elders. Mr. Sherman also occasionally used the Allotment as a base for hunting other game such as marine mammals, fox, moose, and reindeer, with little success. (Ex. B-14; Tr. 1077-1087, 1094, 1101-1107, 1111-1121).

- Community and Others' Use of the Allotment

Many others from the Nome area used Mr. Sherman's claimed Allotment for bird hunting and to launch their boats into Safety Sound. Most of these hunters were unaware of Mr. Sherman's claim to the Allotment land and did not seek his permission before entering the land. John Johnson, Nate Perkins, and his brother Wesley Perkins, are longtime residents of Nome who knew Jake since his childhood. They were aware Mr. Sherman had a campsite or cabin at Nuk, but did not know he had a campsite or claim to the land at milepost 28 where the Allotment is located. They thought of the Allotment land, just east of the Fagerstroms' cabin, as a communally used boat launch site that was also sometimes used as a campsite by another Nome resident, Pete Larson. These men also knew and hunted with the late John Fagerstrom who owned the allotment and cabin adjacent to Mr. Sherman's claim. (Tr. 155, 190, 259, 260-266, 292-293, 298-299, 478-480, 485, 488, 498-499).

In addition to Mr. Larson, John Johnson, and the Perkins brothers, many others from the Nome community used the Allotment land, mostly to launch boats and for bird hunting. This use was generally intermittent, for a few hours or a day at a time, as hunters following the birds passed through the area, either on the road or by boat. These other users generally did not camp on the Allotment. Some others who hunted birds on Mr. Sherman's Allotment over the years in this manner without seeking permission from Jake Sherman include Tom Sparks, Calvin Gooden, Keith McDaniel, Bruce McDaniel, John Larsen, and many others. Some of these hunters who used the Allotment were Native and others were not. (Tr. 260, 419, 452-454, 480, 661, 668, 675-678, 823-824, 834-835, 839, 857-858, 992, 994, 1051-1052).

Some other area residents, friends, co-workers, and relatives of Mr. Sherman, often hunted with him and had express or implied permission to use the land without Mr. Sherman. These include Garret Matthias (former brother-in-law), Darren Otton, Danny Aukon (husband of Jake Sherman's niece), J.T. Sherman (nephew), and Don Stiles. Some of these men, such as Don Stiles and Willy Hoogendorn, also used the land without Mr. Sherman and before they were aware of Mr. Sherman's claim to the Allotment. However, hunters and others in the Safety Sound area do not generally feel the need to ask permission to enter land, even privately owned and patented property. For example, the Aukons, who spend summers in the cabin on the allotment adjacent to Mr. Sherman's, frequently allow hunters on their land without advance permission so long as they respect the area and clean up after themselves. (Tr. 260, 268, 619, 602-603, 674, 769, 868-870).

During the 1990's, the above mentioned Pete Larson engaged in a fishing operation on or near the adjacent Fagerstroms' land with the Fagerstroms' son-in-law Tommy Johnson. At some point between about 2000 and 2003, Mr. Larson installed a small plywood outhouse along the track to the boat launch on Mr. Sherman's claimed Allotment. The outhouse may have previously been located a short distance away on the Fagerstroms' land. In the early 2000's Mr. Larson also camped intermittently on the Allotment land, next to the outhouse, in a small trailer. The outhouse remained on the land after the trailer was removed. The outhouse was present on the Allotment at the time of BLM's field examination on August 13, 2003. (Exs. A-7, A-10, B-6 at 9; Tr. 196, 365-371, 445, 488, 615, 625-628, 657, 683, 824-825).

Mr. Sherman at first thought the outhouse had been placed on the land by a Native corporation or other government entity. The outhouse remained on the Allotment until sometime around 2005 when Mr. Sherman indicated to his friend, Danny Aukon, that he could remove it. Pete Larson later telephoned the Shermans to ask about the outhouse. Mr. Larson also notified the Alaska State Police, who contacted the Shermans but soon dropped the matter. BLM never issued a permit to Mr. Larson or to anyone else for the outhouse. Mr. Larson's trailer has since usually been seen in the Solomon - Bonanza River area, about 3 miles east of the Allotment. (Tr. 64-66, 138-141, 390, 1043-1047, 1075, 1093-1094, 1127-1129).

The Nome waterfowl hunting community in general was not aware of Mr. Sherman's claim to this particular Allotment land at milepost 28 on the Nome-

Council Road, and adjacent areas on Safety Sound. Most in the hunting community knew Mr. Sherman often hunted there, as well as near his cabin in Nuk, near milepost 16. Several witnesses who supported Mr. Sherman's claim for this Allotment were informed of Mr. Sherman's claim to the Allotment only by Mr. Sherman, around or after the time that he filed his application in 2001. (Tr. 602-603, 630, 646, 681).

- Mr. Sherman's Allotment Application Process

Upon passage of the Alaska Native Veterans Allotment Act in 2001, Kawerak, the Native corporation for Nome area Natives, began a program to assist qualifying veterans in the application process. Roy Ashenfelter, Kawerak's Director of Land Management Services, and his staff identified Native Alaskan veterans in the area and prepared maps indicating the limited lands that remained available for allotment selections under the Act. Mr. Sherman visited Kawerak's office and was fortunate that the Allotment land he claimed was apparently still available, and was located along the road system.⁴ Kawerak then consulted with Mr. Sherman regarding his qualifying use and occupancy of the Allotment, and assisted him in delineating the boundaries so that the area comprised 160 acres. Kawerak recognized that Mr. Sherman allowed others to use the land for access to Safety Sound for bird hunting. In 2003, Kawerak undertook a field trip to the Allotment to post the claim boundaries. (Ex. B-5; Tr. 688-709, 759-761, 1087-1089).

With the assistance of his wife Glenda and Mr. Ashenfelter, Mr. Sherman completed his application for the Allotment on December 5, 2001. The application contains an error in his date of birth, giving it as November 14, 1954 (his wife's birth year) rather than 1951. The application included a map showing the four separate areas of the Allotment: Lot 1, the "campsite" area along the road; Lot 2, the east end of the "western island;" the third lot, all of the "eastern island;" and the fourth, the south slope of "Sunrise Hill" on the mainland, totaling 160 acres. On the application, Mr. Sherman indicated he had used the land from 1965 until the present for hunting, fishing, and berry picking. (Exs. B-2, A-1; Tr. 873-875, 1098-1100).

⁴ As mentioned above, however, the State of Alaska has selected the Allotment land, but it has not yet been conveyed to the State.

Boyce Bush, a Realty Specialist with BLM based in Fairbanks, conducted a field examination of Mr. Sherman's Allotment claim on August 13, 2003. Present during the exam were Mr. Sherman, Bruce Tungewunk and Eric Larsen of Kawerak, and another BLM employee from the Nome office, Tom Sparks. The field exam lasted about fifteen minutes to half an hour. Mr. Bush spoke briefly to Mr. Sherman about his use of the land, and confined his visit to Lot 1 or the campsite parcel along the Nome-Council Road. Mr. Bush returned to the Allotment on June 14, 2004 with a representative of the U.S. Fish and Wildlife Service, and two days later to install a BLM marker. (Ex. B-6; Tr. 91-94, 1037-1040).

Mr. Bush prepared his report of the field examination on January 11, 2005. The report noted that Mr. Sherman had used the area all his life for subsistence activities and was familiar with the Allotment. However, Mr. Bush wrote that the evidence showed that Mr. Sherman's use of the land was not exclusive of others. The report included photographs of the outhouse and noted that this "improvement" did not belong to Mr. Sherman but reportedly belonged to Pete Larson. The report also noted that Mr. Bush was informed that others used the boat launch site on the Allotment for bird hunting, and that those hunters ranged throughout the islands and other areas included in the Allotment. Mr. Bush added that he personally knew "this is a high traffic area" although he had not seen people stop on this particular allotment. Mr. Bush included modified survey instructions and a modified map of the Allotment intended to exclude the outhouse and boat launch track, since he believed those improvements indicated the presence of another's campsite and a community use area. (Ex. B-6; Tr. 70-71, 96-99, 104, 116, 142-145, 213-216, 1070-1072).

On February 6, 2007, BLM sent Mr. Sherman a notice and request for additional evidence, particularly concerning the requirement of potentially exclusive use of the Allotment. The notice pointed out that "there is no evidence in the file to suggest that people or persons in the surrounding community would have recognized the parcel as belonging to you as opposed to the surrounding community." (Ex. B-9 at 4). Mr. Sherman responded with a letter dated February 14, 2007, in which he listed his extensive subsistence activities on the Allotment, but did not specifically address the issue of potentially exclusive use. BLM then issued its contest Complaint on January 20, 2009, and Mr. Sherman filed his answer on February 9, 2009. (Exs. B-9, B-10, B-11; Tr. 32-39, 1041-1042).

Discussion

Resolution of this case centers on the issue of whether Jake R. Sherman's use and occupancy of his claimed Allotment was sufficient to satisfy the requirements of the Alaska Native Allotment Act of 1906,⁵ as now memorialized in the applicable regulations of the Department governing Alaska Native allotments. Mr. Sherman applied for his Allotment during the open season as an eligible veteran under the Alaska Native Veterans Act, 43 U.S.C. § 1629g. Under that statute, veterans who served during the Vietnam era when the Native Allotment Act was repealed in December 1971 could apply for allotments from lands that were vacant, unappropriated, and unreserved on the date when the person first used and occupied those lands. 43 U.S.C. § 1629g(a)(1). All public lands in Alaska were withdrawn from all forms of appropriation and disposition by Public Land Order 4582, effective on December 14, 1968. Therefore, in order to be eligible to receive this Allotment, Mr. Sherman must have begun his qualifying use before that date. 43 C.F.R. § 2568.90(a)(4).

Pursuant to the regulations implementing the Veterans Act, Mr. Sherman must satisfy the same substantive requirements applicable to other Native allotment applications considered by the Department. 43 C.F.R. §§ 2568.21, 2568.90(a)(5). Under those rules, an allotment will not be granted until the applicant "has made satisfactory proof of substantially continuous use and occupancy of the land for a period of five years by the applicant." 43 C.F.R. § 2561.2(a). As defined in the regulations at 43 C.F.R. § 2561.0-5(a):

The term *substantially continuous use and occupancy* contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, *at least potentially exclusive of others*, and not merely intermittent use.

⁵ 43 U.S.C. § 270-1 to 270-3(1970), repealed subject to applications pending on December 18, 1971, by the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a).

(emphasis added). This case will turn on whether the preponderance of the evidence in this proceeding establishes that Mr. Sherman met this standard concerning his use of his claimed Allotment on the Nome-Council Road, particularly with respect to whether his use and occupancy was at least potentially exclusive of others.

As stated by the Board:

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 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. Heirs of Pestrikoff, 167 IBLA 361, 379 (2006). Further:

“[A]n applicant’s use and occupancy of the land must be shown to have resulted in public awareness and acknowledgment of the applicant’s superior right to the land, even in circumstances where others used it. . . . [A] variety of evidence may be used to show potentially exclusive use, including physical changes to the land, the presence of physical structures or artifacts, and statements of witnesses about observing the applicant use the land. The defining standard, however, is whether the evidence establishes that the applicant’s use created, or should have led to, a public awareness and acknowledgment of his superior right to the land. *See also United States v. Peterson*, 170 IBLA 231 (2006); *United States v. Estate of George D. Estabrook*, 94 IBLA 38, 53 (1986).

United States v. Longley, 175 IBLA 60, 68 (2008). *See also Angeline Galbraith*, 97 IBLA 132, 169 (1987); *United States v. Heirs of Jake Yaquam*, 139 IBLA 376, 384 (1997).

Native allotment contest proceedings are governed by the procedural rules applicable to Government contests in general, 43 C.F.R. § 4.451 *et seq.* The

contestant, BLM, bears the burden of going forward to establish a prima facie case that the applicant failed to meet the use and occupancy requirements, or that he is otherwise ineligible to receive an allotment. Once BLM has established such a prima facie case, the burden then shifts to the applicant to overcome that case by a preponderance of the evidence. *United States v. Heirs of David Berry*, 127 IBLA 196, 205 (1993). Proof by a preponderance of the evidence means that “there must be a showing that something is more likely so than not.” *Id.* At 207. As a practical matter, a hearing on a Native allotment contest offers a procedural means by which an applicant is given an opportunity to provide proof that he is entitled to issuance of an allotment where the file before the Department does not establish such entitlement. *Sarah F. Lindgren (On Reconsideration)*, 54 IBLA 181, 183 (1981).

- BLM’s Prima Facie Case

BLM established its prima facie case through the testimony of five witnesses. Patricia LaFramboise, a Land Transfer Resolution Specialist, presented the entire BLM file on Mr. Sherman’s application (Ex. B-1), as well as the key documents within that file. Her testimony and this documentary evidence did not establish Mr. Sherman’s entitlement to issuance of his Allotment. The application form itself (Ex. B-2) contained only vague and brief mentions of Mr. Sherman’s use of the land. BLM recognizes the limitations inherent in this form, and therefore routinely seeks additional information from applicants, in addition to conducting field examinations with the applicant present. BLM proceeded with both of these steps with regard to Mr. Sherman’s application for the Allotment.

Boyce Bush, the Realty Specialist who conducted the field examination, testified at the hearing by telephone in support of his field report (Ex. B-6). Although his field exam was shown to be rather cursory, he did report that the land supported the claimed subsistence uses and that Mr. Sherman was familiar with the Allotment. He took photographs documenting the presence of the outhouse and reported that he was told it did not belong to the applicant, but to one Pete Larson. Mr. Bush noted that Mr. Sherman left no physical signs of his own use of the Allotment, and that it was apparently used by many others. Mr. Bush attempted to re-draw the Allotment boundaries by excluding the outhouse area and track leading to the boat launch. He felt these areas were evidently a campsite used by another and a communal use area, which cannot be conveyed to allotment applicants under

the regulations. (Ex. B-6 at 6; Tr. 143-144, 214-216). See 43 C.F.R. §§ 2568.91(a), 2561.1(d). Although his attempt to re-draw the allotment boundaries was probably not authorized, cross-examination of Mr. Bush did not damage the key finding of his report – that Mr. Sherman had not shown that his use of the Allotment was potentially exclusive of others.

BLM then presented the testimony of three Nome residents – Johnnie Johnson, Wesley Perkins, and his brother Nate Perkins. These witnesses testified to their use of the Allotment land as well as the surrounding area for bird hunting, and their lack of awareness of Mr. Sherman’s claim to the land.

John C. “Johnnie” Johnson, who has lived in Nome since the early 1960’s, knew the location of Mr. Sherman’s claimed Allotment and never saw Mr. Sherman there until the last few years, although he saw other hunters use the site. (Tr. 153). Mr. Johnson often traveled past the site to his parents’ camp and visited with the Fagerstroms (to whom he was also related by marriage) just west of the Allotment. Mr. Johnson had seen Pete Larson’s trailer and outhouse on the land. Yet Mr. Johnson did not know that Mr. Sherman claimed a campsite or allotment in the area until he was told by Pete Larson. (Tr. 190). Although under cross-examination, Mr. Johnson expressed some confusion over the exact boundaries of Mr. Sherman’s Allotment, this did not affect the thrust of his testimony. There is no way anyone other than Mr. Sherman himself, Kawerak, and BLM – those who had actually seen his application -- would know the exact location of the boundaries. If Mr. Sherman had a claim to a camp or allotment that was recognized by the community in the area just east of the Fagerstroms, Mr. Johnson would have been expected to be aware of it. Yet he was not.

Nate Perkins testified that he and many other hunters used the boat launch site on Mr. Sherman’s claimed Allotment and hunted in the immediate area for the past 30 years. He had never seen Mr. Sherman on the land and was unaware of Jake Sherman’s claim although he had known him almost all his life. (Tr. 265-266). While they apparently missed actually seeing each other on the Allotment, since Mr. Perkins mostly hunted only on weekends, the key point of his testimony was that the community was not aware of Mr. Sherman’s claim to the land. Nate Perkins knew of Jake’s camp or cabin at Nuk, but not of his claim to the Allotment. (Tr. 293).

Nate Perkins' brother Wesley testified that he had seen Jake Sherman's truck and boat on the Allotment in recent years, along with those of a lot of other people. (Tr. 495, 544). As tabulated by BLM in its post-hearing brief, at least 58 persons were identified in the record as having used the Allotment land, as well as others who were not specifically identified. (BLM Post-Hearing Brief at 9-10). Nate Perkins believed the outhouse had been there since at least 2000. (Tr. 488). The Perkins brothers are concerned that granting Mr. Sherman a Native Allotment at this site could restrict public access to the center of a very popular bird hunting area. (Ex. B-12; Tr. 498-502).

Pete Larson himself declined to testify at the hearing, although BLM offered into evidence a letter he wrote opposing Mr. Sherman's application (Ex. B-13). While little weight can be assigned to this letter in the absence of Mr. Larson's appearance and availability for cross-examination, there was ample corroborating evidence from other witnesses to the effect that Mr. Larson also regularly used the site for camping and fishing. Most witnesses who saw the outhouse knew it belonged to Mr. Larson and believed it had remained on the Allotment, next to the boat launch track, for at least several years. Most of these witnesses had also seen Mr. Larson's trailer there and knew he camped there at times, but had not seen Mr. Sherman camping there.

BLM thus established a prima facie case showing that Mr. Sherman's use and occupancy of the Allotment was not potentially exclusive of others. Mr. Sherman left no postings or other physical signs of his claim to the Allotment other than parking his vehicle or boat there when actually on the land, just as did all other users. BLM's witnesses testified that they were unaware of Mr. Sherman's claim to the land which they considered to be communally used. If anyone had a campsite there, they thought it was Pete Larson. These facts support the proposition that Mr. Sherman's use and occupancy of the site was not potentially exclusive of others. BLM presented a prima facie case that Mr. Sherman's use of the land did not "create, or should have led to, a public awareness and acknowledgment of his superior right to the land." *Longley, supra* at 68.

- Mr. Sherman's Evidence

Mr. Sherman and his witnesses presented considerable credible evidence showing that, over the years, he has made substantial and continuous use of the Allotment. There are however a number of inconsistencies and some lack of corroboration that indicate his use may not have been quite as extensive as alleged. Most significantly, however, Mr. Sherman did not show that his use of the Allotment was potentially exclusive of others.

Mr. Sherman was not sure of the first year he went to the Allotment on his own, but he was sure he was 16 years old, the year he first received a driver's license and acquired a used Plymouth Valiant that he drove to the Allotment. (Tr. 1090). Since he was born in November 1951, the first year he visited the Allotment must have been 1968, as stated in the Findings of Fact. Thus, he began his use of the Allotment before the December 14, 1968 withdrawal of federal lands in Alaska from all forms of disposition by Public Land Order 4582.

Mr. Sherman's testimony concerning the details of his use in 1968 were somewhat vague, as might be expected due to the passage of time since then. No other witness corroborated his use of the land in that year either. Mr. Sherman's only witness who testified concerning that period was his half-brother, Lloyd Hardy, who testified Mr. Sherman first used the land in 1967. (Tr. 333). However, Mr. Hardy was absent from Nome in 1968 when Mr. Sherman's own testimony indicated he first used the land. (Tr. 326). Also, Mr. Hardy's testimony that he transported Mr. Sherman to the Allotment in 1967 by floatplane was not corroborated by Mr. Sherman himself, who testified he only reached the Allotment by driving. (Tr. 884, 1058). Nevertheless, although it is questionable how substantial Mr. Sherman's use of the Allotment was in 1968, he did at least begin its use before the withdrawal deadline in December of that year.

While Mr. Sherman and his witnesses did establish that he used the Allotment regularly over the ensuing decades, there are some inconsistencies in the evidence that indicate that the extent of his claimed use was somewhat exaggerated. Although he testified he often camped on the Allotment, several of his own witnesses (Don Stiles, Garret Mathias, Darren Otton) had never actually seen him camp there. The only other witnesses who testified they actually saw him camp

there were his relatives: his wife Glenda, his niece Barbara Aukon, her husband Danny, and his nephew J.T. Sherman. Don Stiles, who has hunted the land for decades both with and without Mr. Sherman, never saw him camp there, but knew Mr. Sherman had a camp in Nuk. (Tr. 600-601). Most of the witnesses had also seen Pete Larson himself or his camp trailer on the Allotment. Mr. Sherman himself testified he now usually takes day trips to the Allotment from Nuk. (Tr. 1067). Mr. Sherman left no physical evidence of a campsite on the Allotment. Although he camped there at times, particularly in the earlier years of his use, the preponderance of the evidence does not support the proposition that Mr. Sherman established any kind of permanent campsite on the Allotment.

Mr. Sherman testified he first saw Pete Larson's outhouse when he attended the BLM field examination on August 13, 2003. Several other witnesses, including some of Mr. Sherman's, testified they had seen it there much earlier. Barbara Aukon, Mr. Sherman's niece who lives adjacent to the Allotment during the summer, thought it had been there since 1982. (Tr. 824-825). Garret Mathias testified the outhouse was there in 1997 or 1998 when he first hunted with Mr. Sherman. (Tr. 657). Most of the other witnesses also believed the outhouse was there for a longer period than the two years that Mr. Sherman saw it. This calls into question the extent of Mr. Sherman's visitation to the Allotment in the late 1990's and early 2000's. Since the outhouse was located immediately adjacent to the track leading to the boat launch, visible from and near the Nome-Council Road, it would have been hard to miss for anyone approaching the Allotment on the road. Nevertheless, the preponderance of the evidence supports the finding that Mr. Sherman made substantial use of the Allotment for at least 5 years between 1968 and the present.

The extent of Mr. Sherman's use of the Allotment, as well as its potential exclusivity is also called into question by the process through which he selected the land with the assistance of Kawerak. Mr. Ashenfelter's testimony described a process in which Native veterans were first guided to select unappropriated and unreserved lands, and only afterwards asked about their qualifying use. (Tr. 701-702, 710-711). There seems to have been an assumption that if an applicant had used land in the general area at all for hunting, fishing, or other subsistence activities, that would be enough to qualify for an allotment. (Tr. 772). Communal use was not considered. (Tr. 768). Mr. Sherman was fortunate that that he came into Kawerak's

office early when the Allotment along the Nome-Council Road was still available.⁶ (Tr. 711). The overall effect of Mr. Ashenfelter's testimony indicated that Kawerak's goal was to help the Native veteran applicants obtain allotments, with only secondary attention given to whether they actually met the use and occupancy requirements for the particular lands selected.

Most significant, however, was the lack of evidence, even from some of Mr. Sherman's own witnesses, of community awareness of his claim to the land, a key indicator of whether his use was at least potentially exclusive of others. Mr. Sherman's friends and relatives who hunted with him also testified that many others hunted on the land over the same period of Mr. Sherman's use. Most of Mr. Sherman's witnesses were not aware of Mr. Sherman's claim to the Allotment until they heard of it from him after he applied for it in 2001. As further discussed below, the preponderance of the evidence in this proceeding, including that produced by Mr. Sherman, did not establish that his use of the Allotment was potentially exclusive of others.

- Potentially Exclusive of Others

As discussed above, the record shows that Mr. Sherman did make substantial and continuous use and occupancy of the Allotment for at least 5 years, although probably not quite to the full extent he and his witnesses testified to. It is questionable whether his pre-withdrawal use of the land in 1968, the first year he went to the Allotment alone, was substantial. However, it is not necessary to definitively resolve that issue. This is because the preponderance of the evidence in this proceeding establishes that at no time could Mr. Sherman's use and occupancy of the Allotment be considered to have been potentially exclusive of others.

Rather, that evidence shows that his Allotment land was freely and frequently used by at least dozens of others in the Nome hunting community who were not aware of any superior claim to the land by Jake Sherman. Those witnesses who testified in favor of Mr. Sherman's claim were his friends, relatives, and hunting

⁶ In fact, however, as previously noted, this land has been selected by State of Alaska, which has stated its intention not to relinquish it. This does not seem to have concerned Kawerak, perhaps because Mr. Sherman would be entitled to select an alternative allotment, without regard to meeting the use and occupancy requirements, if he is found to be eligible to receive patent to the Allotment.

companions, most of whom were themselves only informed of the claim by Jake around or after the time he applied for his Native Allotment. Other than parking his vehicle and boat there, as any other hunter would, Mr. Sherman made no improvements or left any other physical signs of his claim to the Allotment. Although he may have used the Allotment more than any other single person, Mr. Sherman's use and occupancy was not potentially exclusive of others, and he is therefore not eligible to receive a patent to the Allotment.

Ironically, the most probative evidence in favor of Mr. Sherman's claim of potentially exclusive use involves the fate of Pete Larson's outhouse. The outhouse was present on the Allotment, adjacent to the track to the boat launch, for at least 2 years, from 2003 to 2005. Most witnesses believed it was there for at least several more years, although it is possible it was located on the nearby Fagerstrom land before it was moved to Mr. Sherman's claimed Allotment. In any event, it is clear that Mr. Sherman was instrumental in having it removed. He let it be known to his friend Danny Aukon, that he could remove the outhouse, which Mr. Aukon apparently then did. (Tr. 1045-1046, 1075). This shows that Mr. Sherman did have at least some sense of possession and dominion over the land that did in fact operate to exclude Pete Larson's outhouse from the Allotment.

However, Mr. Sherman's role in having the outhouse removed does not affect the fact of the extensive and ongoing use of the Allotment by many other hunters who couldn't have cared less about the outhouse. If this were a private contest between Pete Larson and Jake Sherman, Mr. Sherman would win in the absence of any appearance by Mr. Larson. This Decision does not find that Mr. Larson had "a regularly used and recognized campsite that [was] primarily used by someone other than [the applicant]," within the meaning of 43 C.F.R. § 2568.91(a). But neither did Mr. Sherman have such a campsite that was recognized by the community. The record shows that he primarily spent the summer at his cabin in Nuk and hunted both there and on day trips to the Allotment. Mr. Sherman's action or words that led to removal of the outhouse took place well after he applied for the Allotment. Although he showed he could exclude Pete Larson's outhouse from the land, he could not show that he could potentially exclude other persons, including Pete Larson and many others, from using the land in the same manner that Mr. Sherman himself did.

The lack of community awareness of Mr. Sherman's claim to the Allotment was most pointedly shown by the testimony of several of his own witnesses, who were friends and relatives of Mr. Sherman. As mentioned above, Don Stiles, Willy Hoogendorn, J.T. Sherman, and Darren Otton, testified that they only learned of the claim when told by Jake in recent years, after he filed his application. For example, Don Stiles testified he hunted on the land for years by himself or with others before he first hunted there with Jake in 1986. (Tr. 601-602). He then testified that he only learned of Jake's claim when told by Jake in the "probably in the mid-1990's." (Tr. 602-603). Willy Hoogendorn testified he learned of Jake's claim only when told by Jake, and shown a map around 2004. (Tr. 630-632).⁷ Garret Mathias and Bryan Aukon also only learned of Jake's claim when told of it by Jake in recent years. (Tr. 646, 681). One witness called by Mr. Sherman, James Jorgenson, had only hunted with him near Nuk and was completely unaware of his claim to the Allotment at the time of the hearing. Thus the testimony of even these friendly witnesses tended to indicate a lack of community awareness of Mr. Sherman's claim, particularly "prior to the filing of a Native allotment application." *Heirs of Pestrikoff, supra*, 167 IBLA 361, 379 (2006)(emphasis added).

In addition, Mr. Sherman's initial denial that he saw other hunters use his land without his permission calls into question his credibility and the extent to which he actually used the Allotment. (Tr. 1049-1050). He soon contradicted himself by admitting that he had seen Calvin Gooden and Keith McDaniels hunting there. (Tr. 1052). Although Mr. Sherman testified he never saw the Perkins brothers on the Allotment, his nephew J.T. Sherman saw them there eight or nine times. (Tr. 992-995). Don Stiles and Garret Mathias, who are probably the most experienced hunters who testified (other than perhaps Mr. Sherman himself), both often saw others using the Allotment land. (Tr. 601-603, 675-682). Mr. Mathias even testified he "saw everybody and their brother [there] for the last 11 years, three sets of tires." (Tr. 672). He sometimes passed the site by and hunted elsewhere when he saw several vehicles parked there. (Tr. 668). Lloyd Hardy, Barbara Aukon, and Danny Aukon all also testified that they had often seen many other hunters on the Allotment, including total strangers. (Tr. 419-421, 452-454, 823-824, 829-831, 835,

⁷ Although Mr. Hoogendorn also testified under redirect examination that "at least one other person," Keith McDaniel, had told him it was Jake's land, he soon retracted that assertion. (Tr. 631-634)

857-858). BLM's witnesses, the Perkins brothers and Johnnie Johnson, also saw many others using the Allotment without permission from Mr. Sherman.

BLM established a prima facie case that Mr. Sherman's use of the Allotment was not potentially exclusive of others. Mr. Sherman failed to overcome that prima facie case by a preponderance of the evidence. The evidence in this case did not establish "that the applicant's use [of the land] created, or should have led to, a public awareness and acknowledgment of his superior right to the land." *United States v. Longley, supra*, 175 IBLA 60, 68 (2008). Therefore, this decision finds that Mr. Sherman did not meet the use and occupancy requirements to be eligible to receive patent to the Allotment.

Conclusion and Order

The Contestee, Jake R. Sherman, failed to show by a preponderance of the evidence in this proceeding that his use of his claimed Allotment (Application #F-93484) was potentially exclusive of others, as required by 43 C.F.R. § 2568.90(a)(5). Therefore, this Decision sustains BLM's contest of Mr. Sherman's application for the Allotment, and declares his interest in the Allotment null and void.

Appeal Rights

Any person adversely affected by this Decision may file an appeal with the Interior Board of Land Appeals under the procedures set forth in 43 C.F.R. Part 4.

_____/s/
Andrew S. Pearlstein
Administrative Law Judge

See page 22 for distribution.