

EDWIN WILLIAM SEILER

IBLA 74-144

Decided August 16, 1974

Appeal from decision of Alaska State Office, Bureau of Land Management, rejecting application to purchase a trade and manufacturing site, AA-9301.

Affirmed.

Alaska: Generally—Alaska: Possessory Rights—Alaska: Trade and Manufacturing Sites—Withdrawals and Reservations: Generally

A claimant's occupancy of a trade and manufacturing site more than 90 days prior to the filing a valid notice of location vests the claimant with no "valid existing right" when the land is withdrawn from appropriation prior to the vesting of any rights.

Alaska: Generally—Alaska: Possessory Rights—Alaska: Trade and Manufacturing Sites—Withdrawals and Reservations: Generally

The failure of a trade and manufacturing site claimant to meet the requirements of the Act of April 29, 1950, 43 U.S.C. § 687a-1 (1970), requires the denial of consideration of any occupancy which occurred more than 90 days prior to the filing of a notice of location or application to purchase.

Alaska: Generally—Alaska: Possessory Rights—Alaska: Trade and Manufacturing Sites—Withdrawals and Reservations: Generally

Where none of several notices of location was free of defect, the failure to file an application to purchase within any of the five-year periods thus possibly initiated bars consideration of any

occupancy more than 90 days prior to the filing of a valid notice of location or of a valid application to purchase.

APPEARANCES: Eugene F. Wiles, Esq., of Delaney, Wiles, Moore, Hayes & Reitman, Inc., Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Edwin W. Seiler has appealed from a decision of the Alaska State Office, Bureau of Land Management, dated October 19, 1973, which rejected his application (AA-8301) to purchase a trade and manufacturing site. This site was applied for pursuant to the Act of May 14, 1898, as amended, 43 U.S.C. § 687a et seq., (1970), and encompasses 54 acres of unsurveyed land in protracted section 12, T. 14 S., R. 37 W., S.M., Alaska, on the shore of Enchanted Lake.

The decision in question states in part that the tract was not available for appropriation at the time the application to purchase 1/ was filed because it had been withdrawn from all forms of appropriation. The tract was withdrawn by Multiple Use Classification AA-818 on March 15, 1967, as supplemented by Public Land Order 5179, issued March 9, 1972, 37 F.R. 5579. Public Land Order 5179 withdrew, "subject to valid existing rights," certain public lands in Alaska, including the township in which the disputed 54 acres lie,

\* \* \* for study and for possible recommendations to the Congress as additions to or creation as units of the National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems \* \* \*.

Id.

The State Office decision relied upon Estate of Bahls, Fairbanks 028598 (July 29, 1968) and Kenecott Copper Corp., 8 IBLA 21, 79 I.D. 637 (1972), as authority for denying any credit for appellant's occupancy prior to the filing of his notice of location. The general rule stated in the latter case is that occupancy of public land prior to the filing of a notice of location invests the occupant with no "valid existing right" where the public land is withdrawn from appropriation before the notice is filed, sufficient to bar the withdrawal of the occupied position of the public land. Id.

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1/ It is noted that the State Office decision more precisely turns on the status of the tract at the time the notice of location was filed, January 11, 1973. However, for the purposes of this opinion the distinction between this date and the date of filing the purchase application, February 13, 1973, is de minimis.

Appellant has filed a statement of reasons and a petition for equitable adjudication of this matter. His notice of location was filed January 11, 1973, and his application to purchase February 13, 1973. In his statement of reasons, he claims that his occupancy, dating from May 15, 1965, should be given some credit prior to the filings of his notice of location and his application to purchase, because in his view the denial of credit for any and all occupancy prior to a notice of location is inconsistent with Departmental precedents.

In support of his position he cites Departmental decisions, 2/ an instruction, 3/ and an opinion of the Solicitor. 4/ Additionally, he points to a notice of location filed by Air Martel, Inc., on May 20, 1965, and another, filed again by Air Martel, Inc., on February 23, 1966. (Air Martel, Inc., apparently is a closed corporation owned and managed solely by appellant and his wife.) With respect to this latter notice, appellant believes that it " \* \* \* should be reinstated and Mr. Seiler given 30 days to submit the required showings."

Appellant has submitted in support of his appeal documents, which he states shows:

(1) That Mr. Seiler first occupied the lands in question for T&M site purposes on or about May 19, 1965.

(2) That he has resided on such land and conducted a business thereon continuously from May 19, 1965 to the present time.

(3) That he has placed improvements which cost him approximately \$110,000.00.

(4) That the business conducted on the T&M site is his major source of livelihood.

(5) That the BLM personnel was aware of his settlement claim by virtue of two location notices and his contact and correspondence with Mr. Merrick [the Bureau's Area Manager].

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2/ James Morris, 47 L.D. 326 (1920); Anne V. Hestnes, A-27096 (June 27, 1955); Loran John Whittington, A-28823 (August 18, 1961); C. Rick Houston, 5 IBLA 71 (1972).

3/ GLO Cir. 1348, 55 I.D. 226 (1935).

4/ Solicitor's Opinion, 55 L.D. 205 (1935).

(6) That his application to purchase does not conflict with an adverse claim of a third party.

(7) That he has fully complied with the law for obtaining a T&M site patent with the exception of the alleged late filing of notice of location.

Based upon these facts, appellant requests equitable adjudication of his case. He refers to the regulation providing for such adjudication by the Director of the Bureau of Land Management, 43 CFR 1871.1-1. 5/

As an alternative to reversal of the State Office decision, appellant requests the Board to grant him a full hearing on the merits of his case. The pertinent regulation does permit the Board to order hearings on questions of fact. 43 CFR 4.415. Before such alternative relief can be granted a disputed question of fact must be found, and thus a recapitulation of the facts underlying this appeal is appropriate.

A notice of location for a trade and manufacturing site, A-056993, was filed April 16, 1962, by Josephine B. Seiler, wife of appellant for a tract of public land on the shore of Lake Iliamna, within T. 6 S., R. 37 W., S.M., Alaska, somewhat distant from the tract at issue. An application to purchase was duly filed, and by decision of September 8, 1965, a deposit for survey was required. Though the time for submitting such deposit was extended by mistake, her application to purchase was subsequently "held for rejection" for failure to submit the deposit.

By letter of July 13, 1966, Mrs. Seiler advised the Anchorage District Office that because she still lacked the necessary funds for a survey deposit, and that she had concluded that her sole recourse was to apply again for purchase prior to April 14, 1967, the termination date of her entry. However, at the termination of the statutory period, the case was closed on the BLM records, for Mrs. Seiler had not reapplied to purchase.

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5/ We note that the Board has referred to this regulation in remanding the rejection of a trade and manufacturing site purchase application filed two days late where we found substantial compliance with the Act. C. Rick Houston, 5 IBLA 71 (1972). Appellant states this provision gives us the authority to "approve and grant" his patent application. However, a closer examination of the Houston decision reveals that there the case was remanded to the Director of the Bureau of Land Management; the officer with the authority under this regulation to grant equitable relief.

Mrs. Seiler's case involved a different tract from the one at issue here, but her entry figures in a rejection of a notice of location filed by Air Martel, Inc. for the latter tract, as will be discussed below.

A notice of location for a trade and manufacturing site, A-062461, was filed May 20, 1965, by appellant for Air Martel, Inc., the privately owned corporation belonging to him and Mrs. Seiler. This was rejected, and the case closed on July 6, 1965, because it did not conform to the regulations as to area and shore space. 43 CFR 2562.3(d)(3). Appellant was told, though, that he could file another location notice, which would conform, but this advice was retracted in a letter on July 27, 1965.

The Bureau's retraction was based on a Departmental policy set forth in GLO Cir. 491, 45 L.D. 241 (1916), which barred corporate applications for trade and manufacturing sites if any "member thereof" had "entered or acquired land entered under the provisions of this act." <sup>6/</sup> Therefore, the land office held, because Mrs. Seiler had already filed an application to purchase a trade and manufacturing site A-056993, supra, she could not qualify; and thus the corporation, Air Martel, Inc., partially owned by her, could not either.

The retraction letter of July 27, 1965, suggested the filing of a location notice in appellant's own name, and the acquisition of a headquarters site in the name of Mrs. Seiler. <sup>7/</sup> This latter

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<sup>6/</sup> This regulatory requirement was superseded by regulations issued in January 1930, which have been carried down to the present.

"§ 2562.2 Qualifications of applicant.

"An application must show that the applicant is a citizen of the United States and 21 years of age, and that he has not theretofore applied for land as a trade and manufacturing site. If such site has been applied for and the application not completed, the facts must be shown. If the application is made for an association of citizens or a corporation, the qualifications of each member of the organization must be shown. In the case of a corporation, proof of incorporation must be established by the certificate of the officer having custody of the records of incorporation at the place of its information and it must be shown that the corporation is authorized to hold land in Alaska."

E.g., C. FISHER, CIRCULARS AND REGULATIONS OF THE GENERAL LAND OFFICE 190, 273 (1930); 43 CFR 81.3 (1940). See Yakutat & S. Ry., 53 L.D. 58 (1929), and on rehearing, 53 L.D. 65 (1930).

<sup>7/</sup> This latter suggestion was directed at remedying Air Martel's defect regarding the compactness required for trade and manufacturing sites. See 43 U.S.C. § 687a (1970).

suggestion was made to enable appellant to control the areas which he had improved, which he could not acquire in toto by himself under the Act.

After receipt of the retraction letter, another location notice was filed by Air Martel, Inc., on February 23, 1966. This new location notice (A-064489) met the requirements of the letter of July 6, 1965, which had been retracted and superseded by the letter of July 27, 1965.

Accordingly, by letter of May 5, 1966, the Anchorage District Office suspended action for thirty days on Air Martel's second notice of location. Based upon the legal rationale already set forth with regards to the retraction letter of July 27, 1965, it was stated:

In view of the above we are withholding further action on your notice of location for a period of thirty days to allow you an opportunity to submit the required showings, [i.e., qualification's of corporate members] failing in which the case file will be closed on the records of this office. (Emphasis added.)

Appellant admits that thereafter he did not contact the Anchorage office until April 1967, after the land had been segregated, nor did he appeal this determination.

The next item is a two page letter, by Appellant dated January 14, 1969, which substantially sets out what has been discussed. In this letter appellant claimed that the refiling in the name of Air Martel was "a simple error." He also stated:

Upon receipt of the May 5th letter the undersigned had intended to change the name of the filing from Air Martel, Inc. to Edwin W. Seiler, which presumably would have been acceptable, but due to the press of other business and the belief that such a step could be made at any time without jeopardizing the entry claim, he procrastinated in this action until May 1968 when he learned for the first time that the area had been withdrawn from entry because of native claims and a Classification for Multiple Use Management which had been publicized and enacted at a time of the year when he was absent from the state in [sic] business.

Between the date of filing a notice of location (A-064489) for the second time in the name of Air Martel, Inc., 8/ and this

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8/ One other notice of location had been filed in connection with this case. Mrs. Seiler apparently filed for a headquarters site on or about February 20, 1966. This entry expired on February 22, 1971, presumably without further action by appellant's wife.

two page letter, the subject lands were withdrawn from appropriation by Multiple Use Classification AA-818 on March 15, 1967. See 43 CFR Part 2400.

The final group of factual items leads to the appeal presently under consideration. On January 11, 1973, appellant filed a notice of location (AA-8301) for this tract, and on February 13, 1973, his application to purchase. It is from the rejection, on October 19, 1973, of his purchase application that he has taken this appeal to us.

The facts supported by appellant's submission on appeal have not been disputed. The decision appealed from rests upon an issue of law; i.e., the legal effect to be given occupancy initiated and continued under defective notices of location. Therefore, we find that appellant has raised no issue of fact sufficient for us to order a hearing in this matter. 43 CFR 4.415.

Appellant has directed our attention to five cases which he asserts have established a favorable precedent for his case. A short discussion of these cases will suffice to show why they do not differ from the clear rule enunciated in Kennecott Copper Corp., 8 IBLA 21, 79 I.D. 636 (1972). In fact, only one of the cases he cites was not discussed in the Kennecott decision.

Several cases were discussed and distinguished in the Kennecott decision. The case entitled James Morris, 47 L.D. 326 (1920), was shown to have no precedential significance in cases involving the Trade and Manufacturing Site Act, as amended, 43 U.S.C. § 687a et seq. (1970). Kennecott Copper Corp.; supra at 8 IBLA 26-27, 79 I.D. 638-39. The two cases which discuss the Act, Anne V. Hestnes, A-27096 (June 27, 1955), and Loran John Whittington, A-28823 (August 18, 1961), were also advanced in the Kennecott decision. With respect to them, we stated that the purposes of the Act of April 29, 1950, 43 U.S.C. § 687a-1 (1970), would be thwarted

\* \* \* if a claimant could present his application to purchase long after a withdrawal had been in effect claiming his occupancy precluded the withdrawal from being effective and though he gave no notice to the Bureau, as required.

Kennecott Copper Corp., supra at 8 IBLA 28-29, 79 I.D. 639-40.

Furthermore, we found that the 1950 Act should be literally read and applied to give effect to the underlying legislative intent,

\* \* \* rather than some forced interpretation which, in effect, would obviate any filing of a notice of location or purchase application prior to a withdrawal of the land.

Id. at 8 IBLA 29, 79 I.D. 640.

One other case has been cited by appellant. In C. Rick Houston, 5 IBLA 71 (1972), already noted, a trade and manufacturing site claimant had filed a notice of location on February 3, 1965. However, his subsequent application to purchase was filed on February 4, 1970. After almost four years of occupancy, Public Land Order 4582, 34 F.R. 1025, on January 17, 1969, had withdrawn the land involved.

On December 8, 1970, Public Land Order 4962, 35 F.R. 18874, had amended P.L.O. 4582, and thus permitted consideration of Houston's claim on its merits. C. Rick Houston, supra at 74. There we said:

Appellant nevertheless has demonstrated his attempt to comply with the law in his efforts to find out the proper procedures for filing his application and in his mailing the application prior to expiration of the deadline. Appellant also asserts that he has constructed substantial improvements on the claim, and that he has substantially complied with the requirements of Trade and Manufacturing Site Act, supra. We believe that cancellation of the claim would be an unwarrantably harsh consequence for the two day delay involved in the filing.

In the instant case, appellant would have us take two steps. The first would be to regard the notice of location of February 23, 1966 (A-064489), filed in the name of Air Martel, Inc., as the requisite notice to the Bureau of Land Management. The second step would be to disregard the period of time from February 23, 1966, to February 22, 1971, and rule that the five year statutory life of the claim had not expired.

These two steps are what appellant seems to contemplate in his request for a remand of the case to the BLM State Director and equitable adjudication, 43 CFR 1871.1-1, based upon C. Rick Houston, supra. But as already alluded to, the Houston case involved a properly filed notice of location, a claimant's substantial compliance with the law in mailing his application to purchase in advance of the deadline, and the construction of

substantial improvements on his claim. In the immediate case, appellant has complied with only two of the three controlling factors in the case upon which he seeks to rely. Thus we are compelled to find that a mere two day's delay in receipt of a purchase application mailed before the date due is not equivalent to failure to file an adequate location notice between the date of entry, May 19, 1965, and the withdrawal for the multiple use classification on March 17, 1967, nor is it equivalent to the failure to file an application to purchase within a reasonable time thereafter.

As was stated in Kennecott,

\* \* \* The provisions of the Act [of April 29, 1950, 43 U.S.C. § 687a-1 (1970), which requires the filing of a location notice as a prerequisite for credit for occupancy], in amending the Trade and Manufacturing Site Act established certain conditions and requirements whereby the United States would recognize occupancy for trade and manufacturing site purposes. The failure of the appellant to meet these conditions brought into operation the consequences of the lack of fulfillment of the condition, i.e., that occupancy prior to the filing of a notice of location or application to purchase could not be considered. \* \* \*

Kennecott Copper Corp., *supra* at 8 IBLA 29, 79 I.D. 640.

One final matter deserves some consideration. Appellant has requested a full hearing on the merits of his case, based on United States v. O'Leary, 63 I.D. 341 (1956), and Don C. Jonz, 5 IBLA 204 (1972).

The former case holds that mining claims are property claims which may not be invalidated without due process of law, and thus a hearing thereon must comply with the standards of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1970). The latter case establishes that where a homestead claimant has made a valid entry, i.e., "has done all that is required under the law to perfect his claim," Don E. Jonz, *supra* at 207, he has an equitable title which cannot be canceled without a hearing. The hearing process must be used where defects found to support a cancellation do not appear on the face of the record.

In the instant case, the Act of April 29, 1950, 43 U.S.C. § 687a-1 (1970), requires that:

\* \* \* [a]ll qualified persons, associations, or corporations \* \* \* hereafter initiating claims subject to the

provisions of section 687a [the Trade and Manufacturing Site Act of May 14, 1898, as amended] of this title, shall file a notice describing such claim \* \* \* in the United States land office for the district in which the land is situated \* \* \* within ninety days from the date of the initiation of the claim \* \* \*. Unless such notice is filed \* \* \* within the time prescribed the claimant shall not be given credit for the occupancy maintained in the claim prior to the filing of (1) a notice of the claim in the proper district land office, or (2) an application to purchase, whichever is earlier. \* \* \*

In this case, the defects are apparent from the record, so neither the O'Leary nor the Jonz rulings afford a remedy to appellant. Furthermore, it cannot be said that appellant has made a valid entry upon the public lands, for every notice of location filed in reference to the tract involved here had one or more defects. And even if some remedying feature could be found in the notices of location filed before the land was withdrawn, no application to purchase has ever been filed, save the one filed February 13, 1973, the rejection of which this appeal concerns. Thus appellant would fail under the next sentence of the statute first quoted, *i.e.*,

\* \* \* [a]pplication to purchase claims, along with the required proof or showing, must be filed within five years after the filing of the notice of claim under this section.

Therefore, even were it possible to accept one of the location notices and allow credit for five years of qualifying use and occupancy thereafter, we would still be obliged to find that the failure to file a purchase application until long after the claim had expired was fatal to appellant's assertion of entitlement. Appellant has shown no compelling reason for his failure to file his application within five years. But cf. Elizabeth Hicketier, 6 IBLA 306 (1972). We find no basis for equitable adjudication of the claim. The request for hearing is denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Alaska State Office is affirmed.

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Frederick Fishman  
Administrative Judge

We concur.

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Edward W. Stuebing  
Administrative Judge

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Anne Poindexter Lewis  
Administrative Judge

