

Editor's note: Reconsideration denied by order dated Sept. 11, 1980

CARL A. LINE

IBLA 77-294

Decided March 16, 1979

Appeal from a decision of the Alaska State Office, Bureau of Land Management, declaring appellant's trade and manufacturing site claim, AA 3011, null and void ab initio.

Reversed and remanded.

1. Alaska: Townsites--Alaska: Trade and Manufacturing Sites--Applications and Entries: Generally--Applications and Entries: Filing--Applications and Entries: Valid Existing Rights

Rights may be established by occupancy of a trade and manufacturing site on vacant, unappropriated public domain in Alaska and filing of a notice of location thereof, despite a prior survey pursuant to a petition for survey of townsite lands, when the notice of location and occupancy of the claim for trade and manufacturing precedes settlement and occupancy under the townsite laws.

APPEARANCES: Nicholas C. Newman, Esq., Lee, Smart, Cook, Biehl & Martin, P.S. Inc., Seattle, Washington, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GOSS

This appeal is brought from a decision of the Alaska State Office, Bureau of Land Management (BLM), declaring appellant's trade and manufacturing site claim, AA 3011, null and void ab initio because the land in the claim had been segregated from entry by a townsite survey at the time appellant commenced his settlement and occupancy. Appellant contends that no townsite entry which could segregate the land was made prior to the time appellant settled and occupied the land and filed his notice of location of a trade and manufacturing site.

The BLM decision recites that the residents of South Naknek petitioned on January 30, 1958, for appointment of a townsite trustee and requested that the townsite be surveyed. BLM noted that in April 1967 a 200-acre parcel for the townsite was mutually agreed upon by the townsite trustee and the BLM State Director, among others, as indicated by their signatures on "as-built" drawings of the 200-acre parcel. This tract included the land embraced in appellant's trade and manufacturing site. The actual survey of the townsite tract was conducted during July and August 1967.

Appellant's notice of location and settlement was filed on July 8, 1968, reciting that his settlement and occupancy of the trade and manufacturing site commenced on July 3, 1968. 43 U.S.C. §§ 687a and 687a-1 (1970). ^{1/} BLM held that once an application for survey of a townsite is on file, the lands therein are segregated from entry under 43 CFR 2091.4 ^{2/} and may be entered only under the townsite laws. Therefore, BLM further ruled that the land embraced in appellant's trade and manufacturing site was segregated from entry by the prior townsite survey, and the trade and manufacturing site entry was null and void ab initio.

Appellant argues in his statement of reasons for appeal that (1) 43 CFR 2091.4, under which public lands settled upon and occupied as a townsite are segregated from entry, was not in effect at the time of appellant's occupation and filing of notice of location of the trade and manufacturing site in July 1968; the regulation was not promulgated until 1970 and thus could not be effective to bar appellant's prior claim; (2) any segregative effect is solely by administrative regulation and not mandated by statute; (3) under the townsite statutes, entry was not established on January 30, 1958, when the residents of South Naknek petitioned for a survey, for "entry" means the filing of an application with the registrar of the land office together with proof showing performance of the statutory conditions regarding settlement and occupancy of the land as a townsite, citing Holland v. Buchanan, 19 Utah 11, 56 Pac. 561 (1899), and Lockwitz v. Larzon, 16 Utah 275, 52 Pac. 279 (1898). Appellant alleges that no valid townsite entry was made until 1972 when the townsite trustee applied for townsite entry.

The townsite trustee filed application for townsite entry and notice of intention to file final proof on October 26, 1972, citing 48 U.S.C. §§ 355, 355a, 355b, 355c, 355d, and 355e as authority.

^{1/} Repealed effective October 21, 1986, Federal Land Policy and Management Act of 1976, 43 U.S.C.A. § 1701 et seq. (Supp. 1978).

^{2/} 43 CFR 2091.4 provides in part:

"Lands occupied as townsites.

"Public lands settled upon and occupied as a townsite are segregated from entry and may be entered under section 2387 to 2389, Revised Statutes (43 U.S.C. § 718-720) * * *."

These sections previously had been recodified as 43 U.S.C. §§ 732-737 (1970). ^{3/}

Section 732 provides, in part:

Until otherwise ordered by Congress lands in Alaska may be entered for town-site purposes, for the several use and benefit of the occupants of such town sites, by such trustee or trustees as may be named by the Secretary of the Interior for that purpose, such entries to be made under the provisions of section 718 of this title as near as may be; * * *.

43 U.S.C. § 732 (1970) (repealed 1976).

[1] Provision for entry of lands settled upon and occupied as a townsite is set forth in 43 U.S.C. § 718 (1970) (repealed 1976). ^{4/} That section states in part:

Whenever any portion of the public lands have been or may be settled upon and occupied as a town-site, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests * * *.

The issue on appeal is whether the filing with BLM of a petition for appointment of a townsite trustee and for survey of the townsite, coupled with the execution of the survey on the ground, segregates the land from subsequent location and entry under the trade and manufacturing site law.

In a somewhat analagous factual situation, the Supreme Court was called upon to evaluate the title of one claiming land within a townsite, as against the conflicting claim of a railroad pursuant to an Act of Congress granting the railroad the public land within 200 feet on either side of its right-of-way. Northern Pacific Railroad Company v. Smith, 171 U.S. 260, 268-69 (1898). Therein the Court ruled that rights created under a townsite settlement pursuant to statute (later

^{3/} The provisions of 43 U.S.C. §§ 732-737 (1970) have been repealed. Federal Land Policy and Management Act of 1976, 43 U.S.C.A. § 1701 et seq. (Supp. 1978).

^{4/} Federal Land Policy and Management Act of 1976, 43 U.S.C.A. § 1701 et seq. (Supp. 1978).

codified at 43 U.S.C. § 718 (1970) (repealed 1976)) should not be carried back so as to defeat the title of a party who, under color of right, had taken possession and made valuable improvements before entry under the townsite statute. It should be noted that the construction of the railroad track which gave rise to the 400-foot right-of-way through the land within the townsite occurred after the land was selected and surveyed as a part of the townsite.

Hinchman v. Ripinsky, 202 F. 625 (9th Cir. 1913), cert. denied, 234 U.S. 759 (1914), involving the occupants of an Alaskan townsite, is consistent with Northern Pacific Railroad Company. The court held that the initial steps to be taken in establishing a townsite are to settle upon and occupy the land for townsite purposes and, when so occupied, the occupants may have the same entered in the land office through a trustee named by the Secretary of the Interior. Hinchman at 628. Proof of settlement and occupancy of public land in Alaska, by applicants for survey under the townsite statutes (43 U.S.C. §§ 718 and 732 (1970)), even in the absence of entry of the land as a townsite, may preclude a finding of possession by a homestead claimant pursuant to a notice of location of homestead claim. Id. at 636.

The principles of the Northern Pacific and Hinchman cases, have been followed by the Department. Alvin R. Aspelund, Anchorage 029661 (January 30, 1959). Although BLM cited 43 CFR 2091.4 as authority for the segregative effect of the petition for appointment of townsite trustee and survey of the townsite, the record does not show settlement and occupancy of the tract for townsite purposes—the prerequisite for segregation of the land under that regulation. ^{5/} Moreover, we note that the regulation in effect at the time appellant located his trade and manufacturing site only referred to settlement and occupancy of a townsite as segregating the land from entry under the agricultural land laws. 43 CFR 2013.4 (1968).

Appellant's application to purchase the trade and manufacturing site, filed June 22, 1973, claims numerous improvements in connection with fish canning and processing, including several buildings, boats, equipment, and vehicles with an estimated value in excess of \$55,000. BLM's own land report dated September 4, 1975, recites that: "It is apparent the applicant is using the entire site to support his fishing operation." The report further states that the examiner talked to five people in the vicinity who knew the applicant and each said that he had been there fishing every summer for a long time and that he

^{5/} As to more recent survey applications, cf. memorandum of June 30, 1972, from Director, BLM, to the Secretary, "Inchoate Native Townsites," approved by the Secretary, which states an application "segregate[s] the lands involved."

salts his fish and ships to markets or sells directly to local canneries. Two of the people interviewed specifically stated that appellant located in 1965 or thereabouts.

In view of the evidence of occupancy by appellant, and the absence of evidence of occupancy as a townsite, the decision below must be reversed.

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 reversed and the case is remanded to the Alaska State Office.

Joseph W. Goss
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Edward W. Stuebing
Administrative Judge

