

INTERIOR BOARD OF LAND APPEALS

United States

v.

Heirs of Alec Dolchok

140 IBLA 45 (August 7, 1997)

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UNITED STATES
v.
HEIRS OF ALEC DOLCHOK

IBLA 94-57 Decided August 7, 1997

Appeal from a Decision of Administrative Law Judge Ramon M. Child approving Parcel A of Native allotment application AA-8272.

Affirmed.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Evidence: Preponderance

An Administrative Law Judge's conclusion that a Native allotment applicant commenced substantially continuous use and occupancy of the claimed land potentially exclusive of others as an independent adult prior to the land's withdrawal will be upheld on appeal where the evidence in the record, taken as a whole, renders it more likely than not that, even if no cabin was built on the land prior to its withdrawal, the applicant began his independent subsistence use of the land before the land was withdrawn, and his use of the land was potentially exclusive of others.

APPEARANCES: Joseph D. Darnell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management; Colleen M. Baird, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for the heirs of Alec Dolchok.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

The Bureau of Land Management (BLM) has appealed from the October 5, 1993, Decision of Administrative Law Judge Ramon M. Child approving the entire 100 acres of Parcel A of Alec Dolchok's Native allotment application AA-8272 and ordering the issuance of the allotment to Dolchok's heirs.

On December 4, 1972, the Bureau of Indian Affairs (BIA) filed Native allotment application AA-8272, (Ex. G-1), on behalf of Alec Dolchok, pursuant to the Alaska Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (Native Allotment Act), repealed effective December 18, 1971, by section 18(a) of the Alaska Native Claims

Settlement Act, 43 U.S.C. § 1617(a) (1994), subject to applications then pending. In his application, which was dated June 10, 1971, Dolchok sought two parcels of land. Parcel A, the only parcel involved in this dispute, consists of 100 acres of land located in sec. 32, T. 3 N., R. 7 W., Seward Meridian, Alaska, along the east shore of Harvey Lake. Dolchok claimed use and occupancy of Parcel A for hunting, trapping, fishing, and berrypicking from November 15 through March 31 each year beginning in 1936 and continuing to the date of the application. Dolchok indicated that he had once had dog teams on Parcel A and identified a log cabin built in 1938 as an improvement on the land. He also stated that he had used Parcel A "for subsistence living since 1936 for fishing, hunting, trapping and berry picking, when I took over the trap line and then built the cabin on the lake. Since then my occupancy has been winter trapping and summer fishing."

On December 16, 1941, Exec. Order No. 8979 withdrew the land embraced by Parcel A as part of the Kenai National Moose Range. In 1980, section 303(4) of the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2371, 2391, 16 U.S.C. § 668dd note (1994), expanded the Moose Range and renamed it the Kenai National Wildlife Refuge. ^{1/}

By letter dated November 26, 1975, (Ex. G-25), the U.S. Fish and Wildlife Service (FWS) protested Dolchok's allotment application, asserting that it had no evidence that Dolchok possessed a valid claim to any land within the Range.

On May 21, 1979, a BLM realty specialist conducted a field examination of the allotment accompanied by Dolchok. The July 16, 1979, report prepared after the examination, (Ex. G-2), identified the remains of Dolchok's cabin, remnants of a stove and a meat carving table, a naturally protected sleeping area, and signs of temporary campsites as evidence of Dolchok's use and occupancy of the allotment. The report noted Dolchok's statement that he personally had never fished in Harvey Lake, but that individuals he had flown in to hunt had fished in the lake. According to the report, the area abounded in big game and small trappable animals, but no evidence of extensive berry patches existed nor did Dolchok claim use for berrypicking at the time of the examination. The report found that, while all the available evidence supported the conclusion that Dolchok had established use and occupancy of the allotment prior to the December 16, 1941, withdrawal of the land for the Moose Range, there was not enough evidence

^{1/} Because the land within Parcel A was withdrawn for the Kenai National Moose Range in 1941, the land was not unreserved on Dec. 13, 1968, and Dolchok's allotment application could not be legislatively approved pursuant to § 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1994). See, e.g., United States v. Mary T. Akootchook, 123 IBLA 6, 7 n.2 (1992); United States v. Estate of George D. Estabrook, 94 IBLA 38, 41-42 (1986).

to determine whether Dolchok, who was born on July 24, 1922, and thus was 14 years old in 1936 when he established use and occupancy and over 19 years old in 1941 when the land was withdrawn, was an independent adult prior to the withdrawal. The report recommended that Dolchok provide evidence establishing that he was an independent adult prior to December 16, 1941, and that if he met the age requirements, the allotment be reduced to a 40-acre tract encompassing the improvements and evidence of use. The BLM Area and Acting District Managers concurred with the report's findings and recommendations on July 23, 1979.

On November 18, 1980, BLM received a letter from Dolchok, dated November 12, 1980, (Ex. C-19), providing further information about his use of the land. Letters from Eugene Juliussen, (Ex. C-20), and Gordon Baktuit, (Ex. C-21), supporting Dolchok's allotment application were also filed with BLM on November 18, 1980.

Dolchok died on May 9, 1982. See Ex. G-3.

By Decision dated September 29, 1983, (Ex. G-4), BLM approved 40 acres of Parcel A, rejected the remaining 60 acres, and dismissed the FWS protest. No appeal was filed from this Decision.

In July 1985, the Alaska Legal Services Corporation (ALS), on behalf of Dolchok's heirs, requested that Dolchok's application be reinstated as to the 60 acres disapproved in the 1983 Decision. In August 1985, ALS submitted witness statements supporting Dolchok's use of all 100 acres of Parcel A. See Exs. C-16, C-22, C-23, and C-24. 2/

In a Decision dated December 12, 1986, (Ex. G-9), BLM rescinded its September 29, 1983, Decision to the extent it rejected 60 acres within Parcel A and approved Parcel A as to the 60 acres previously rejected.

The FWS appealed BLM's approval of Parcel A to the Board, and Dolchok's heirs moved to dismiss the appeal.

By Order dated February 26, 1988, (Ex. G-11), the Board denied the motion to dismiss, set aside both of BLM's Decisions, and remanded the matter to BLM for initiation of contest proceedings. In so doing, the Board found that there was substantial evidence in the case file indicating that Dolchok did not use all 100 acres in Parcel A in a substantial and continuous manner which was at least potentially exclusive of others for a 5-year period and that questions existed as to whether he had used the land for hunting and trapping as an independent adult before the land was withdrawn in 1941 and whether that pre-withdrawal use was continuous, substantial, and at least potentially exclusive.

2/ The record also contains witness statements from Ron T. Dolchok, Arthur E. Foss, and Sigvold I. Juliussen, signed on March 19, 1984 (Exs. G-5, G-6, G-7, respectively), supporting Dolchok's allotment application.

The BLM filed a contest complaint on March 26, 1991. Dolchok's heirs answered the complaint and requested a stay of the administrative proceedings pending resolution of their U.S. District Court action challenging the Secretary's jurisdiction over the allotment. The stay was granted on June 25, 1991. By Order dated July 24, 1992, the District Court stayed the court case pending decision in the administrative proceeding. Dolchok v. Lujan, No. A91-256 CIV (D. Alaska July 24, 1992).

Judge Child held a hearing on BLM's complaint in Kenai, Alaska, on April 15 and 16, 1993. The BLM called three witnesses: Richard K. Johnston, the park ranger and pilot at the Kenai National Wildlife Refuge assigned to investigate Dolchok's allotment for FWS in 1982, (Tr. 30-145, 186-212); David L. Spencer, the Kenai National Moose Range manager from 1948 through 1955, (Tr. 146-86); and Donald L. Card, a non-Native trapper on the Moose Range since 1958, (Tr. 274-301). Upon completion of the Government's case, Dolchok's heirs moved for dismissal of the contest for failure to make a prima facie case against Dolchok's allotment application, (Tr. 302-10). Judge Child denied the motion. (Tr. 319.) Dolchok's heirs presented nine witnesses including FWS park ranger and pilot Johnston, (Tr. 319-25); Herman Hermansen, a Dena'ina (Kenaitze) Indian born in Kenai familiar with Dolchok and his family from childhood, (Tr. 217-66); Rose Brady, a BIA realty specialist assigned to review the Refuge's trapping permit files and narrative reports, (Tr. 326-42); Emil Dolchok, Dolchok's younger brother, (Tr. 342-83); Herman D. Lindgren, a Dena'ina Indian born in Kenai well acquainted with Dolchok from boyhood and married to Dolchok's former wife, (Tr. 384-96); Alfred Wik, another Kenai-born Dena'ina Indian knowledgeable about Dolchok's early years, (Tr. 396-404); Paul Johnson, a former chief of the BLM Native allotment adjudication section, (Tr. 404-70); Ronald Dolchok, Dolchok's son, (Tr. 470-86); and Fiocla Marie Decker, Dolchok's younger sister, (Tr. 487-95.) The parties filed extensive post-hearing submissions.

In his Decision, Judge Child recited the following facts:

The applicant, Alec Dolchok, was born on July 24, 1922, and died on May 9, 1982. (Exhibit G-3) He was the second oldest child of eight children of Mike Dolchok. (Tr. 377) Alec only attended school through the eighth grade. (Tr. 221, 350) As a Kenaitze Indian, he was considered an adult at the age of 14, who was expected to contribute to his family's subsistence by hunting, trapping, and fishing. (Tr. 220-221, 232-234, 252, 394, 403, 434)

Alec turned 14 in 1936, the year he claims that he initiated use and occupancy of the land by hunting, fishing, trapping, and berrypicking. (Exhibit G-1) When he reached age 14, he had his own trap line and he trapped by himself. He made an income from trapping prior to 1940. (Tr. 353-357, 387, 391) In 1938, Alec built a primitive cabin on Parcel A as a base for trapping. (Exhibit G-1; Tr. 480)

Alec did hunt and trap on the land each year from 1936 to 1944, when he entered the United States Army. (Tr. 219, 225, 227, 237, 250, 256-57, 350-52, 354, 387, 391, 395, 397-98; Exhibit G-27) He was one of the best hunters in the Kenai area and was hunting moose when observed by a white trapper in 1975. (Tr. 236) He made his living by working in canneries, commercial fishing in the summer, and trapping on the land in the winter. (Tr. 258, 265, 380) The trapping season was from November through March. (Tr. 242) He went trapping for weeks or months at a time and trapped throughout the winter months. (Exhibit C-16, C-22; Tr. 239-241, 490). Trapping on the land was a frequent and important activity of Alec's. (Tr. 239-240, 354-355, 357, 359)

Alec's father, Mike Dolchok, trapped Parcel A before Alec began trapping it. (Tr. 348; Exhibit G-1) When Alec began trapping in the 1930's, he went trapping with his father frequently. (Tr. 348, 397) Prior to World War II, Alec and his younger brother, Emil, used a dog team to access Parcel A from their father's cabin, 2 to 2½ miles east of Harvey Lake. (Tr. 228-229, 346-347, 349, 398) The trap lines on Parcel A were recognized by the few hundred inhabitants in the Kenai area as belonging to the Dolchok family. (Tr. 228-229, 393) Alec told his son, Ron Dolchok, that they had built cabins near Harvey Lake. Their trapping cabins included a main cabin and smaller cabins just large enough to spend the night - nothing more than a hut. (Tr. 480)

According to Emil, Alec lived in his parents' house prior to entering the Army and, after their mother died in 1940, Alec was "more or less taking care of the family with my father." (Tr. 380) It was not incompatible with independent adulthood for males, age 14 and older, to live with their parents. (Tr. 261-262)

Mike Dolchok ceased trapping at least 1 year prior to his death in 1944. (Tr. 378) Alec took over control of the family dog team in 1940 until the last dog was stolen prior to Alec entering the Army in 1944. (Tr. 374, 382, 391, 398)

After World War II, Alec returned to the Kenai area in August of 1946 (Tr. 250; Exhibit G-27), and married Sarah Brown. (Tr. 366-367) They had a child, Ron T. Dolchok, on November 6, 1947. (Tr. 471) Also, in 1947, his brother, Emil, helped Alec build a cabin on Parcel A which was used by them as a base for trapping. (Tr. 360-362) Emil ceased trapping on Parcel A that winter when he realized that there were not enough beavers for 2 trappers. (Tr. 363) Alec continued to trap and fish to support his family until he and Sarah were divorced in 1952. (Tr. 364, 367, 392)

Alec's younger sister, Fiocla, lived with Alec, her legal guardian, for periods of time during the 1950's and testified that he trapped Parcel A in 1950 and probably trapped it in the mid-1950's, as he was absent from home for long periods of time. (Tr. 489-494) Ron Dolchok went hunting with his father on Parcel A in the 1950's and remembers visiting there for the first time in 1955. (Tr. 472-473) In 1957, his father went to work for United Physical, apparently an oil company or company which performed seismographic work for oil companies. (Tr. 367, 373, 479, 494) Alec guided hunters on Parcel A in the 1960's. (Tr. 373-374) In the mid-1960's, Alec's leg was severely injured while working for United Physical, and he was not able to trap, but continued to hunt on Parcel A, after being injured. (Tr. 236, 371, 373, 479; Exhibit C-16)

In the final analysis, only Alec filed for a Native allotment on part of the land the Dolchok family had used since 1919. (Tr. 481)

(Decision at 4-6.)

Judge Child found that the facts set forth above demonstrated that Dolchok's heirs had preponderated on the issue of whether Dolchok had substantially used and occupied Parcel A for a period of 5 years commencing prior to the withdrawal of the land on December 16, 1941. Dolchok's use and occupancy of the land, the Judge elaborated, was substantially continuous from 1936 forward, and not merely intermittent use, since, except for his 2-year military service from 1944-46, Dolchok had trapped and hunted the land for a significant number of months each year beginning in 1936 until he injured his leg in the mid-1960's, after which he was unable to trap but continued to hunt on the land. (Decision at 9.)

Judge Child further concluded that Dolchok's use was at least potentially exclusive of others, stating:

The evidence shows public awareness and acknowledgement of the Dolchok family's superior right to Parcel A, the area around their trap lines, from at least 1936 until 1940. In 1940, when Alec's mother died and he took over the dog team, an awareness of Alec's superior right to Parcel A developed. At this point, Alec's aging father was on the verge of discontinuing his trapping activities, and Alec was assuming responsibility for taking care of his siblings.

Alec's own brother, Emil, recognized Alec's superior right to the land in acknowledging Alec's ownership of the cabin which he helped Alec build in 1947. He gave further recognition to Alec's superior right to Parcel A by terminating his trapping activities on the land when he discovered that there was an insufficient number of beavers on Parcel A to sustain two trappers, both Alec and himself.

Furthermore, any person on the land should have known it was subject to a prior claim, as Alec built cabins on the claim including those built in 1938 and 1947. He also had extensive trap lines on the claim and was present on the claim for weeks and months at a time. This evidence establishes that his substantial actual use and occupancy of the land was potentially exclusive of others, including his own family.

(Decision at 9-10.)

Citing the uncontroverted evidence that, according to Kenaitze tradition, Alec attained adulthood at the age of 14 in 1936 at which time he began contributing to the family's subsistence using his own trap line and that he assumed primary responsibility for the family's subsistence in 1940, the Judge considered Dolchok's use to be personal in his own right as an independent adult, beginning no later than 1940, when Dolchok was 18 years old. (Decision at 11.) Judge Child therefore approved Parcel A of Dolchok's Native allotment application in its entirety and ordered issuance of the allotment to Dolchok's heirs. (Decision at 12.)

In its statement of reasons for appeal (SOR), BLM challenges Judge Child's conclusion that Dolchok made use of Parcel A in a qualifying manner prior to the withdrawal of the area for inclusion in the Kenai National Moose Range, arguing that the record does not support a finding that Dolchok used Parcel A in a substantial and continuous manner potentially exclusive of others prior to December 16, 1941, (SOR at 1-2, 6). ^{3/} The BLM specifically disputes the adequacy of the evidence of cabin building and trapping introduced by Dolchok's heirs and relied upon by the Judge to establish by a preponderance of the evidence that Dolchok initiated sufficient use and occupancy before the land was withdrawn. (SOR at 9.)

The BLM maintains that the record does not support the Judge's finding that a cabin was built on Parcel A earlier than 1947, asserting that neither the testimony of Ron Dolchok nor Dolchok's allotment application establish that a cabin existed on the land in 1938. Ron Dolchok's testimony that his father had said that he had built a cabin near Harvey Lake including a main cabin and smaller cabins little more than huts fails to mention where or when the cabins were constructed, BLM submits, and thus does not establish that Dolchok built a cabin on Harvey Lake in 1938. (SOR at 10.) Not only do the allegations in Dolchok's allotment application that a cabin was built in 1938 not constitute evidence that such a cabin was built, but, according to BLM, the reliability of that statement must be questioned since the record contradicts other assertions made in

^{3/} The BLM does not appeal that part of the Judge's Decision holding that Dolchok was an independent adult by the date of the withdrawal. See SOR at 6 n.7.

the application. (SOR at 11-13.) The BLM contends that the only evidence that Dolchok constructed a cabin on Harvey Lake consists of Emil Dolchok's testimony that he built a cabin with his brother in 1947, long after the land was withdrawn. (SOR at 10.)

The BLM avers that the record does not support Judge Child's finding that Dolchok trapped on Parcel A prior to World War II and that, in fact, no evidence exists showing that Dolchok made any use of the land at that time, much less substantial and continuous use sufficient to put another person on notice that the land was being used. (SOR at 13.) Even if the trapping cited in the Judge's Decision were supported by the record, BLM submits that trapping alone does not qualify as substantially continuous use and occupancy potentially exclusive of others. (SOR at 14.) Specifically, BLM claims that the transcript cites referenced in the decision relate to general trapping and hunting activities, not to Dolchok's use of Parcel A prior to 1947, that testimony about Dolchok's father's use of the land is irrelevant as ancestral use, and that the finding that Dolchok used a dog team for travelling to the land has no basis in the record. (SOR at 14-17.)

According to BLM, greater evidence of use than the possibility that a trap line may have run in the vicinity of the claimed parcel is required to establish substantially continuous use and occupancy potentially exclusive of others especially since, if a Native's trapping over a large area constituted qualifying use, the area tied up by one allotment claim could easily extend over 100 square miles or more. (SOR at 17.) The BLM asserts that the record contains no evidence that Dolchok trapped on Parcel A or left any physical evidence of use on the parcel until he built a cabin with his brother in 1947 and that the lack of physical improvements before 1947 sufficient to put others on notice that the land was being used defeats his allegation that he began using the parcel before the December 16, 1941, withdrawal of the land. (SOR at 18.)

In their answer, Dolchok's heirs contend that Judge Child properly found that Dolchok had fully satisfied the requirements of the Native Allotment Act and implementing regulations and that the Judge's factual and legal conclusions are amply grounded in the record. (Answer at 12.) The heirs assert that the preponderance of evidence in the record demonstrates that Dolchok initiated use of Parcel A in a substantial manner to the potential exclusion of others prior to 1941, citing both testimonial and documentary evidence supporting Dolchok's use of the land beginning in 1936 when he was 14 years old. (Answer at 13-14.) The record also contains sufficient evidence that Dolchok's use and occupancy of the land was substantially continuous and potentially exclusive of others prior to the withdrawal, the heirs submit, especially considering customary and seasonal patterns of use and occupancy which include the extensive winter trapping undertaken each year by Dolchok. (Answer at 15.)

Dolchok's heirs argue that the evidence in the record clearly renders it more likely than not that Dolchok built a cabin on Parcel A in 1938. (Answer at 15-16.) Even if no cabin existed in 1938, the absence of a

cabin on the parcel at that time would not preclude his qualifying use and occupancy, the heirs assert, since physical evidence relates to potentially exclusive use, and Dolchok's presence on the land during the trapping season, his trap lines and tracks, and other signs of his use would have put others on notice of his claim. (Answer at 17.)

The heirs maintain that the record also adequately supports Judge Child's finding that Dolchok trapped on the parcel before World War II and that this use for weeks or months over the winter trapping season is easily distinguishable from nonqualifying casual or intermittent use. (Answer at 17-19.) The public awareness and acknowledgement of Dolchok's family's superior claim to the area, the deference paid by trappers to another's claim boundaries, and the presence of his traps not only corroborate Dolchok's substantially continuous use of Parcel A, but, according to the heirs, suffice to establish that his use and occupancy was at least potentially exclusive of others. (Answer at 19-20.) The heirs suggest that various inconsistencies between Dolchok's application and witness testimony about Dolchok's use of his allotment do not undermine the Judge's conclusion that Dolchok qualified for his allotment. (Answer at 21.) Dolchok's heirs also aver that the record sufficiently establishes that Dolchok's use and occupancy of the parcel prior to the withdrawal was personal in his own right as an independent adult. (Answer at 22.) Thus, the heirs assert that the un rebutted evidence in the record when viewed as a whole leads to the conclusion that Dolchok used the land he applied for on Harvey Lake in a qualifying manner for over 5 years. (Answer at 23.)

[1] The Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), granted the Secretary of the Interior authority to allot up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Native Alaskan Indian, Aleut, or Eskimo, 21 years old or the head of a family, upon satisfactory proof of substantially continuous use and occupancy for a 5-year period. Departmental regulations interpret the Act as follows:

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

43 C.F.R. § 2561.0-5(a).

A Native applicant may be granted an allotment on withdrawn land if all other requirements have been met and the applicant commenced the required use and occupancy prior to the withdrawal. United States v. Heirs of Elsie Hansen Wilson, 128 IBLA 252, 254 (1994); United States v. Estate of George D. Estabrook, 94 IBLA 38, 42 (1986), and authorities cited. In order for use and occupancy prior to a withdrawal to qualify, the applicant must use and occupy the land as an independent citizen acting on his or her

own behalf or as head of a family and not as a minor child in the company of and under the supervision of one's parents. United States v. George Jim, Sr., 134 IBLA 294, 296 (1995), and cases cited. Use and occupancy of the land which does not alter the land's appearance by leaving physical evidence of use may be sufficient to establish entitlement to an allotment provided the applicant demonstrates substantiality and exclusivity. United States v. Heirs of David F. Berry, 127 IBLA 196, 207-08 (1993), citing Angeline Galbraith (On Reconsideration), 105 IBLA 333 (1988).

The BLM bases its challenge to Dolchok's allotment application on its contentions that no cabin was built on Parcel A until 1947, and that the lack of physical evidence prior to that time defeats Dolchok's claim that he initiated use and occupancy of the land before the land's December 16, 1941, withdrawal. We agree with BLM that the record contains conflicting evidence over whether or not a cabin existed on the parcel prior to the land's withdrawal, but we need not resolve that conflict since the date on which the cabin was erected does not prove when use and occupancy began. United States v. Melgenak, 127 IBLA 224, 240 (1993). Thus, even assuming, without deciding, that no cabin existed on the parcel before 1947, the absence of physical evidence of use prior to the land's withdrawal does not mandate a finding that Dolchok did not use the land embraced within Parcel A before December 16, 1941, if the record establishes that Dolchok's use and occupancy of the land encompassed substantial actual possession and use, at least potentially exclusive of others, and not merely intermittent use. See United States v. Pestrikoff, 134 IBLA 277, 286-87 (1995).

The BLM argues that the record does not support Judge Child's finding that Dolchok trapped and hunted on the land before the land was withdrawn and that, in any event, trapping alone is insufficient to satisfy the use and occupancy requirements. We do not accept BLM's assertion that, as a legal matter, trapping cannot qualify as substantially continuous use and occupancy potentially exclusive of others. Although BLM considers running a trap line over a large area to be less significant use than the setting up of base camps deemed nonqualifying intermittent use in United States v. Estate of George D. Estabrook, *supra*, the several months of winter trapping per year claimed by Dolchok far exceeds the two visits per year for a few days to a week per visit made by the applicants in that case. Nor does that case or any other establish that a traditional Native subsistence use of the land, by itself, can never be considered a qualifying use. In fact, the Board expressly disclaimed any such intention as to berry-picking in Angeline Galbraith (On Reconsideration), *supra*, at 339-40. Therefore, as long as the record establishes that Dolchok's use was both substantial and potentially exclusive, his trapping activity can serve as an adequate basis for the grant of a Native allotment. See Angeline Galbraith (On Reconsideration), *supra*, at 340.

The ultimate issue raised by BLM focusses on whether Dolchok began substantial actual possession and use of Parcel A, at least potentially exclusive of others, before the December 16, 1941, withdrawal of the land. Based on our review of the record, we agree with Judge Child that the evidence indicates that it was more likely than not that Dolchok used the

land in a substantial manner. The testimony of the witnesses for Dolchok's heirs, including his brother Emil Dolchok and his boyhood companions, provide sufficient support for the Judge's finding that Dolchok used the land for subsistence trapping throughout the winter and earned income from that trapping before 1940. See, e.g., Tr. 347-59, 386-87, 389-91, 397. The record also confirms that Dolchok's use of the land, although initially with his father, progressed to independent use on his own behalf no later than 1940 when he assumed greater responsibility for the care of his family and took over the family dog team. See Tr. 374, 380; see also Tr. 377-78.

The BLM has offered no first hand evidence rebutting Dolchok's use of the land in the manner claimed nor has it successfully undermined the testimony of the witnesses on Dolchok's behalf. Rather, BLM disputes that the parts of the record cited by the Judge support his factual findings and highlights isolated conflicting statements made by Dolchok concerning his use of the parcel. In our view, however, when considered as a whole, the evidence in the record more than suffices to demonstrate Dolchok's substantial actual use of the land prior to the withdrawal. That Dolchok may have made inconsistent statements about when he ceased using a dog team to reach the parcel does not undermine Emil Dolchok's uncontroverted testimony that Dolchok used a dog team at least from 1940 through 1941 or 1942, the time span relevant to the issues raised on appeal. See Tr. 374. Nor does contradictory evidence about when Dolchok stopped trapping undercut the finding that he was actively trapping the land embraced by Parcel A before World War II. The BLM's attempt to invalidate Dolchok's claim because he trapped an area greater than the size of his allotment directly conflicts with Board precedent explicitly recognizing that a Native following a traditional subsistence lifestyle could clearly use and occupy in excess of 160 acres in a manner consonant with the Native Allotment Act but could only seek up to a maximum of 160 acres. See United States v. Flynn, 53 IBLA 208, 234, 88 Interior Dec. 373, 387 (1981); Andrew Petla, 43 IBLA 186, 196 (1979). Therefore, we affirm Judge Child's holding that it is more likely than not that Dolchok used Parcel A in a substantial manner as an independent adult prior to the land's withdrawal.

We also agree that Dolchok's use was at least potentially exclusive of others. In order to establish potentially exclusive use, a claimant need not show that he or she actually excluded others from the land sought but simply that the nature of the use was such that under normal circumstances, any person on the land knew or should have known it was subject to prior claim. United States v. Heirs of David F. Berry, *supra*, at 208-09; Angeline Galbraith, 97 IBLA 132, 169, 94 Interior Dec. 151, 171 (1987). The presence of physical evidence of use on the allotment parcel relates to the question of potential exclusivity since, just as a visual sighting of a Native using the land would serve to notify others that the land was under occupancy, physical evidence of use would also apprise others of the existence of an outstanding claim to the land when the Native was not present. United States v. Heirs of David F. Berry, *supra*, at 209; Angeline Galbraith (On Reconsideration), *supra*, at 335. Witness statements may

also be very relevant to the question of potential exclusivity. United States v. O'Leary, 125 IBLA 235, 245 (1993); Angeline Galbraith (On Reconsideration), *supra*, at 339.

The BLM's reliance on the absence of a cabin on Parcel A until 1947 as proof that Dolchok's use of the land was not potentially exclusive of others ignores the fact that Dolchok was physically present on the land for weeks at a time during the winter trapping season and had trap lines on the land. See, e.g., Tr. 239-44. The existence of the trap lines should have put others on notice that the land was claimed by another. The evidence, including the testimony of the witnesses on behalf of Dolchok's heirs, also establishes that the public acknowledged and respected the Dolchok family's superior right to the land around their trap lines, including Parcel A. See, e.g., Tr. 219, 228, 229, 393. Although the area was initially trapped by Dolchok's father, as noted above, the evidence supports the conclusion that Dolchok took over the dog team and assumed primary trapping responsibilities by 1940, thus rendering his use potentially exclusive of his own family as well as the general community. None of BLM's witnesses came to the Kenai area before World War II and accordingly could present no first hand evidence that Dolchok's use of the land was not potentially exclusive of others. We, therefore, find that the preponderance of the evidence supports Judge Child's holding that Dolchok's use was potentially exclusive of others.

Although BLM has confined its appeal to challenging the sufficiency Dolchok's use and occupancy prior to the land's withdrawal, we have nevertheless reviewed the entire record, including the evidence of Dolchok's use and occupancy after the withdrawal and conclude that Judge Child properly approved Dolchok's allotment application for Parcel A.

Therefore, 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.

Will A. Irwin
Administrative Judge

I concur.

C. Randall Grant, Jr.
Administrative Judge