

UNITED STATES v. HENRY JAY BUSH

IBLA 79-5

Decided March 27, 1979

Appeal from decision of Administrative Law Judge Dean F. Ratzman rejecting application to purchase headquarters site and cancelling entry. Contest No. AA-38.

Affirmed.

1. Administrative Procedure: Burden of Proof--Alaska: Headquarters Sites--Rules of Practice: Appeals: Burden of Proof

Applicant has burden of establishing entitlement to headquarters site claim, and must demonstrate that he has complied with statute and regulations.

2. Alaska: Headquarters Sites

In contest hearing on headquarters site claim, a contestee, to prevail, must submit evidence from which it can be concluded that he was engaged in an actual business operation from which he reasonably hoped to derive a profit, or is an employee of a qualified business.

3. Alaska: Headquarters Sites

Where evidence showed that in 5 years during which applicant was allowed to prove up headquarters site applicant realized \$152 from trapping, and where other claimed uses were construction of runways and base camp for hunting and fishing parties, but there was

no clear information as to extent of operations or returns derived from these uses, administrative law judge properly rejected application to purchase headquarters site under 43 U.S.C. § 687a (1970).

APPEARANCES: Denis R. Lazarus, Esq., Anchorage, Alaska, for appellant;
Bruce E. Schultheis, Esq., Office of the Regional Solicitor, Department of the Interior.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Henry Jay Bush has appealed a decision by Administrative Law Judge Dean F. Ratzman, dated August 25, 1978, rejecting his application to purchase a headquarters site and cancelling his entry. See 43 U.S.C. §§ 687a, 687a-1 (1970); 43 CFR Subpart 2563. ^{1/} The lands in issue are described as follows: Lot 5, U.S. Survey 5047 located within sec. 1, T. 21 N., R. 12 E., Seward meridian, Alaska, containing 4 acres.

The appellant filed the notice of location of settlement or occupancy claims on July 15, 1966. The notice states that the trade or other industry for which the claim was filed, was hunting and sport fishing. The application to purchase, filed on July 8, 1971, lists improvements as: "Mobile home 8 x 36 with 8 x 36 lean-to, 12 x 12 meathouse and a 8 x 36 shed. Also installed a generator and built a house around it next door." The application further stated that the nature of the commercial operation was a headquarters site for: "Construction of landing strips for hunting guides also for trapping during trapping season." No allegation has been made nor has appellant alleged payment of the purchase monies then. The Bureau of Land Management (BLM), filed its contest complaint against appellant on September 21, 1977. The complaint asserted that actual use by appellant of the lands was not primarily as a headquarters site in connection with trade, manufacture, or other productive industry. The complaint further alleged that appellant was not, during the proveup period, using the site for a business or in connection with a business.

The Act of March 3, 1927, provides that:

[Any] citizen of the United States twenty-one years of age employed by citizens of the United States * * *, whose employer is engaged in trade, manufacture or other productive industry, and any citizen of the United States twenty-one years of age who is himself engaged in trade,

^{1/} The statutory provisions cited were repealed effective 10 years after October 21, 1976, by section 703 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2789-91.

manufacture, or other productive industry may purchase one claim, not exceeding five acres, of unreserved public lands * * * in Alaska as a homestead or headquarters, under rules and regulations to be prescribed by the Secretary of the Interior * * *. [Emphasis supplied.]

44 Stat. 1364; 43 U.S.C. § 687a (1970). The application to purchase was required to be filed within 5 years after the applicant's filing of his notice of claim. 43 U.S.C. § 687a-1 (1970). In its regulations on homesites and headquarters, the Department has rendered the following interpretation of the Act of March 3, 1927: "The purpose of this statute is to enable fishermen, trappers, traders, manufacturers, or others engaged in productive industry in Alaska to purchase small tracts of unreserved land in the State, not exceeding 5 acres, as homesteads or headquarters." (Emphasis supplied.) 43 CFR 2563.0-2. 2/

On appeal to this Board, appellant argues that he conducted three different business operations on his site, year round: trapping, providing shelter for guides for hunting and fishing trips, and constructing air strips. Additionally, he argues that amount, or existence of profit need not be shown as long as there is a showing of an ongoing business. Appellant contends that the judge ignored the payments he received, in cash or valuable services, and that his activities were carried on with a reasonable expectation of profit.

Appellant's contentions were thoroughly discussed by the judge with ample references to the evidence of record. The judge's discussion, together with his findings and conclusions are set forth hereinafter:

Mr. Bush submitted an Alaska business license application for "B and B Construction, Eureka, Alaska," which was applied for on July 7, 1971 (Exhibit 4). The business described on that application is "Construction of small runways for hunting guide." Exhibit 5 is a State of Alaska receipt for payment of business license taxes of \$25 for 1971, and Exhibit 7 is a 1971 Alaska resident's hunting, trapping and sport fishing license.

Exhibits 8, 9, 10 and 11, are guide-client contracts submitted by Mr. Bush in response to a Bureau of Land Management Show Cause Order. Tr. 11. Three of them were executed in 1970, prior to the end of the five-year proof period. Mr. Bush did not sign the contracts as guide. Tr 12. Mr. Hirsh concluded that the use of the "applied

2/ Formerly 43 CFR 2239.9-1(b) (1967).

for land" did not show that it was a business as opposed to a recreational property. No new airstrips in the Glenallen area had been authorized by the BLM in the last ten years. Tr. 13, 16. The Eureka airstrip is not on the Bush tract.

Upon cross examination, Mr. Hirsh [witness for BLM] conceded that many bush strips used by guides and outfitters have been made by simply removing rocks and debris from "natural places where a plane can land." Tr. 15. In his view, even a primitive strip on public lands should be authorized by the BLM.

The first witness for the applicant was Mr. Robert O. Coleman, who has been a registered guide since 1960. He testified that during the period 1966 through 1971, his headquarters site "was at Eureka operating out of Jay Bush's place" and that he based his headquarters there. He said that Mr. Bush was his (Coleman's) employee. Tr. 19. His first response when he was asked as to Mr. Bush's capacity as an employee was:

"I used his headquarters for my guiding operation. Used his headquarters. Brought my hunters in there, my clients, and billeted at his place and brought them back out and rebilleted them again going and coming from the field. I had my gasoline there and at times I had my vehicles there and so forth."

Mr. Coleman testified that for one year during the prove-up period he employed Mr. Bush as an assistant guide. Tr. 19. The other years he wasn't actually an ["employee" but Mr. Coleman used the site for a headquarters. In return for use of the facilities he paid "cash and . . . reciprocal hunts." Tr. 20. The persons who took the reciprocal hunts were Mr. Bush's friends or relatives.

Mr. Bush and others built "Super Cub air strips" for Mr. Coleman. They are not on the headquarters site, but it was used as a base of operations. Tr. 22.

The guide contracts (Exhibits 8, 9, 10 and 11) were signed by Mr. Coleman. He estimated that in the period from 1966 through 1971 he "probably ran 10, 12 hunters a year" and a few fisherman through the camp on the Bush headquarters site. Tr. 23. Eventually he built his own facility at the Eureka air strip.

A bunk house on the Bush site was used to house hunters and fishermen. The meat house and generator were "used summer and winter." Tr. 25.

Mr. Coleman stated that copies of all of his guide contracts are available at the Alaska Fish and Game Department, but his own records were washed away in a flood. Tr. 27. He observed Mr. Bush trapping in the winter during the prove-up period and saw skins from animals trapped by Bush. Tr. 27. The investment at the headquarters site was entirely that of Mr. Bush. Tr. 29.

The employment of Mr. Bush by Mr. Coleman was for "the short hunting season" during a year "maybe two months." Tr. 32. No social security, tax withholding, or workmen's compensation payments or filings were ever made by Mr. Coleman for Mr. Bush. Tr. 32. Payments to the latter were the equivalent of \$300 to \$400 per season. Some years none of the compensation was in cash and in other years "probably half or something like that" was in cash. Tr. 33.

Mr. Charles J. Stratton worked with the contestee at Elmendorf Air Force Base. In 1968 he executed a contract with Mr. Coleman under which the latter served as a guide for Mr. Stratton and a friend. Tr. 36. They met Mr. Coleman at Eureka, stayed in Mr. Bush's bunk house, and departed for the hunting area from the Eureka air strip. After a successful hunt they brought the meat back to the contestee's meat house. Tr. 36. Mr. Stratton testified that Mr. Bush "handled the whole hunt" as an assistant guide at that time. Tr. 36-37. Mr. Stratton also signed guide-client contracts with Mr. Coleman in 1970 and 1971, and used Mr. Bush's Eureka facilities as a base. Mr. Bush handled the gear, loaded the airplane, and allowed Mr. Stratton to use his meat house.

Mr. Charles R. Lindstrom also signed written contracts with Mr. Coleman for guide services. The Bush site at Eureka was used as a "kind of headquarters . . . where Mr. Coleman picked us up . . . and [took] us out on a hunt." Tr. 43. In 1968, 1969 and 1970, Mr. Bush put gas in the planes, loaded equipment and handled the meat.

In the years between 1966 and 1971, Mr. Lindstrom also visited the headquarters site on weekends in winter months in order to operate snow machines. At that time of year Mr. Bush was running trap lines and Mr. Lindstrom

observed "a lot of his furs." He worked with Mr. Bush at Elmendorf. Tr. 46.

Mr. Lindstrom testified that guides in Alaska ordinarily have arranged for a site that serves as a meeting point and a location for the return of the hunting party. Some of the guides may "operate just off the lake." Tr. 46-47.

The contestee testified that he entered into an agreement with Mr. Coleman "to operate a hunting location." Tr. 48. In 1966 and 1967, Mr. Bush installed structures and equipment on the headquarters site worth approximately \$5,100, exclusive of labor. Tr. 49.

Two registered guides other than Mr. Coleman used the site as a place for their clients to stay. It was also utilized as a base when Mr. Bush constructed runways in more remote areas. Tr. 50, 51. The location at Eureka is 128 miles from Anchorage, 80 miles from Palmer and 61 miles from Glenallen.

For his work in constructing runways for Mr. Coleman, Mr. Bush was paid in cash and in trips – Mr. Coleman took Mr. and Mrs. Bush and their son hunting and fishing. Tr. 52.

The contestee applied for a business license as a construction contractor on two occasions, but did not obtain a license either time. The trapping activities carried on by Mr. Bush and a partner "made expenses." He sold green hides to a taxidermist. Tr. 54. During the trapping season he spent every weekend at Eureka. In the hunting season he would take leave from his full-time Federal job "from four to five to six weeks to use for hunting." Tr. 55. He obtained an assistant guide's license in 1968. He asserts that he was an employee of Mr. Coleman during hunting seasons in the period 1966 through 1971. Tr. 56.

Mr. Bush did not pay any Federal income tax, or report to the Social Security Administration, on the money that he received from Mr. Coleman.

* * * * *

Although Mr. Bush asserts that he conducted a business and served as an employee of Mr. Coleman during the five-year period of proof, the approach of both to transactions at the site was entirely unbusinesslike. There is no testimony or document in the

case record to give an indication as to the yearly income from trapping. Mr. Coleman made written contracts with clients for short hunting trips, but apparently had no written employment agreement with Mr. Bush covering one or more seasons. No cancelled checks or receipts showing payments to Mr. Bush by Mr. Coleman or other guides were produced.

It is questionable whether the Coleman-Bush arrangement was intended to be permanent. Mr. Coleman established his own site at Eureka in 1972, the year following expiration of the period of proof.

Mr. Coleman's testimony regarding payments to the contestee is general and unsubstantiated. The estimate that he gave would indicate that he paid Mr. Bush less than \$150 in cash each year. If it is assumed that Mr. Bush was an employee during the hunting season of approximately six weeks, this would mean that he invested more than \$5,000 plus an unspecified number of hours of labor in order to realize an average return of about \$5 per day at a location 128 miles from his residence.

I find that Mr. Bush was not engaged in an actual business operation from which he reasonably hoped to derive a profit. His witnesses were friends and co-workers at the Air Force Base who attempted to give testimony that was favorable, but on the basis of the proofs submitted any trade or business use of the tract applied for was incidental. Mr. Bush helped his friends and they helped him, and this increased the benefits realized by all concerned from hunting, fishing and recreational use. This does not meet the standard that the tract shall be used primarily as a headquarters site in connection with trade, manufacture or other productive industry.

Because of lack of substantiation as to income, and the contestee's failure to produce evidence that he actually was an employee, I find that the charge in the Complaint has been sustained.

Decision of administrative law judge, pp. 2-7.

With respect to revenues obtained from trapping, the record shows (Exh. 7) that in 1971 appellant received \$152 for furs. In the same year, he was paid \$250 for "repair and extension of runway at Sanena Creek" by Mr. Coleman (Exh. 7).

[1, 2, 3] We accept the judge's findings of fact and the result he reached. Appellant has failed to demonstrate any error therein and the evidence or the sufficiency of all three alleged uses is too scanty to allow the conclusion that any of them were carried out as actual business operations within the criteria of the applicable law and regulations. See U.S. v. Vernon L. Nash, 17 IBLA 332 (1974); U.S. v. Charles T. Beard, 31 IBLA 203 (1977). While the size or nature of a business that qualifies for a headquarters site is not specified by law or departmental regulations, an applicant must nevertheless submit evidence from which it can be concluded that he was engaged in actual business operations from which he reasonably hoped to derive a profit, or that the site was used by an employee of a qualified business for such purposes. United States v. Ronald B. Tippetts, 29 IBLA 348 (1977); Thelma S. Butcher, 7 IBLA 48 (1972); Jay Frederick Cornell, 4 IBLA 11 (1971); aff'd Civ. No. 73-1930 (9th Cir. 1974); Kenai Power Corp., 2 IBLA 57 (1971); Hershel E. Crutchfield, A-30876 (September 30, 1968). This does not mean that a modest operation or even an unprofitable one would necessarily fail to qualify, but there should be evidence of activity of such a nature that a reasonable return could be expected. Hershel E. Crutchfield, *supra*; James E. Allen, A-30085 (February 23, 1965). Appellant's trapping was insufficiently continuous or remunerative and therefore falls short of these criteria. Moreover, it cannot be concluded, viewing the evidence in a light most favorable to appellant, that he reasonably hoped to derive a profit from constructing runways. Similarly, he has failed to show that he derived a reasonable return, or even had a reasonable expectation thereof, from utilizing his site as a base camp for hunting and fishing parties. Also, we cannot find that appellant was an employee of a qualified business as contemplated by the Act. We determine that the administrative law judge properly rejected appellants application to purchase and properly cancelled his entry.

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.

Frederick Fishman
Administrative Judge

We concur.

Edward W. Stuebing
Administrative Judge

Joan B. Thompson
Administrative Judge

