

Editor's note: Reconsideration denied by order dated May 22, 1979; Appealed – aff'd No. A79-322 (D. Alaska March 14, 1980), dismissed, remanded to D.Ct. to vacate judgment (no jurisdiction - left IBLA decision unreversed) No. 80-3135 (9th Cir. Aug. 17, 1981), D.Ct. vacated judgment (D. Alaska Aug. 20, 1981)

UNITED STATES

v.

JACK ZEMMY BOYD, JR.

IBLA 79-36 Decided February 27, 1979

Appeal from decision of Administrative Law Judge E. Kendall Clarke rejecting applications to purchase trade and manufacturing site AA-4314 and headquarters site AA-4315, and cancelling the entries.

Affirmed as modified.

1. Act of March 3, 1891—Alaska: Headquarters Sites—Alaska: Trade and Manufacturing Sites—Applications and Entries: Generally—Patents of Public Lands: Generally

An entryman may not take advantage of sec. 7 of the Act of Mar. 3, 1891, entitling an entryman to a patent after 2 years from date of issuance of a receiver's receipt when there is no pending contest or protest against the validity of the entry, where he has not shown that preconditions of the Act have been met, *i.e.*, making the final payments required.

2. Administrative Procedure: Burden of Proof—Alaska: Headquarters Sites—Alaska: Trade and Manufacturing Sites

In a contest proceeding the Government has the burden of establishing a *prima facie* case of noncompliance with the requirements for trade and manufacturing, and headquarters sites. The burden then shifts to the applicant to show by a preponderance of the evidence that he has used, occupied, and improved the sites for trade, manufacture, or other productive industry.

3. Alaska: Headquarters Sites--Alaska: Trade and Manufacturing Sites

A claimant of a trade and manufacturing site must show that at the time of filing his application to purchase he was engaged in trade, manufacture, or other productive industry in connection with the sites. While it is not necessary for the claimant to show that all functions of the business were carried on at the site, he must show a bona fide commercial enterprise from which he reasonably hoped to derive a profit; mere preparation for a prospective business is not sufficient under the regulations. A claimant for a headquarters site must also be engaged in such a business or be an employee of such a business.

APPEARANCES: Jack Zemmy Boyd, Jr., pro se; Joyce E. Bamberger, Esq., Office of the Solicitor, Department of the Interior, Anchorage, Alaska, for contestant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Jack Zemmy Boyd, Jr., appeals from the September 7, 1978, decision of Administrative Law Judge E. Kendall Clarke rejecting his applications to purchase headquarters site AA-4315, and trade and manufacturing site AA-4314, located adjacent to one another in sec. 10, T. 1 S., R. 1 E., Copper River meridian, Alaska, and cancelling the entries.

Appellant filed notices of location of the headquarters and trade and manufacturing sites on November 20, 1968, planning to develop a dude ranch and resort on the trade and manufacturing site, and a trapping business on the headquarters site. On November 16, 1973, he filed applications to purchase the two sites. A Bureau of Land Management (BLM) field examiner conducted a land examination on July 12, 1976, and completed his written reports on November 30, 1976, and December 1, 1976. He recommended that the Government institute contest proceedings to cancel the claims. A contest was initiated and the hearing took place on October 17, 1977.

Section 10 of the Act of May 14, 1898, 30 Stat. 413, as amended, 43 U.S.C. § 687a (1970), allows United States citizens "in the possession of and occupying public lands in Alaska in good faith for purposes of trade, manufacture, or other productive industry" to purchase one claim not exceeding 80 acres 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." As amended by the Act of March 3, 1927, 44 Stat.

1364, the Act provides that a United States citizen "whose employer is engaged in trade, manufacture or other productive industry" and a citizen "who is himself engaged in trade, manufacture, or other productive industry may purchase one claim, not exceeding five acres * * * in Alaska as a homestead or headquarters, under rules and regulations to be prescribed by the Secretary of the Interior, upon payment of \$2.50 per acre."

The regulations governing trade and manufacturing sites, 43 CFR Subpart 2562, require the claimant to file a notice of location designating the kind of trade, manufacture, or other productive industry for which he plans to use the site. 43 CFR 2562.1. The application to purchase must be filed within 5 years after filing the notice and must show:

(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. 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. 687a). [Emphasis supplied.]

43 CFR 2562.3(d).

The requirements for headquarters sites are somewhat similar, the claim being initiated by filing a notice designating the kind of trade, manufacture, or other productive industry for which the claim is desired. 43 CFR 2563.1(a). The application to purchase must be filed within 5 years of the notice, 43 CFR 2563.1-1(c), and show, among other things:

(2) The actual use and occupancy of the land for which application is made for a homestead or headquarters.

(3) The date when the land was first occupied as a homestead or headquarters.

(4) The nature of the trade, business, or productive industry in which applicant or his employer, whether a citizen, an association of citizens, or a corporation is engaged.

(5) The location of the tract applied for with respect to the place of business and other facts demonstrating its adaptability to the purpose of a homestead or headquarters.

43 CFR 2563.1-1(a).

In his application for the trade and manufacturing site, appellant states the nature of his commercial operation on the site to be:

Public recreation in the form of seclusion, camping, hiking, snow shoeing, skiing, ice skating, canoeing, archery practicing, boating, swimming, nature studying, snow machining, airplane stationing (float & ski) - all guided (supervised) or unguided (unsupervised). Also I engage in sporting equipment rentals here of canoes, tents, axes, sleeping bags, snow shoes, snow machine, ski, saws, motor cycle, life jackets, camp stoves, archery equipment, etc.

He estimated the total value of his improvements to be \$2,590, breaking it down as follows: "Road-3/4 mile long (\$800.00), Dock-small landing dock (\$200.00), clearing-for main lodge & big tents (\$50.00), trails-approx. 3.5 miles (\$1000.00), well & pump (\$180.00), out house-15'X6' (\$100.00), tables-13 tables (\$260.00)."

In the headquarters site application, appellant lists trapping and tanning of furs as the commercial operation, stating that the site is 4 hours by car from his home and necessary as a base for his quarters and supplies, using the "stream as a trap line" and also for access into the mountains. He lists the improvements on the site as "clearing for tents (\$100.00) and trails (approximately 50 yards) (\$20.00)."

Judge Clarke summarized the evidence presented at the hearing as follows:

Mr. Hirsh [1/] described the access of both the headquarters and trade and manufacturing. There was a walk approximately a quarter to a third of a mile into the headquarters site. The headquarters site was located through the applicant's trade and manufacturing site so you could reach the headquarters site by first traveling to the T & M site and then going south. He explained that during [the] time of the land examination, the land was accessible by traveling up the Alyeska Pipeline work pad, but that that route was no longer available since the Alyeska pipeline is gated. (Tr. 6). Mr. Hirsh explained that the trail is a walking trail not large enough or wide enough for vehicles, but would be wide enough for a dog sled or snow machine. (Tr. 7). He found, located on the headquarters site, a sawhorse and one tree stump which was

^{1/} Mr. Hirsch is the BLM realty specialist who examined appellant's claims.

rounded off. (Tr. 7). These improvements are depicted in Exhibit 2. In addition to this there was a trail which ran down the east shore of an unnamed lake. There was no indication that there had ever been any more improvements. The examiner found no racks to stretch hides or other indications of fire pits which might have been used in connection with the drying of hides.

The trade and manufacturing site was examined the same day as the headquarters site. (Tr. 13). Originally the contestee had claimed the use for the T & M site as a dude ranch and camping resort business. However, there were no horses on the site and no evidence that they had ever been on the site. (Tr. 13). The 80-acre parcel of land had many campsites and trails. Generally, each site had a fire ring on the ground. A few had a picnic table which consisted of a used cable spool. (See Exh. 4). It was the examiners opinion that the physical evidence did not show any major use of the campsites. (Tr. 15). The only water available was from the lake, although there was an inoperable pump located on the parcel. Mr. Hirsh also noted a few 55-gallon oil drums located throughout the site for collection of trash. There were two out-houses located near the lakeshore, neither of which showed much sign of use. (Tr. 15). There was no shed or buildings where sporting goods could be stored and he found no sporting goods on the site. He also noted no advertising along the Richardson Highway. (Tr. 16). It was his opinion that a very generous estimate of the improvements would be between \$250 and \$500. He noted that the record contained business licenses for the year 1972 and 1973 but no tax returns.

In his testimony, Mr. Boyd, the contestee, stated that he filed the headquarters site in 1968 and began trapping that year. He doesn't remember whether he caught anything the first year or not. (Tr. 44). He has had a hunting, fishing, and trapping license every year since 1967, although he could not locate these licenses except for the years 1972 and 1973. He testified that he used a tent when he went upon the headquarters site to trap and that he only went then after the snow. In order to stretch the hides he cut sticks from the willows and he also cut willows and burned them in a metal bucket which he took with him so that it left no evidence of the use on the ground. At one time he had as many as 50 traps or perhaps as high as 100, (Tr. 46), but most of these had been stolen.

As to the trade and manufacturing site, he stated that he kept the equipment for rent at his home which was

located 150 miles from the site. (Tr. 44). During the period of time that he was operating the T & M site, the prove-up period, he was fully employed elsewhere. He averaged between 25 and 30 camper visits per year to the T & M site for a charge of \$5 per camper, although his original price per camper per night was \$2. (Tr. 55-56). It was his opinion that he could not make money until he could borrow money to put in better roads, a bigger parking lot and make a portion of the site into an area like a public campground. (Tr. 54). The only evidence of income from the T & M site is that which was supplied by a certified public accountant that said in a written statement, Exhibit A, that he had examined the income tax returns for the contestee prior to 1975 and had found that Mr. Jack Z. Boyd reported \$3,130 income from Jazebo Outdoor Recreation Business and \$843 income from trapping and tanning of furs. Nowhere is there any evidence as to the expenses that were incurred in these income figures, nor is there any indication with regard to the T & M site as to whether the income from Jazebo was derived from a rental business, not necessarily connected with the T & M site.

Judge Clarke's decision at pp. 3, 4.

Judge Clarke went on to analyze the evidence:

Here, of course, taking the evidence in the most favorable light for the contestee, the headquarters site was merely used as a place to pitch his tent while attending a trapline. In the period of "prove-up," again taking the evidence in the most favorable light for the contestee, he had an income from this activity of some \$800, without regard to the expenses he incurred. Even assuming that he had 50 traps during this period of time the business activity which was conducted from the area claimed as a headquarters site was certainly minimal. His headquarters could have been established just as well at any other point on the public domain. The activity of trapping only took place apparently on weekends as the claimant was employed 150 miles away from the site. The trapping activity appears more closely to resemble a recreational activity rather than a business enterprise. Not even by the greatest use of ones [sic] imagination could the slight use made of this claimed headquarters site be considered to make it the usual place of business, principal office, or administrative center of an enterprise.

Turning now to a consideration of a trade and manufacturing site, we see the development of the most rudimentary camping facilities possible. (See Exh. 4). The T & M site

was only slightly more developed than one would expect to find in any suitable camping area in the wilderness where no development had taken place. Taking again the testimony of the contestee in regard to what he intended and expected, it would appear on the one hand that he said that the campground was in a near wilderness state because that is what he intended for his business, and on the other hand he has testified that he could never make a profit from the business until he got title to the land so that he could get a loan in order to make at least a part of the trade and manufacturing site into a developed campground by installing larger parking areas and more highly developing facilities at least in a portion of the area.

Assuming that the contestee actually had 20 visitors per year at \$5 per visit that would only amount to approximately \$100 per year income from such activity. Assuming that the accountant's statement is true, the income reported from Jazebo Corporation must have been derived basically from the rental of camping equipment, an activity which was conducted at the contestee's home some 150 miles away from the site, rather than an activity directly connected to the trade and manufacturing site.

The business activity contemplated by the contestee here clearly is a future business prospect, and one which, therefore, does not qualify as under the law and regulations.

Decision, pp. 5, 6.

Judge Clarke concluded:

The headquarters site is rejected and the entry cancelled, for the reason that during the prove-up period the contestee had such a minimal business activity, if any, that the site cannot be considered to be used in connection with a business or occupation.

The trade and manufacturing site is rejected and the entry cancelled for the reason that during the prove-up period the contestee did not carry on a trade or manufacturing activity on the site, that the development of the area encompassed by the site was so minimal that all that can be found is that the contestee anticipated establishing trade or manufacturing activity in the future and was not operating a present trade or manufacturing as required under the law and regulations.

Decision, p. 6.

Appellant asserts several grounds for reversal in his statement of reasons for appeal. He states that "the only evidence being used against" him is the field examiner's testimony and reports. He points out that the examination of the claims took place almost 3 years after submission of final proof, and that due to revegetation, it should not be surprising that the sites looked unused. He reiterates much of the evidence, asserting that he ran a campground with campers and equipment, he actively engaged in trapping, and he received income from his activities. He does not dispute the above listing and description of improvements. Finally he asserts that the headquarters and trade and manufacturing sites are not subject to contest because section 7 of the Act of March 3, 1891, as amended, 43 U.S.C. § 1165 (1970), mandates:

That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him.

Because more than 2 years elapsed between the time of filing his applications to purchase and the initiation of the contest proceedings, appellant urges he is entitled to patent.

[1] We shall consider this latter argument first. Section 7 of the Act of March 3, 1891, supra, requires a patent be issued for certain land entries if no contest or protest has been initiated within 2 years after the applicant receives the receiver's receipt. Appellant first raised this issue in a motion to dismiss prior to the hearing. The motion was denied at the hearing "for the reason that that act is not applicable to either a headquarters site or a trade and manufacturing site." Judge Clarke's decision at p. 2. Appellant asserts that the Act does apply to headquarters sites and trade and manufacturing sites, and that since more than 2 years elapsed between receipt by BLM of final proof, and initiation of any contest or protest, he is entitled to patents for the land upon payment of \$2.50 per acre.

We need not decide here if this statute applies to headquarters sites and trade and manufacturing sites. Even if we were to agree with appellant that it is applicable to such sites, we cannot find that it is applicable in this case. A precondition for its application is issuance of the manager's receipts. 2/ 43 U.S.C. § 1165

2/ The receipts formerly issued by receivers are now issued by managers. 43 CFR 1862.6, fn. 1.

(1970); 43 CFR 1862.6. In Instructions, 43 L.D. 322 (1914), the Commissioner, Department of the Interior, stated: "Payment, of which the receiver's receipt is but evidence, is, therefore, the material circumstance that starts the running of the statute, inasmuch as a claimant is and always has been entitled to a receipt when payment is made." Payment by the appellant is one of the final acts of compliance by him with the law. Appellant has not alleged or submitted any evidence showing either that the receipts were issued to him, or that he tendered payment; nor do we find any indication from the record that this final step has been taken. Therefore, the condition required by the statute to start the 2-year period running has not been met and the statute is inapplicable to appellant's case, in any event. The decision of the Judge is modified to reflect this as the reason for denying appellant's motion based on section 7 of the Act of March 3, 1891.

[2] Appellant urges that he is entitled to patents for both the headquarters site and the trade and manufacturing site because the Government's evidence "is derived from one and only one very obviously biased source," the field examiner's reports and testimony. Statement of reasons at 6. In a contest proceeding, the Government has the burden of establishing a prima facie case of noncompliance with the laws and regulations for trade and manufacturing, and headquarters sites. If the application to purchase meets the requirements for patent and BLM fails to establish a prima facie case, patent must issue to the applicant, all else being regular. However, if BLM establishes a prima facie case of noncompliance with such requirements, the burden of proof shifts to the applicant to show by a preponderance of the evidence that he has used, occupied, and improved the sites for trade, manufacture, or other productive industry. United States v. Beaird, 31 IBLA 203 (1977); United States v. Tippetts, 29 IBLA 348 (1977); United States v. Crow; 28 IBLA 345 (1977); Gustav O. Weigner, 26 IBLA 123 (1976). To prove entitlement to land under the public land laws the ultimate burden of proof is borne by the claimant. Cf. United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975). In meeting its burden of establishing a prima facie case it was proper for BLM to rely on the reports and testimony of the field examiner. The Government's evidence was sufficient to make a prima facie case and to shift the ultimate burden to appellant.

[3] Appellant contends that he did offer sufficient evidence to meet the requirements of the laws and regulations governing headquarters and trade and manufacturing sites. After reviewing the record, we cannot agree. Appellant was required to show that he was engaged in some form of trade, manufacture, or productive industry in connection with the sites at the time of filing his applications to purchase. 43 CFR 2562.3(d) and 2563.1-1(a).

As proof of his compliance with the requirements for the trade and manufacturing site, appellant, in his statement of reasons,

emphasizes the passage of time between the date of filing the application to purchase and the field examination, by way of explaining the unused condition of the campground. He stresses his access road, 5 miles of trails, 25 picnic tables, ^{3/} 2 outhouses, ^{4/} a dock, and a water pump. Regarding the headquarters site, appellant explains that it did not occur to him to save expired trapping licenses. Appellant states that he always went to the site after there was deep snow and never saw the ground during his trapping.

Appellant seeks to distinguish several cases cited by Judge Clarke, Gustav O. Weigner, 26 IBLA 123 (1976); Laveta O. Schoephorster, 19 IBLA 90 (1975), and Jay Frederick Cornell, 4 IBLA 11 (1971), on the ground that the claimants had few or no receipts or admitted there had been no commercial enterprise. Those were cases in which the applicant failed to meet the requirements for headquarters or trade and manufacturing sites on the face of their applications. No hearings were held because the showings were deemed inadequate to warrant them. Here, where there was a hearing and the Government made a prima facie showing of nonfulfillment of the requirements, appellant has the burden of persuasion to show that he met the requirements of the law and regulations. The showings by appellant are not substantially better than those made in the other cases.

Appellant's improvements were minimal, consisting mostly of trails on both sites and small clearings for tents on the trade and manufacturing site. The lapse of time between filing the applications and the land examination is not sufficient to explain the lack of evidence of use on land in Alaska where revegetation is slow (Tr. 37). See United States v. Hill, 33 IBLA 395 (1978). While an entryman is not required to continue his business operations on a site after a purchase application has been filed, his failure to do so may be viewed with all the evidence as going to his good faith in acquiring the sites for the purposes sought. Thus a minimal compliance before an application is filed would be viewed more favorably if the business activities increase thereafter than where they cease. There was very little to show any commercial activity on the trade and manufacturing site. As Judge Clarke pointed out, it is hard to imagine campers paying \$5 a night to camp in appellant's campground when they could camp as comfortably on nearby public lands for free (Tr. 53-54). Appellant's rental business, such as it was, was conducted largely from his home. While it is not necessary for appellant to show that all functions of his business were carried on at the site, he must show a bona fide commercial enterprise from which he reasonably hopes to derive a profit. United States v. Tippetts, *supra*; United States v. Beaird, *supra*; Hershel E. Crutchfield, A-30876 (September 30,

^{3/} In the application to purchase appellant claims only 13 tables.

^{4/} Only one structure is listed in the application to purchase.

1968). Appellant's proof did not support the statements in his applications. The applicant must show actual business use to support either a headquarters site or a trade and manufacturing site. At most appellant has shown only preparation for a prospective business which has never materialized. This is not sufficient. 43 CFR 2562.3(d); United States v. Hill, supra; Thelma S. Butcher, 7 IBLA 48 (1972); Hershel E. Crutchfield, supra. Viewing the evidence in the light most favorable to the appellant, we cannot find that he has shown himself qualified to receive a patent for either the headquarters site or the trade and manufacturing site.

Accordingly, 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 above.

Joan B. Thompson
Administrative Judge

We concur.

Joseph W. Goss
Administrative Judge

Frederick Fishman
Administrative Judge

