

LEONA R. STRANG

IBLA 76-153 (Supp.)

Decided September 28, 1979

Proceeding after administrative hearing ordered by the Board, Leona R. Strang, 26 IBLA 144 (1976). Recommended decision of Administrative Law Judge E. Kendall Clarke accepted.

Decision of Townsite Trustee rejecting application of Leona R. Strang for lots within Townsite of Kake, Alaska, and awarding said lots to Victor M. and Patricia M. Ward affirmed.

1. Alaska: Townsites -- Townsites

Alaska Natives who occupied lots in a native townsite on date of approval of final subdivisional townsite survey, prior to Oct. 21, 1976, are entitled to receive deeds thereto from the Townsite Trustee.

APPEARANCES: Dennis L. McCarty, Esq., Ellis, Sund & Whittaker, Inc., Ketchikan, Alaska, for appellant; Mildred Weil, Esq., Alaska Legal Services Corporation, Sitka, Alaska, for appellees; James R. Mothershead, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

In Leona R. Strang, 26 IBLA 144 (1976), this Board ordered a hearing to determine what party or parties, if any, occupied or were entitled to occupy lots 3 and 4, Block 1, United States Survey 3851, Addition to Townsite of Kake, Alaska, on the date of the final subdivisional survey, January 2, 1975.

The matter had come before the Board on appeal by Mrs. Strang from the August 5, 1975, decision of the Bureau of Land Management Alaska Townsite Trustee rejecting her application for a deed to the subject lots and awarding an unrestricted deed to the lots to Victor M. and Patricia M. Ward.

Following a hearing in Sitka, Alaska, on May 26, 1977, at which testimony and evidence were received on behalf of appellant Strang, appellees Ward, and respondent BLM, Administrative Law Judge E. Kendall Clarke issued proposed findings of fact and a recommended determination that the Wards are entitled to occupancy of the two lots at issue. After our review of the entire record we adopt the recommendations of Judge Clarke as the Board's decision. A copy is attached hereto as Appendix A.

Counsel for appellant objected to the admission of affidavits of Daniel Paul, Frank Gordon, and Duke Short, because the affiants were not available for cross-examination and further objected that undue reliance had been placed on the untested evidence. He argued that the evidence demonstrated that Mrs. Strang had placed a trailer on or near the lots at issue, and that there had been no intention to abandon the property on which improvement had been made. It was contended that reliance had been placed on the statement of the Townsite Trustee that "if a person has occupied a lot and made improvements on it, he will qualify for a deed even if he moves off of the lot at a later time." Counsel maintains the Judge erred in his recommended determination that Mrs. Strang had not sufficiently improved the property and that she had abandoned the lots.

Counsel for appellees responded in support of Judge Clarke's recommendations. As to affidavits of Paul, Short, and Gordon, he has pointed out that the Judge had given opportunity for appellant's counsel to submit interrogatories in order to cross-examine the affiants, but no interrogatories were submitted. Further, he argues that the evidence clearly supports the finding that the Strang trailer was on the road right-of-way, and not on either lot 3 or lot 4, and that there was no evidence that Mrs. Strang had ever cleared any part of either lot. On the contrary, he asserts there was ample evidence that the Wards had both cleared the land and initiated improvements on the land.

As above stated, we have reviewed the record and agree with the findings of Judge Clarke.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Townsite Trustee rejecting the application of Leona R. Strang for lots 3 and 4, Block 1, Addition to Townsite of Kake, is

affirmed, and the case is remanded to the Townsite Trustee for further consideration of the application of the Wards for the subject lots.

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Douglas E. Henriques  
Administrative Judge

We concur:

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Frederick Fishman  
Administrative Judge

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Anne Poindexter Lewis  
Administrative Judge

December 28, 1978

Leona R. Strang,

Appellant

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IBLA 76-153

PROPOSED FINDINGS  
AND RECOMMENDED DETERMINATION

Appearances: Dennis McCarty, of Ellis, Sund & Whittaker, Inc.,  
Ketchikan, Alaska, for the Appellant.

Dennis J. Hopewell, Alaska Legal Services Corp.,  
Sitka, Alaska, for the Intervenors.

James R. Mothershead, Office of the Solicitor,  
U.S. Department of the Interior, Anchorage, Alaska,  
for the Bureau of Land Management.

Before: Administrative Law Judge Clarke.

Appellant, Leona R. Strang has appealed from an August 5, 1975 decision by the Bureau of Land Management's (BLM) Alaska Townsite Trustee, which rejected her October 23, 1973 Native Townsite application for an unrestricted deed to lots 3 and 4, Block 1, United States Survey 3851, Addition to Townsite of Kake, Alaska. By decision dated August 2, 1976, the Board of Land Appeals (Board) set aside the Trustee's decision and referred this case to the Hearings Division, Office of Hearings and Appeals, to allow the presentation of evidence and a proposed finding of fact pursuant to 43 CFR 4.415. Accordingly, a hearing was held on May 26, 1977, in Sitka, Alaska.

As directed by the Board in Leona R. Strang 26 IBLA 144 (1976), the issue to be decided is:

"[W]hat party or parties, if any, occupied or were entitled to occupy the lots in question on the date of final subdivisional survey, January 2, 1975."

A conflicting application for lots 3 and 4 in Kake was filed by Victor M. and Patricia M. Ward on March 4, 1974. The Wards also contend they have an interest in the lots pursuant to the Alaska Native Townsite laws and regulations.

The disposition of the public lands in Alaska that are set apart or reserved for the benefit of Indian or Eskimo occupants in trustee townsites was formerly authorized by the Act of May 25, 1926, 44 Stat. 629, 43 U.S.C. § 733 (repealed by Pub. L. 94-579, Title VII, § 703(a), Oct. 21, 1976, 90 Stat. 2789). Still in effect, however, the Act of February 26, 1948, 62 Stat. 35, 43 U.S.C. § 737 provides for the issuance of an unrestricted deed for a tract of land within any such trustee townsite claimed and occupied by any competent native.

Since the regulations governing native townsites, 43 CFR subpart 2564 et. seq., lack specific sections concerning the disposal of lots with conflicting applicants, the Board has approved the application of the non-native Alaska townsite regulations to resolve this issue to the extent they do not vitiate the purposes or provisions of the Alaska native townsite laws. See Leona R. Strang, supra at 148. The Board has determined the pertinent regulation to be applied in this case is 43 CFR 2565.3(c) which states in part:

"\* \* \* Only those who were occupants of lots or entitled to such occupancy at the date of approval of final subdivisional townsite survey or their assigns thereafter, are entitled to the allotments herein provided. \* \* \*"

#### Basic Facts

George E. M. Gustafson, Townsite Trustee for the Bureau of Land Management in Anchorage, Alaska, was called as a witness in behalf of the Government. He is the Townsite Trustee for every townsite in Alaska. (Tr. 44). He first examined the contested lots in Kake on April 8, 1970. At that time the lots were uncleared and in a virgin state. Since the lots were covered with thick brush and tree stumps, they were unsuitable for a building site. (Tr. 46). Mr. Gustafson did not discover any development of the lots at that time. On his next visit to the lots on June 10, 1975, he found 10-foot long creosoted pilings on a gravel pad that had been constructed on the lots. (Tr. 47). The pad and pilings were part of a foundation for a house. (Tr. 48). At the time Mr. Gustafson discovered the pad and pilings on the lots, the

appellant, Mrs. Strang, was not living on the lots. (Tr. 48). Although Mr. Gustafson attempted to contact Mrs. Strang in Kake at that time, he was unsuccessful in doing so. (Tr. 49).

When Mr. Gustafson inspected the lots in 1970, he discovered a house trailer parked on the Keku Road right-of-way (See Ex. G-1). He thought the trailer was used in conjunction with a construction project nearby and therefore concluded the trailer would be there only for a temporary time. (Tr. 50). Since he was familiar with the survey monuments and the boundaries of the right-of-way, Mr. Gustafson was sure that the trailer was on the right-of-way and not on the lots. (Tr. 52). He did not know whether the trailer was occupied or not. The trailer was removed by the time he visited the lots in 1975. (Tr. 53).

When asked about the interest the Wards had in Lot 3 and 4, Mr. Gustafson stated they became interested in the lots in 1973. However, neither the Wards nor the Strangs have occupied the lots. (Tr. 53). Mr. Gustafson discovered that the Wards had constructed the pad and pilings for a house they intend to build there. (Tr. 54).

After inspecting a 1963 U.S. Subdivisional Survey of the town of Kake (Ex. G-1) and comparing it to the 1975 Supplemental Subdivision Survey (Ex. G-2), Mr. Gustafson attested the configuration and location of lots 3 and 4 were identical in the two surveys. (Tr. 55).

As a Townsite Trustee, Mr. Gustafson advised people as to how they could qualify for townsite lots pursuant to the Native Townsite Regulations. (Tr. 59). Although an applicant can occupy the lots, a supplemental subdivisional survey of the lots was required before a deed could be issued. (Tr. 60).

On cross-examination, Mr. Gustafson stated the trailer found near the lots was a large light colored trailer 10 ft. wide and 40 ft. long. There were other developments around the trailer. (Tr. 62). He reaffirmed his earlier conclusion that the trailer was on the right-of-way and not on the lots. (Tr. 63). The trailer was parallel to the roadway and just opposite of Lot 3.

The standards and requirements that Mr. Gustafson required before he issued a deed varied from place to place. He stated, "Where there is a tremendous interest and demand for property, the requirements are higher." (Tr. 64). Normally, a structure with a permanent foundation must be built on the lots. (Tr. 65). The demand for the lots in Kake is medium. As of now, there are some remaining lots available for settlement.

When asked if he could recall whether he had visited Kake and inspected the lots between 1970 and 1973, Mr. Gustafson replied he could not. (Tr. 67).

However, he maintains he visits Kake at least once a year. (Tr. 67). Other construction near the lots was taking place when Mr. Gustafson initially found the trailer, but no construction was being made on Keku Road. (Tr. 73).

Mr. Gustafson had followed the Saxman opinion, 66 I.D. 212 (1959) for the disposition of lots in Native Townsites until the recent City of Klawock v. George E. M. Gustafson decision rendered by Judge Fitzgerald in the United States District Court for Alaska. [(No. K-74-2, issued November 11, 1976) Ex. A]. Prior to the Klawock decision, Mr. Gustafson allowed applicants to move onto the lots and make improvements. Later, he would inspect the lots to see if the improvements would qualify an applicant for a deed. Then Mr. Gustafson would issue one. If the improvements were insufficient, he would ask the applicant to make more improvements. (Tr. 76). If a person has occupied a lot and has made improvements on it, he will qualify for a deed even if he moves off the lot at a later time. (Tr. 76). A prior application does not give any preferred rights to the lots nor does it give rise to any claim to a lot. (Tr. 77).

Surveys of unoccupied lots were made as a matter of economy so that the BLM would not have to resurvey the townsite every year. Mr. Gustafson stated he tried to get a surplus of lots in the surveys. However, he has determined that there will be only surveys of occupied lots because the Klawock decision has altered the disposition procedures for the lots. (Tr. 78, Tr. 82).

Upon cross-examination by the Wards, Mr. Gustafson repeated his earlier statements that he had not observed any improvements made by the Strangs on the lot. (Tr. 79). On the other hand, Mr. Gustafson did find improvements made on the lots during his 1975 inspection. (Tr. 80). The gravel pad he found straddled the lot line between lots 3 and 4. (Tr. 92).

Significantly, Mr. Gustafson asserted the official plat of survey of Block 1, which lots 3 and 4 are in, is the 1963 survey. (See Ex. G-1). He also acknowledged that the date of approval of a plat is the cut-off date for settlement in that subdivision. (Tr. 84).

Mr. James Strang, the husband of the appellant, Leona Strang, testified he had resided in Kake from 1968 to 1970. He was the Chief of Police in Kake during the years he resided there. (Tr. 96). He contended he placed a white 10 x 50 foot mobile home on lot 3 near its western boundary. (Tr. 101). Mr. Strang indicated the mobile home was placed parallel to the western boundary of lot 3. (See Ex. A-12, Tr. 102). Furthermore, he disputed Mr. Gustafson's conclusion stating a trailer was parked on the Keku Road right-of-way. (Tr. 104). Mr. Strang insisted his mobile home was placed on lot 3 on June 1970 which was two months after Mr. Gustafson's inspection. (Tr. 104).

Mr. Strang professed he had done a considerable amount of work on the two lots. He asserted he had cut down trees and dug up tree stumps. Also, he claimed to have put a water line and septic tank on lot 3. (Tr. 106, 109). All this work was done in the early part of 1970. However, there was little work done on lot 4. Mr. Duke Short allegedly assisted Mr. Strang in compacting the ground on lots 3 and 4 with a tractor. (Tr. 111). Approximately 60% of lot 3 had been cleared. (Tr. 122). No one inspected the lots during the time the Strangs were clearing them. (Tr. 125). Mr. Strang asked Mr. Short to remove the trailer from the lot in November 1970. (Tr. 133). Although Mr. Strang contends water and power were extended to the lots he did not submit any records to corroborate this claim. He also insisted the condition of the property remained the same from 1970 to 1975. (Tr. 125).

Leona R. Strang claims she is a member of the Tlingit Indian Tribe. She was raised in Kake. She claims she and her husband began clearing the lots in March, 1970. (Tr. 141). Since she has lived in Kake, Mrs. Strang has never seen Mr. Gustafson make a visit there. (Tr. 142). Furthermore, she did not find any other trailer near the lots in April, 1970 and she also denies her trailer was on the Keku Road right-of-way. (Tr. 143). Mrs. Strang stated, "I don't see how that trailer could stand there, 10 x 50, because the roads are small. Only one car can pass through. And the entire side of it is nothing but drainage." (Tr. 143). Although she received information that revealed other people were making claims to the lots, she stood by and took no action to further uphold her own claims. (Tr. 146). Moreover, Mrs. Strang admits she received a notice of rejection for her application for lots 3 and 4. (Tr. 148).

On cross-examination, Mrs. Strang replied she could not recall exactly how close the trailer was to the Keku road but she insisted it was far enough to allow an ambulance to be parked in between the road and the trailer. (Tr. 152). She also admitted she intended to use lot 3 for residential purposes while lot 4 was to be used for business purposes. (Tr. 153). However, she never used lot 4 in conjunction with any business. Mrs. Strang contends the improvements made by the Wards are all on lot 3. (Tr. 154).

Upon further questioning concerning a letter sent to Mrs. Strang from Shirley Short, (Ex. C) Mrs. Strang agreed that Vic Ward and his father-in-law, Daniel Paul, could have burned the trees that Mr. Strang had cut. (Tr. 157). Mrs. Strang argued the installation of a septic tank and trailer foundation should be enough to justify an award of a deed to the lots. (Tr. 159). She also contends she left the foundation for the trailer on lot 3 after she had removed the trailer.

Victor M. Ward, a conflicting applicant for lots 3 and 4, is a commercial fisherman who resides in Kake. He conceded he knew that the Strangs had applied for the lots in 1970, but he also learned they had left Kake.

(Tr. 169). Furthermore, he found out that the lots were still unimproved. Later, Mr. Gustafson gave him permission to clear the land and make an application for it. (Tr. 169).

According to Mr. Ward, the Keku Road is 23 feet wide with a 1 1/2 foot wide gutter. (Tr. 170). He also described a trail road on lot 2 that runs parallel and adjacent to the property line between lots 2 and 3. The trail road was extended through the length of lot 2 and it separated the two lots. (See Ex. D, Tr. 171). Mr. Strang asserted he had begun improvements on the lots after February, 1974. (Tr. 172).

The right-of-way adjacent to Keku Road and lots 3 and 4, was already cleared before Mr. Ward had started his own work on the lots. (Tr. 174). The cleared right-of-way south of lot 3 was soft and muddy. Mr. Ward contended, "If you drove a car on them your tires would sink in." (Tr. 175). Currently, the right-of-way has been cleared by Mr. Ward and the condition is all hard pan. The distance between the edge of Keku Road and the southern survey line of lots 3 and 4 is 30 feet.

The lots were covered with heavy growth and tree stumps before Mr. Ward made any improvements. The Moore Construction Company from Anchorage was employed by Mr. Ward to help clear the lots. The trees on the lots were cut down and removed. (Tr. 176). Mr. Ward constructed a 55 foot long driveway from Keku Road to lot 3. (See Ex. D). He never discovered a septic tank on the lots. The entire northern portion of lots 3 and 4 was excavated and the pilings for the foundation of the Ward's home were constructed there. (Tr. 178).

Mr. Ward disputed the Strangs' testimony describing the location of their trailer on lot 3. Mr. Ward introduced several photographs of the lots with his improvements shown on them. (See Ex. F through J). Although the Strangs' testimony and photographs of the lots indicated the trailer was on lot 3, (See Ex. A-12), the Wards stated the area that the Strangs' have claimed to have put their trailer is actually on the Keku Road right-of-way and not on lot 3. (See Ex. E). Mr. Ward contended the trail road near the Strang's trailer that Mr. Strang had stated to be on the southwestern boundary of lot 3 (See Ex. A-12) is not that far west. (See Ex. E). Mr. Ward deposed that the roadway which is shown in Ex. A-3 is actually a driveway that he had constructed on lot 3. (Tr. 184). Furthermore, he argued the photo indicating that Mrs. Strang is allegedly standing where the rear end of her trailer was located (Ex. A-2), was not a photo of lot 3 but of lot 4. (See Ex. D, A2 marking designates where Mrs. Strang actually stood.) (Tr. 186). Additionally, although Mr. Strang had pointed out a tree stump purportedly on lot 3 (See Ex. A-12), Mr. Ward declared the stump is actually on the southern boundary line of lot 4. (See Ex. E, Tr. 188, also compare Ex. A-5 with Ex. H).

Patricia M. Ward, a full-blooded Tlingit, also resides in Kake. She corroborated Mr. Ward's testimony that stated the trailer was on the

right-of-way and not on lot 3. (Tr. 190) There was no other trailer on the property. Another trailer was placed on parts of lots 1 and 2 by the Public Health Service. Mrs. Ward verified Mr. Ward's earlier testimony concerning the lots. She stated the lots were unimproved when the Wards started working there. (Tr. 195).

The affidavit of Daniel Paul, who resides in Kake and who is Patricia Ward's father, was admitted into evidence. Mr. Paul deposed he assisted the Wards in clearing the lots. Furthermore, he is certain the trailer was on the right-of-way and not on any of the lots. Also, the lots were in an unimproved state which required clearing. Mr. Paul claims that the photo of Mrs. Strang (Ex. A-2) reveals that she is on land cleared by the Wards not the Strangs. In addition, he contends any improvements made by the Strangs could not extend beyond the log depicted in the photo. (Ex. A-2). The only area that was cleared before the Wards did any work was the right-of-way area south of lot 3. Mr. Paul did not discover a septic tank or any sewage system on the lots.

Frank Gordon also submitted an affidavit on behalf of the Wards. Mr. Gordon is a long time resident of Kake. Likewise, he agrees with Mr. Paul's determination that the trailer was on the right-of-way and was never on any of the lots. The trailer was very close to the running surface of Keku Road and could not have gone back more than 30-feet. Moreover, the Strangs had cleared only enough of the land to allow them to place their trailer there. Mr. Gordon has visited the Strangs in their trailer and therefore certifies his statements are correct. He also verifies the accuracy of the Ward's photographs submitted into evidence. (Ex. F through J). Any improvements or work on the lots were performed by the Wards.

In support of the Wards' allegations, Mr. Bill "Duke" Short, submitted an affidavit which also insists the Strangs' trailer was placed on the right-of-way south of lot 3 and not on any of the lots. Mr. Short assisted the Strangs in moving the trailer onto the right-of-way. He acknowledges that he helped clear part of the right-of-way for the Strangs, but any clearing done was only enough to allow him to place the trailer thereon. Significantly, he denies ever having assisted Mr. Strang in placing a septic tank on any of the lots and he also contends he is the only person in Kake in 1970 that had the equipment to do so. Mr. Short also corroborated Mr. Ward's statements in regards to the photographs. (Ex. F through J).

#### Findings and Recommendations

As directed by the Board, the final subdivisional survey date shall be January 2, 1975. 1/ The Board further decrees the provisions of the non-native townsite laws are to be applied to the disposition of native townsite lands to the extent they do not vitiate the purposes of the Alaska Native Townsite laws. 2/ Leona R. Strang, supra, cited in Nancy A. Delkittie 35 IBLA 370 (1978). The critical issue is who occupied or is entitled to occupy lots 3 and 4 on January 2, 1975.

Based upon the testimony and evidence submitted, it is concluded that whatever improvements or trailers that have been placed on the lots by the Strangs were removed before the Wards began clearing the lots. As noted by the Board any settlement initiated by the Strangs prior to January 2, 1975, could be lost by abandonment. Leona R. Strang, supra at 150. Although the Strangs contend they had no intent to abandon their claim to the lots, they admit they did nothing to further perfect their claim. (Tr. 146). Moreover, the lots were still in an unimproved state when the Wards began improving the lots. (Tr. 176). In any event, there is ample evidence to conclude the Wards were entitled to occupy the lots on January 2, 1975.

Whatever improvements or structures that were placed on the lots were placed there by the Wards. Although the Strangs did clear some land and did place a trailer near the lots, the facts clearly indicate such activity was performed on the Keku Road right-of-way and not on lots 3 or 4. Mr. Short, who assisted Mr. Strang in clearing part of the right-of-way and placing the trailer there, deposed that the trailer was never placed on lot 3 or 4. Furthermore, conflicting evidence has demonstrated that the Strangs are mistaken in their description of where their trailer was located as described in their photographs. (Ex. A-2). The Strangs' photographs (Ex. A-2) are not photographs of lot 3, but of lot 4. (Tr. 186). Mr. Strang was mistaken as to the actual location of the boundary line of lot 3. Consequently, it must be concluded that the Strangs did not place a trailer on any of the lots. Accordingly, I find the Strangs did not occupy, nor are they entitled to occupy, the two disputed lots.

On the other hand, the amount of improvements and construction on the two lots will entitle the Wards to the occupancy of them. The photographs (Ex. F through J) reveal that the Wards have cleared the lots and have constructed a foundation for a dwelling. The three affidavits submitted confirm this fact. Based on this evidence, the Wards are hereby adjudged to be entitled to the occupancy of the two lots.

E. Kendall Clarke  
Administrative Law Judge

## FOOTNOTES

1/ Although the BLM has disputed the Board's determination concluding this to be the correct survey date, I am without authority to rule otherwise. See 43 CFR 4.415. However, it is unclear as to what date the final subdivisional survey date should be. In examining the two survey plats, (Ex. C and D), lots 3 and 4 are in Block 1 of the U.S. Survey 3851. However, Block 1 had not been completely subdivided until the later 1975 survey. Despite the fact that both lot 3 and 4 were previously subdivided and their actual dimensions have not been resurveyed after the 1963 survey, Block 1 was not completely surveyed until 1975. The evidence submitted by the BLM has not assisted me in making a more determinative finding as to the actual final survey date. Therefore, I shall not disturb the Board's prior findings.

2/ The BLM has further raised the issue of whether the recent United States District Court Decision City of Klawock v. George E. M. Gustafson, et al., *supra*, rendered by Judge Fitzgerald which has reversed the Saxman opinion in part, would have a retroactive and governing effect on the Wards and Strangs claims to the lots. This issue would be more appropriately directed to the Board since it could be controlling in this case if the Board decides the final date of subdivisional survey is other than January 2, 1975. However, I will give a brief discussion of this issue.

The recent Federal District Court case of Litwhiler v. Hidlay 429 F. Supp. 984 (M.D. Penn, 1977), provides a valuable summary of the applicable law. As prescribed in Litwhiler at 986:

"A prospective-only application of a constitutional holding in a non-criminal context is not automatic. Linkletter v. Walker, 381 U.S. 618, 627, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965). However, since judge-made rules are, until overturned, 'hard facts on which people must rely in making decisions and in shaping their conduct', the Supreme Court recognizes a 'doctrine of non-retroactivity' which places a tremendous obstacle in the path of the party seeking retrospective relief. Lemon v. Kurtzman, 411 U.S. 192, 93 S. Ct. 1963, 362 Ed. 2d 151 (1973).

The non-retroactivity question generally involves a consideration of three separate factors. Chevron Oil Co. v. Huson, 404 U.S. 97, 106, 92 S. Ct. 349, 30 L. Ed. 2d. 296 (1971). First, in order to be applied

non-retroactively, the decision must establish a 'new principle of law,' either by overruling past precedent or by deciding an issue of first impression whose resolution was not predictable. (Citations omitted). Second, the prior history of the decision in question as well as its purpose and effect must be evaluated to determine whether prospective-only application will 'further or retard its operation.' Linkletter v. Walker, 381 U.S. 618, 629, 85 S. Ct. 1731, 14 2. Ed. 2d 601 (1965). Third, the inequity imposed by a retroactive application must be weighed, for '[W]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity.' Cipriano v. City of Houma, 395 U.S. 701, 706, 89 S. Ct. 1897, 1900, 23 L.Ed. 2d 647 (1969).

As conceded by the Government, the Klawock decision rendered by Judge Fitzgerald overrules the Saxman opinion previously followed by the BLM. Turning to the second factor, I believe a prospective application is appropriate to dispose of these lots since Mr. Gustafson has stated he will alter his future procedures in order to avoid having unoccupied lots surveyed. (Tr. 82). Furthermore, an examination of Judge Fitzgerald's decision reveals that he has only disapproved of the BLM's prior practice of foreclosing non-natives from applying for land in Native townsites. (See Ex. A at 17). Judge Fitzgerald's decision decrees that the Townsite Trustee is not precluded from disposing of unclaimed lots under the non-native townsites laws, but, he has not mandated such action either. It is my opinion that a prospective application in this case will not retard the operation of Judge Fitzgerald's Klawock decision.

More importantly, the third factor is the most significant one to justify a prospective application in this case. Clearly, injustice and hardship will befall upon the Wards if a retrospective application is made. The Wards have expended considerable amounts of money and labor on these lots in reliance on the previous BLM procedures. The most important consideration in determining whether to limit a judicial decision to prospective effect is the extent of justifiable reliance upon rejected precedents. National Ass'n of Broadcasters v. F.C.C. 554 F2d 1118, 1132 (D.C. Cir., 1976).

In addition, the Board has previously ruled where there have been changes in administrative practice, the new practice will be given prospective application only and will not be applied retroactively.

V. J. Malloy 20 IBLA 327 (1975) citing Franco Western Oil Co. 65 I.D. 427 (1958) which held a new and different interpretation of an act of Congress by the Department of the Interior is to be given prospective application only. Cf. D.E. Pack 38 IBLA 23 (1978) reaffirming Franco Western Oil Co., supra but refusing to apply a prospective only application because there had been no prior decision overruled in that case. See also United States v. Frank W. Winegar et. al., 81 I.D. 370 (1974).

Finally, the retroactive application of the Klawock decision and the mandatory application of the non-native townsite regulations would vitiate the purpose of the Native Townsite laws in this case. The net result would be a rejection of the Wards application although they are Alaskan Natives who have substantially complied with the appropriate regulations.

