

SANDY FONDY

IBLA 77-486

Decided September 18, 1978

Appeal from decision of the Bureau of Land Management, Alaska State Office, rejecting application to purchase trade and manufacturing site AA-4162.

Affirmed as modified.

1. Alaska: Trade and Manufacturing Sites--Equitable Adjudication:
Generally--Withdrawals and Reservations: Effect of

Where land within a trade and manufacturing site is withdrawn from appropriation prior to cognizable occupancy and use for purposes of trade or manufacture under 43 U.S.C. § 687a (1970) and 43 CFR Subpart 2562, an invalid claim cannot be perfected, and appellant has not shown wherein she is entitled to equitable adjudication under 43 CFR 1871.1.

APPEARANCES: Peter A. Lekisch, Esq., Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GOSS

Sandy Fondy has appealed from an Alaska State Office, Bureau of Land Management (BLM), decision which rejected her trade and manufacturing (T & M) site application. This application to purchase was filed November 2, 1973, pursuant to section 10 of the Act of May 14, 1898, as amended, and the Act of April 29, 1950, 43 U.S.C. § 687a (1970), repealed by section 703(a) of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2789, effective October 21, 1986.

In part, 43 U.S.C. § 687a (1970) provides:

Any citizen of the United States twenty-one years of age * * * 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 * *

According to the implementing regulation, 43 CFR 2562.3(d), the application to purchase must show, among other things:

(1) 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.

On November 4, 1968, Sandy Fondy filed a notice of location of settlement or occupancy for a T & M site in an unsurveyed region, sec. 14, T. 27 N., R. 11 W., Seward meridian. Her intended use was first listed as gold mining and prospecting and then, after BLM informed her that the initially listed use was inappropriate, she listed a cabin and camping facility. The use listed on all of appellant's subsequent submissions was that of a sawmill operation.

On appeal, appellant alleges that on November 3, 1971, she amended her T & M location notice to change from section 14 to section 4 of the same township and to change her intended use to sawmill and logging. She submits a Xerox copy of this notice on appeal, which notice is prepared on a BLM form. BLM has no record of this amendment, and appellant's copy does not show a filing other than the 1977 receipt on appeal stamp.

The decision below stated that there had been no amendment of appellant's original location notice pertaining to section 14. Instead, it pointed to the discrepancies in location listed on the 1968 notice and the 1973 purchase application. The decision treated appellant's T & M application as if the application served as the location notice for the section 4 land. Because Public Land Order (PLO) 5254, 37 FR 18914 (1972), withdrew the lands in question on September 12, 1972, the land was held not available. The PLO is "subject to valid existing rights" as of the date of passage. If, as appellant claims, her amended notice of location was validly established as of November 3, 1971, then PLO 5254 would not be a bar to location. However PLO 4582, 34 FR 1025 (1969), as modified by PLO 4962, 35 FR 18874 (1970), closed these lands from January 17, 1969, through December 18, 1971. PLO 4962 provides an exemption for T & M sites initiated prior to December 14, 1968.

The decision below also held that there was not a prima facie showing of the existence of a trade or business within the boundaries claimed. Appellant's husband, Mr. Vic Fondy, has a headquarters site claim adjacent to her T & M site. It is not clear on which of the claims the sawmill is located. The numerous submissions—photographs and maps—are contradictory. BLM's field investigation shows the claims in an alignment different from that shown in appellant's diagram.

As to the amended location notice dated November 3, 1971, no proof of evidentiary facts surrounding the claimed filing has been offered. Appellant did not mention the amendment prior to this appeal, although she had ample opportunity to do so and recited the progress of the case in letters to various Government officers. See Kathleen M. Smyth, 8 IBLA 425 (1972). The BLM decision (p. 5) declares that "[t]he continued refusal of the applicant to clarify matters required of her, tends to verify the defects of the proof."

[1] The fact that BLM has no record of the November 3, 1971, document indicates presumptively that BLM never received it. Charles J. Babington, 36 IBLA 107 (1978). Appellant has not submitted an offer of evidentiary facts which would overcome this presumption. However, even if we assume arguendo that the notice was filed November 3, 1971, this would not help appellant, because appellant has not shown a cognizable initiation of the claim prior to December 14, 1968, which would exempt appellant's claim from operation of PLO 4962. No credit may be given for any occupancy prior to the filing of the location notice or application to purchase. 43 U.S.C. § 687a-1 (1970); 43 CFR 2562.1(c). Since under PLO 4962, the land was withdrawn on November 3, 1971, when the claimed amendment was filed, and withdrawn under PLO 5254 on November 3, 1973, when the application was filed, the land was unavailable to appellant under either approach. It is well settled that where a T & M site is located on land that is withdrawn from appropriation prior to its occupancy and use for the purposes of trade or manufacture, the invalid claim cannot be perfected. E.g., Allen D. Hodge, 22 IBLA 150 (1975).

As to appellant's request for equitable relief, under the facts herein it has not been shown that appellant is entitled to relief under 43 CFR 1871.1. Her request is denied.

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.

Joseph W. Goss
Administrative Judge

We concur.

Newton Frishberg
Chief Administrative Judge

Joan B. Thompson
Administrative Judge

