

UNITED STATES
v.
BARBARA JEAN HILL

IBLA 77-188

Decided January 30, 1978

Appeal from January 27, 1977, decision of Administrative Law Judge E. Kendall Clarke rejecting Contestee's application to purchase land in Alaska for a trade and manufacturing site. A-056201.

Affirmed as modified.

1. Alaska: Trade and Manufacturing Sites

Where evidence shows that as of final day of 5-year statutory period for proving up a trade and manufacturing site, claimant's business on site was only prospective, concept of substantial compliance may not properly be invoked to bring claimant within bounds of legal requirements for proving up of such a site. Such evidence showed rough completion of golf course in final month of entry, only \$120 gross receipts, and three lifetime memberships in exchange for labor expended in construction of golf course.

2. Alaska: Trade and Manufacturing Sites

Contestee's rights, if any, in trade and manufacturing site claim had to be earned prior to November 23, 1966 (the expiration date of the entry) and no action by BLM after that date could prejudice Contestee since the evidence shows her failure to meet requirements during the statutory period. Accordingly, Board rejects equitable estoppel and laches arguments based on asserted BLM actions in 1967 and thereafter.

3. Alaska: Trade and Manufacturing Sites

Since Contestee has shown no prejudice suffered as result of delay by BLM in bringing contest, the Board concludes that there is no reason for dismissal of contest based on "reasonable time" provision of 5 U.S.C. § 555(b) (1970).

APPEARANCES: Bruce E. Schultheis, Esq., Assistant Regional Solicitor, Anchorage, Alaska, for the United States; George M. Kapolchok, Esq., Atkinson, Conway, Young, Bell and Gagnon, Inc., Anchorage, Alaska, for Contestee-Appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Barbara Jean Hill, referred to as Appellant or Contestee herein, appeals from a January 27, 1977, decision of Administrative Law Judge E. Kendall Clarke rejecting her application, A-056201, to purchase land in Alaska for a trade and manufacturing site. See 43 U.S.C. § 687a (1970). ^{1/} Contestee had filed her Notice of Location on the claim on November 24, 1961, and her application to purchase on November 22, 1966. On December 6, 1974, the Bureau of Land Management (BLM) had filed a complaint alleging her failure to satisfy the requirements in the statutes and regulations, *infra*, governing purchase of trade and manufacturing sites.

In 43 U.S.C. § 687a (1970) it is provided:

Any citizen of the United States twenty-one years of age, or any association of such citizens, or any corporation incorporated under the laws of the United States or of any State or Territory authorized on May 14, 1898, by law to hold lands in the Territories, thereafter in the possession of and occupying public lands in Alaska in good faith for the purposes of trade, manufacture, or other productive industry, may each purchase one claim only not exceeding eighty acres of such land for any one person, association, or corporation, at \$2.50 per acre, upon submission of proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry * * * .

Further, 43 U.S.C. § 687a-1 (1970) states in part that "[a]pplication to purchase claims, along with the required proof or showing, must be

^{1/} 43 U.S.C. § 687a (1970) and 43 U.S.C. § 687a-1 (1970), *infra*, have been repealed effective October 21, 1986. Federal Land Policy and Management Act of 1976, P.L. 94-579, Section 703(a), 90 Stat. 2789.

filed within five years after the filing of the Notice of Claim under this section."

The implementing regulations have fleshed out the specific requirements of proof intended by the statutes. Under 43 CFR 2562.3(d)(1), an applicant must show:

That the land is actually used and occupied for the purpose of trade, manufacture or other productive industry when it was first so occupied, the character and value of the improvements thereon and the nature of the trade, business or productive industry conducted thereon and that it embraces the applicant's improvements and is needed in the prosecution of the enterprise. A site for a prospective business cannot be acquired under section 10 of the Act of May 14, 1898 (30 Stat. 413; 43 U.S.C. 687(a)). [Emphasis supplied.]

The facts of this case are as follows. The stated use for which the claim was filed included accommodations for tourist cabins, a lodge, a store, a gift shop, and the manufacture of ceramics and gift items and clay products (Tr. 6). Contestee discussed recreational uses of the land with nearby neighbors after the Notice of Location was filed, and decided to construct a golf course.

On June 14, 1966, the BLM advised Contestee that the 5-year statutory period established by law, supra, would expire on November 23, 1966 (Tr. 9). Mrs. Hill arranged with her husband, who owned the homestead adjacent to the trade and manufacturing site, to obtain a cabin which was ultimately moved to the site. This was accomplished prior to November 1966. Contestee informed the BLM of her intention to use the trade and manufacturing site as a golf course in her letter of December 12, 1966 (Tr. 8).

Contestee testified concerning the work that had been done to open the golf course prior to November 23, 1966:

We cleared the greens and put the golf cups in. We had a surveyor and -- who completely laid out the course first. We had done some of the -- years earlier, just on a tentative basis, and then he spent two weeks doing the surveying and laying out of the -- approximately two weeks laying out the golf course. And flagging it, tagging it, getting it ready to clear. And then we transported the Cats and materials, oil and all the things that were needed to clear to the golf course, and cleared the land, and made the -- completed the golf course.

(Tr. 13.)

Contestee submitted photographs to show the condition of the golf course on or before November 23, 1966. These photographs showed in progress the clearing of areas, surveying work done on the heating system of the clubhouse, and work on the log cabin clubhouse. The pictures also showed two men playing golf and hitting the ball out of an area covered with bulldozer tracks. In addition, the photographs showed the various golf holes with yardages indicated on signs.

Mrs. Hill testified that she had received \$ 120 in cash for two 1-year memberships at \$60 each. These were paid November 3 and November 22, 1966. Three other people were given lifetime memberships in exchange for work they performed in the construction of the golf course (Tr. 18-22). Contestee maintained that she was in business before the expiration of the statutory period on November 23, 1966, although no business license was obtained in 1966 (Tr. 23-26).

Contestee had a total investment in the golf course construction of \$ 6,296.60. This amount includes payments made subsequent to the close of the statutory period for tax assistance from H & R Block and for a State business license (Tr. 134).

Clarence Smith, a BLM realty specialist, testified that he examined the property on July 27, 1970, and again on July 24, 1973. The second examination was necessary because the photographs taken on the first examination were mislaid (Tr. 40). He said that the course was covered at that time by knee-deep native grass on the fairway, and that he was able to locate all of the golf cups, but not all of the signs indicating the holes (Tr. 42-43).

Two men who lived in the area testified that in early November 1966 fairways were not laid out, and there were no improvements on the property (Tr. 105, 114).

Both of the Hills alleged that from 1967 until about 1971 they were told by BLM employees not to do any further work on the trade and manufacturing site until the couple heard from the BLM (Tr. 146-151, 159-160). However, Mrs. Hill stated they got the impression from Mr. Smith in 1971 that they should continue to develop the golf course (Tr. 159-160). In her brief on appeal, Contestee says that she and her husband "were given conflicting instructions as to whether they should continue to improve the site, or simply leave it alone and await an adjudication by the Land Management Office." Contestee urges that this "conflicting information prejudiced what condition the golf course would be in when finally inspected," and she characterizes the actions of BLM officials as "affirmative misconduct."

Based on this, and upon her view that a "fair and impartial analysis" of the evidence has not been made, Contestee argues that the BLM should be equitably estopped from bringing this contest, and

that laches should apply. She also asserts in respect to the BLM's filing the contest in December 1974 that unreasonable delay resulting in prejudice to Contestee merits dismissal under the Administrative Procedure Act. As another basis for relief, she maintains that she substantially complied with the law on proving up trade and manufacturing sites and should be granted the right to purchase under the allowance made under 43 CFR 1871.1-1 for equitable adjudication.

After consideration of the evidence presented in this case, we agree with the findings of fact rendered in the Administrative Law Judge's decision:

Here we have a situation wherein the Contestee expended approximately \$ 6,000.00 developing a golf course. Almost all of the expenses were incurred during the last month of the statutory period. * * * The cash flow which had been generated by the end of the statutory period, November 23, 1966, amounted to \$ 120.00 for two memberships; prorated for the entire year, this would amount to \$ 10.00 for the month of November 1966.

The testimony indicates that some persons actually played a round of golf on the course prior to the end of the statutory period. It may be that there are persons willing to travel to this golf course, either by water, or air, or over a difficult road, in order to use these rustic facilities. If that is true, it is something in the nature of a prospective business because there was certainly not enough showing by November 23, 1966, to indicate that a viable business could even be hoped for. There was simply not enough time between the completion of construction and the end of the 5-year period in which to even make an informed judgment concerning the viability of this enterprise as a business.

* * * * *

Based on the facts taken in the light most favorable to the Contestee, I find that the land had not actually been used and occupied for the purposes of a trade, manufacturing, or productive industry at the time the Application to Purchase was filed on November 22, 1966. Based on this finding, the Application to Purchase the trade and manufacturing site is hereby rejected. * * *

These findings are buttressed by Departmental case law. An applicant bears the burden of proving that an actual business is being conducted on a trade and manufacturing site. Thelma S. Butcher, 7 IBLA 48 (1972). The mere preparation of land for

conducting a business is not enough to satisfy the requirements of the law. Butcher, supra; James E. Allen, A-30085 (February 23, 1965); Kenai Power Corp., 2 IBLA 56 (1971). An applicant must be in actual use and occupancy of the site for the purpose of a trade, and a prospective business does not fulfill the requirements. Jay Frederick Cornell, 4 IBLA 11 (1971), aff'd Cornell v. Morton, No. 73-1930 (9th Cir. September 3, 1974); 43 CFR 2562.3(d)(1).

One factor to be considered when assessing whether a business is more than prospective is whether a profit is being made. Contestee stated that gross receipts in 1966 were \$ 120 for two paid memberships. She urges that we consider the lifetime memberships which were given to three men in exchange for their work in constructing the golf course. Even if we value these memberships at \$ 60 per year along with the two paid memberships, this still amounts to negligible and inconclusive gross receipts, particularly when we consider the timing of the cash payments (Tr. 21). We note, however, that the three lifetime memberships are more properly classified as expenses balanced off by receipts. The discussion in James E. Allen, supra, is appropriate to this case as well:

We do not mean to imply that a modest operation or even unprofitable one would necessarily fail to qualify under the trade and manufacturing site law. That law does not require the existence of a full-blown enterprise before a patent can issue. We do not believe, however, that the law can be interpreted to encompass an operation so infrequently used by customers and so unproductive of gross receipts as the business operated by the appellant here during the life of the claim.

Further, the testimony of Contestee's husband supports the findings of fact of the Administrative Law Judge. He explained that the bulk of the work on the course was done and most of the expense was incurred in November of 1966, and that prior to their effort of that November, the land "had open area where water had kept foliage from developing * * * [a]nd the trees to my impression were quite thick. * * * There was substantial ground work felling them * * *" (Tr. 130-131, 133-138). It was November 1966 when Contestee arranged to have a cabin clubhouse moved from the adjacent homestead onto the T & M site (Tr. 10, 130, 154). Contestee claimed the course was ready by November 23, 1966 (Tr. 15), although a business license was not acquired for the golf course at that time (Tr. 24, 25).

[1] In accord with the evidence herein and the authority of the cases cited above, we conclude that Contestee's substantial compliance argument is without merit. Where the evidence shows that as of the final day of the 5-year statutory period for proving up a trade and manufacturing site a claimant's business on the site was only prospectively viable, the concept of substantial compliance may not properly

be invoked to bring the claimant within the bounds of the legal requirements for proving up such a site.

[2] Pursuant to the provisions of the trade and manufacturing site statutes and regulations, supra, Contestee's rights in the claim, if any, had to be earned prior to November 23, 1966, the expiration date of the entry, and no action by BLM after that date could prejudice Contestee since the evidence shows a failure to meet statutory requirements during the life of the entry. As indicated above, Contestee's husband conceded that the "golf course" was not completed until November 15, 1966, and was not a viable business at the end of the statutory period. Accordingly, we reject her equitable estoppel and laches arguments based on the BLM's asserted actions in 1967 and thereafter.

Contestee argues that this contest should be dismissed under the provisions of the Administrative Procedure Act, in particular 5 U.S.C. § 706(1) and 5 U.S.C. § 555(b) (1970). 2/ As authority for this argument, Equal Employment Opportunity Commission v. Moore Group, Inc., 416 F. Supp. 1002 (N.D. Ga. 1976) is cited. As contestee has characterized that case:

Prejudice was found on the fact that potential evidence and records for the defendant were unavailable. The court also found that in delaying the commencement of the action without giving the defendant any indication of its intent concerning the matter, created [sic] the risk of prejudicing the defendant in the preparation of its case.

Contestee would apply such reasoning in this case:

Contestee submits that the showing of identical prejudice is overwhelming in the instant case before this Board. Are the Hills to be held to a standard which would require that they prepare a case and preserve all proof for later trial when the BLM gave no indication of their position until eight years after the application date? Would this even be possible? In proving or disproving substantial compliance (that there was an operational golf course on the property in 1966) certainly a major component of such proof would be a physical observation and in this case, a field inspection of the facility within a reasonable time. Is an

2/ In 5 U.S.C. § 555(b) (1970) it is provided in part:

"With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it."

inspection conducted seven years after the fact in any way relevant evidence on which to base a contest of claim? This fact should be considered in light of the testimony that the Hills were never informed as to what they should do after the 1966 cutoff date in terms of maintaining the site or in terms of continued improvements.

The Board is asked to dismiss the contest under the Administrative Procedure Act based upon the prejudice resulting from the unexplained and unreasonable delay in the bringing of the BLM action which gives rise to this appeal.

While it appears that BLM may have been dilatory in filing its complaint in this matter, we cannot agree that Contestee has shown that she has suffered any substantial prejudice in respect of the preparation of her case. The record does not indicate that Contestee or, more significantly, her husband, who did the construction work, was unsure of the determinative facts as they existed in 1966 or that they were unable to preserve necessary records and other forms of proof until 1973, except for the natural condition of the alleged golf course. As we have noted above, under the evidence presented by Contestee, she had not satisfied the trade and manufacturing site purchase requirements as of November 23, 1966. It is not necessary for us to refer to the 1970 or 1973 BLM inspections in order to reach this conclusion. The Moore Group, Inc., case is inapplicable here not only because it involved proved prejudice, but also because it did not involve a party's proving by its own evidence offered at a hearing that it had failed to satisfy the pertinent requirements set out by the Congress.

[3] Since Contestee has shown no prejudice suffered as a result of the timing of the BLM in bringing the contest, this Board concludes that there is no reason for dismissal of the contest, which would imply approval of Contestee's application to purchase, based on the "reasonable time" provision of 5 U.S.C. § 555(b) (1970). In so holding, we do not reach the question of whether or under what circumstances this statutory provision might be appropriately invoked.

We find it unnecessary to discuss the merits of the United States' arguments concerning the selection of the subject land by the State of Alaska. We note that the Administrative Law Judge rejected the application to purchase. Since the life of the entry had expired, it was incumbent upon the Judge to cancel the entry. In the circumstances, we deem the entry appropriately cancelled, and we so order.

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 as modified.

Frederick Fishman
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

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ADMINISTRATIVE JUDGE STUEBING CONCURRING:

My concurrence in the result reached in the main opinion is based upon my finding that the so-called "golf course" is nothing of the sort, and bears only a remote resemblance to the real thing. It appears to me that in the twilight time of the statutory life of this T & M claim the claimant seized upon the idea of making a golf course as the only possible way to occupy the entire 80 acres with any improvement that would offer the appearance of a commercial operation. The course is nothing more than a series of lanes cleared through the trees and brush with cups at the end of each such lane, or "fairway," which afford an extremely rough surface. There are no tees, greens, installed water hazards or bunkers. Had the land been open prairie the same effect could have been achieved simply by placing nine cups in the ground in an appropriate pattern.

The majority opinion leaves the impression that a golf course was built, but that appellant failed to get it into commercial operation prior to the expiration of the statutory life of the claim. It is my view that nothing which could properly be called a golf course was ever completed,, and that no activity of a business nature was ever conducted there which could be considered a devotion of the site to commercial use.

Moreover, the evidence persuades me that the enterprise was not undertaken in good faith. I view it as an effort to add an additional 80 acres to the 160-acre patented homestead which adjoins. The following testimony by the appellant on cross-examination is instructive:

Q. What's the par for the course?

A. Nine. It's a nine hole golf course.

Q. No, what's the par for the course?

A. I don't know. I'm not that much technically -- I don't know.

Q. Yet you're operating a golf course?

A. Well, I've forgotten the details. We haven't --

Q. Do you know what par means?

A. Vaguely, yes.

Q. What?

A. Would you explain it to me?

Q. No, I'd like you to explain it to me.

A. No, I don't know offhand. I know that we played golf. I -- we were -- I was taught the game of golf by some of our golfers.

Q. But your ability to play golf is not in question.

A. No.

Q. Your operation of a golf course is.

A. That's right.

(Tr. 16, 17).

Q. Do you feel that during this visitation to many golf courses in the south '48 that you became acquainted with how to operate and how to lay out, how to own a golf course?

A. Sufficiently so.

Q. I ask you once again, what's par?

A. I don't know as much about the technical aspects of -- I can go out and play a fair game of golf along our golf course. I know what to do when I get on the golf course. And I know what -- we don't play -- I don't play a very technical game. And we have some members, and have had in the last two years who played -- who knew exactly how to play golf, and know all the right terms to use.

(Tr. 27-28).

At the time of this testimony in February 1976 appellant had been the nominal proprietor and manager of an allegedly commercial course for nearly 10 years. While her ignorance of these matters is not disqualifying per se, it would appear that her lack of rudimentary knowledge of golf course requirements and of the game itself betrays a lack of the sincere concern and interest which ordinarily attend the bona fide pursuit of an endeavor.

For the foregoing reasons, as well as those stated in the majority opinion,, I concur in the affirmation of the decision below.

Edward W. Stuebing
Administrative Judge.

