

GULKANA VILLAGE COUNCIL  
CLYDE N. AND UNICE MCCURDY

IBLA 92-452

Decided August 30, 1996

Appeal from a decision of the Townsite Trustee, Alaska State Office, Bureau of Land Management, approving application for trustee deed to a townsite lot in the Gulkana Townsite, rejecting conflicting application and protest of the Village of Gulkana for the same tract. U.S. Survey 4861.

Affirmed.

1. Alaska: Townsites--Townsites

Where a decision of the Alaska Townsite Trustee, approving one of two conflicting applications for the same townsite lot in the Gulkana Townsite is based on a finding of fact that the successful applicant had complied with the occupancy requirements of the statutes and regulations governing townsites in Alaska as of the date of approval of the final subdivisional survey or, as in this case, as of the date of the Federal Land Policy and Management Act's repeal of the Townsite laws, and the conflicting applicant, the Gulkana Village Council, does not establish error in the trustee's application of the Alaska townsite rules, that decision will be affirmed on appeal.

APPEARANCES: Gronia G. Ewan, President, Gulkana Village Council, Gakona, Alaska, for appellant; Clyde N. and Unice McCurdy, respondents, pro sese.

OPINION BY CHIEF ADMINISTRATIVE JUDGE BYRNES

The Gulkana Village Council has appealed from an April 28, 1992, decision of the Townsite Trustee (Trustee), Alaska State Office, Bureau of Land Management (BLM), approving the application of Clyde N. and Unice McCurdy for a trustee deed, rejecting a conflicting application for a deed to the same townsite lot, described as Lot 9, Block 1, Tract D, U.S. Survey 4861, Gulkana Townsite, Alaska, and dismissing a protest of the Gulkana Village Council as to approval of the McCurdy application.

The record shows that the Gulkana Village Council submitted an application on July 29, 1976, for a deed to Tracts D, F, G, and H, U.S. Survey 4861, Gulkana Townsite. The Trustee's decision noted "[t]he Council's

application listed improvements of these tracts as roads, campground and village use. The history of occupancy stated that the village people used these lands since time immemorial" (Decision at 2). The Trustee rejected the Village Council's asserted communal uses as insufficient specific uses to define occupancy within the meaning of the regulations, stating that:

[t]he Village Council's communal uses cited on their application for Tracts D, F, G and H do not rise to a level that indicates to others that the Council is claiming these entire tracts of land to the exclusion of all others, and thus would be insufficient to establish a claim under 43 CFR 2565.3(c)

(Decision at 4).

The record shows that the McCurdys filed their initial application for an unsubdivided portion of Tract D, on September 10, 1985, and amended their application February 10, 1992, by applying specifically for Lot 9, Block 1, Tract D. In the Trustee's decision he states further:

The application of Mr. and Mrs. McCurdy indicated that they staked their claim during the month of July, 1976 and proceeded to construct a cabin the following summer. The application had two witness signatures to support this contention. Support documentation in the form of pictures of a recently constructed cabin were found in the Gulkana pending file. The pictures were labeled as the McCurdy cabin site and noted as received on September 29, 1977. The protest did not list any specific challenges to the facts as stated on this application.

(Decision at 3).

In reliance on 43 CFR 2565.3(c), <sup>1/</sup> the Trustee approved Clyde and Unice McCurdys' application and rejected the application of the Village of Gulkana. The Trustee found the McCurdys' staking of the site in July of 1976 with their continued occupancy through the completion of construction of the cabin in the summer of 1977 as qualifying occupancy under the townsite laws, stating:

Although construction of the cabin on what is now known as Lot 9, Block 1, Tract D was initiated and completed in the summer of 1977, which is after the cutoff date of October 21, 1976, the staking of the lot occurred prior to this date. The staking created an inchoate right which was perfected upon the diligent construction of the cabin the next summer. Both the staking and the construction are viewed as a series of acts which together define the act of occupancy on the part of the McCurdys and

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<sup>1/</sup> 43 CFR 2565.3(c) provides: "Only those who were occupants of lots or entitled to such occupancy at the date of the approval of final subdivisional townsite survey or their assigns thereafter, are entitled to the allotments therein provided."

sustain their claim to this lot. When the applicants initiated their occupancy by staking their claim in the summer of 1976, they had a reasonable expectation that they could diligently perfect such occupancy in accordance with the townsite regulations upon which they relied. Such legitimate expectation constituted a valid existing right within the meaning of the savings clause of section 701 (a) of FLPMA (90 Stat. 2786). Aleknagik Natives, Ltd. v. United States, 806 F. 2d 924, 926-927 (9th Cir. 1986).

(Decision at 3).

Appellants filed a general statement of reasons (SOR) applicable to all the claims approved within the townsite, asserting, inter alia, that the Trustee erroneously made lands within the Gulkana Townsite available to non-Native settlement. They assert this is contrary to the provisions of the Alaska Native Townsite Act of May 26, 1926 (ANTA), 43 U.S.C. § 735 (1970), and the promises of the former Trustee, George E.M. Gustafson, that townsite lands would only be made available for Natives to occupy and obtain title. Appellants also contend the Trustee's decision is erroneous because the historical use and occupancy of townsite lands by the Natives of Gulkana Village, as evidenced by remains of old log structures, graves, and other historical finds within Tracts G and H, predates any other claim to these lands (SOR at 1).

Appellants charge "[t]he acceptance, review and determination process for each townsite lot application, is based on irrelevant facts and dubious ANTA requirements." They question the guidelines and procedures used to process and validate claims, charging that the Trustee accepted applications by "word of mouth" and then proceeded with field examinations 8 years later (SOR at 2).

Appellants object to the Trustee's finding that staking constitutes a valid claim and assert that such staking was accomplished and existed on or before July 28, 1976. They charge that except for lands or lots settled upon by Gulkana Indian residents, "unsubdivided lots claimed within Tract D and G, were without stakes, dwellings, structures, and were unoccupied \* \* \* until or after the summer of 1977" (SOR at 2).

They object to the application procedure which relies on the statements of two disinterested witnesses to verify the facts of the applicants' settlement because they allege the claimants "selected witnesses who were bias [sic] and allied against native lands selection" in the townsite (SOR at 2).

They argue that ANTA lands cannot be taken without the Village Council's consent which they will not give, indicating that ANTA was passed for the benefit of Natives and the Federal Government is held to strict fiduciary standards in its implementation to protect Indians (SOR at 2-3).

Appellants filed a supplemental statement of reasons (SSOR) June 23, 1992, in which they reiterate many of the same arguments raised in their SOR. In addition, they specifically contest the facts of the McCurdys' application, charging that although the application states the cabin was built by the summer of 1977, BLM did the field examination 7 years later. They state "[t]his conduct allowed ample time for anyone to construct a dwelling on the land in question" (SSOR at 1). They further state that the McCurdys' dwelling was insufficient to be considered suited for seasonal or yearly occupancy in that "[e]vidence found and verified with aerial photography shows four 50 gallon drums and if used for the foundation, it wasn't permanent and the dwelling hastily built." They also charge that, "if the McCurdy's intent was to gain title, their use and occupancy of the land was not notorious, exclusive, continuous and substantial. It did not leave visible evidence so as to put strangers on notice that the land is being used and occupied by another as is reasonably apparent" (SSOR at 1).

They further challenge the sufficiency of the McCurdys' occupancy, noting that the passage of the Federal Land Policy and Management Act (FLPMA) on October 21, 1976, repealed the requirement that occupancy as of the date of the subdivisional survey establishes a valid entry. They point out that the McCurdys' occupancy did not occur as of this date and they disagree with the BLM finding that the mere act of staking the site establishes an inchoate right to perfect the claim even if it occurs shortly after the cut off date. They conclude that McCurdys' claim meets none of the criteria of the Townsite regulations in that their use was not specific; they did not place a permanent building and foundation and other improvements on the tract which shows an intention to possess or claim the tract (SSOR at 2).

The McCurdys have filed their response to this appeal denying appellants' charges, stating that the cabin was built in 1977 as shown by photographs submitted for BLM records in 1977. They state:

When we built the 16 x 20 cabin it was set at an optimum height which allowed shade for the permafrost ground, barrels are used which allow installation and maintenance of insulation under the floor, as you can see the barrels are still there. Upon finishing the cabin we went to Mr. Ewan and told him to feel free to have whoever needed it use it when we were not there.

[1] Both the Village Council and the McCurdys sought the lot in question pursuant to section 11 of the Alaska Townsite Act of March 3, 1891, 43 U.S.C. § 732 (1970) (repealed by section 703(a) of FLPMA, P.L. 94-579, 90 Stat. 2790 (1976), effective October 21, 1976, subject to valid existing rights) and section 3 of ANTA, *supra* (also repealed by section 703(a) of FLPMA). Section 11 provided for the entry of lands in Alaska "for town-site purposes, for the several use and benefit of the occupants of such townsites" by a trustee appointed by the Secretary of the Interior and provided that, upon entry, the Secretary "shall provide by regulation

for the proper execution of the trust in favor of the inhabitants of the townsite, including the survey of the land into lots." Section 3 extended the provisions of section 11 of the Act of March 3, 1891, to Native townsites, subject to the same limitations and restrictions. Joe L. Herbert, 128 IBLA 13 (1993); see Aleknagik Natives, Ltd. v. United States, 635 F. Supp. 1477, 1497 (D. Alaska 1985), aff'd, Aleknagik Natives Ltd. v. United States, 886 F.2d 237 (9th Cir. 1989); Marlin L. Virg-In, 117 IBLA 285, 293 (1991); Native Village of Circle, 114 IBLA 377, 378-79 (1990); Bristol Bay Housing Authority, 95 IBLA 20, 22 (1986). Regulations promulgated by the Secretary of the Interior to implement these acts are found at 43 CFR subparts 2564 and 2565.

In applying the referenced townsite acts, this Board and the courts have consistently held that the townsite trustee properly awards townsite lots only to those inhabitants who occupied the lots or are entitled to such occupancy at the date of approval of the final subdivisional townsite survey. 43 CFR 2565.3(c); Marlin L. Virg-In, supra at 293; Native Village of Circle, supra at 379; Bristol Bay Housing Authority, supra at 23; Ruth B. Sandvik, 26 IBLA 97, 98 (1976); City of Klawock v. Andrew, 24 IBLA 85, 83 I.D. 47 (1976); aff'd, City of Klawock v. Gustafson, Civ. No. K-74-2 (D. Alaska Nov. 11, 1979). FLPMA's repeal of the Alaska townsite laws, subject to valid existing rights, voided the authority under which townsite lots could be entered and occupied, and no rights under those laws could be derived from occupancy initiated after October 21, 1976. Aleknagik Natives, Ltd., supra at 1497-98; Royal Harris, 45 IBLA 87, 89 (1980). Thus in this instance since the record discloses that the final subdivisional townsite survey for the Gulkana Townsite was not conducted until 1990 and later approved on October 17, 1991, occupancy as of October 21, 1976, determined entitlement to the Gulkana Townsite lots.

We must first reject the Village Council's argument that ANTA was created only for the benefit of Alaska Natives to occupy and obtain title to townsite tracts and the Trustee has erred in approving a conveyance of a tract to a non-Native occupant. Although the Village Council asserts that the Trustee has violated his fiduciary obligation with respect to the townsite property and to the Natives, it is clear that the Trustee is not required to administer townsite lands exclusively for the benefit of the Natives. See Aleknagik Natives, Ltd. v. United States, 806 F.2d 924, 927 (9th Cir. 1986). Rather, once the trustee obtains patent to a townsite, that patent is held in trust for all the occupants of the townsite, not the municipality or only the Native residents, and a person is considered an occupant if he or she initiated a timely claim. Marlin L. Virg-In, supra at 294. Moreover, the Department has traditionally rejected this very assertion, noting that as a matter of statutory and regulatory interpretation there is no such limitation on who may qualify by occupation under the townsite laws. City of Klawock v. Andrew, supra at 94, 83 I.D. at 54.

We next affirm the Trustee's finding that the McCurdys sufficiently occupied this lot by staking the lot in the summer of 1976 and later constructing a cabin on the site. An occupant is entitled to an award encompassing the land occupied at the date of the approval of the final

subdivisional survey (43 CFR 2565.3(c)), or, in this case, the date of FLPMA's repeal of the townsite laws. As of that date the record confirms that the McCurdys had already staked Lot 9, Block 1, Tract D and pictures submitted to BLM in 1977 along with the statements of witnesses verify that a cabin had been erected on the lot in that year. Although appellants challenge these facts they have presented nothing with this appeal to substantiate their allegations.

Under the cited regulations, the Board has held that the prior and superior claim to a townsite lot is established by settlement and improvement, or the initiation thereof, on the lot. Ruth B. Sandvik, supra at 99. In City of Klawock v. Andrew, supra at 95-96, 83 I.D. at 55-56, the Board applied the rule set out in Sawyer v. Van Hook, 1 Alaska 108, 110 (1900), where the court held that residence need not be established, but that the clear and unmistakable intention to possess and improve must be evidenced on the ground. The court found that the plaintiff's staking and depositing building materials on the lot at the time of determination established his right to the lot. The court clearly defined the requirements of qualifying occupancy, stating:

[Occupancy] includes such an improvement of the lot by the erection of buildings or fences, or by actual residence thereon, or by such other acts of possession or improvement, as clearly and unmistakably show that it is bona fide the intention of the settler to take and hold possession of the lot, and that his possession and improvement is intended to be permanent, and for himself.

As in Sawyer, the McCurdys' continuous actions in this case beginning with the staking of the lot prior to the cutoff date of October 21, 1976, followed by their efforts in 1977 more than adequately demonstrated their clear intent to possess and improve this tract for themselves and established occupancy under the townsite law.

We must similarly affirm the Trustee's rejection of the Village Council's conflicting application for this same tract based on Native village communal uses. Such uses are clearly insufficient for the necessary occupancy within the meaning of 43 CFR 2565.3(c) as they fall far short of facts necessary to meet the test for occupancy as set forth in Sawyer v. Van Hook, supra, for the same reasons that such communal acts of the Native village would not be intended to establish occupancy of tracts by the individual Natives for themselves as outlined above.

In addition, as the Trustee has correctly pointed out, the Village Council's communal uses do not meet the test for occupancy which creates possessory rights as defined in United States v. State of Alaska, 201 F. Supp 796, 799-800 (D. Alaska 1962) where the court held that the use or occupancy must be notorious, exclusive, continuous, substantial and of such a nature as to leave visible evidence thereof so as to put strangers upon notice that the land is in the use or occupancy of another and the extent thereof must be reasonably apparent.

In this instance the history of the Native village uses as claimed in their application do not rise to a level that indicates to others that the Village Council has used and claimed these entire tracts of land to the exclusion of all others. Accordingly, appellants have failed to establish any prior right to Lot 9, Block 1, Tract D, which would defeat the McCurdys' claim to the land.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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James L. Bymes  
Chief Administrative Judge

I concur.

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Franklin D. Amess  
Administrative Judge

