

PATSY KARL NEAKOK
SMILEY A. C. NEAKOK

IBLA 79-607

Decided July 11, 1980

Appeal from a determination of the Townsite Trustee, Bureau of Land Management, Anchorage, Alaska, rejecting a settlement claim on unsubdivided townsite lands.

Affirmed.

1. Federal Land Policy and Management Act of 1976:
Generally -- Federal Land Policy and Management Act of 1976: Repealers -- Townsites

The townsite laws were repealed by sec. 703 of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2790. A claim under the townsite laws will be rejected where appellants have submitted no proof that they occupied the land prior to the effective date of FLPMA, Oct. 21, 1976, thus giving them a valid existing right which would have survived FLPMA.

APPEARANCES: Patsy Karl Neakok and Smiley A. C. Neakok, pro sese.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Patsy Karl Neakok and Smiley A. C. Neakok appeal from a determination by the Townsite Trustee, George E. M. Gustafson, on behalf of the Alaska State Office, Bureau of Land Management (BLM), rejecting a settlement claim on unsubdivided townsite lands.

By letter of June 5, 1978, appellants notified Gustafson that they were in the process of choosing a homesite in Block B of Barrow Townsite. Appellants noted that the land was not surveyed and inquired if any other portions or rights-of-way in Block B had been granted. The Trustee responded by letter of June 11, 1978, stating

that one permit had been issued for Tract B. He informed appellants that the Trustee did not keep a record of who may be building on Tract B and said that it was up to each claimant to clearly mark his site. He enclosed additional information.

On September 20, 1978, appellants requested an application for title to "our lot" and also information regarding the procedures they must follow in obtaining title to the land. Gustafson wrote appellants on September 28, 1978, informing them that an application at this time would be premature as no survey had been made. He said that he would help them file an application after the survey and that they could continue to improve and occupy the land which they had staked.

Gustafson wrote appellants again on March 15, 1979, informing them of the Department's Regional Solicitor's opinion in which the Solicitor stated that persons not in occupancy on October 21, 1976, had no rights which survived the repeal of the townsite laws by section 703(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 note (1976). Gustafson thereafter initiated the action which led to this appeal.

In his decision rejecting appellants' claim, Gustafson referred to the Solicitor's opinion. He also quoted a letter dated March 19, 1979, from the City Manager of Barrows in which he said that "from my [City Manager's] research, and the personal knowledge of the council members, it was determined that there were no claimants in Block 11A and Block 'B', with improvements, prior to October 21, 1976." In another letter dated August 14, 1979, to Gustafson the City Manager wrote,

I am aware that Mr. and Mrs. Neakok are claiming to have had improvements on the land prior to 1976. The City disputes claim for the following reasons:

1. Mr. and Mrs. Neakok were not married at that time.
2. The Neakoks are not aware that the land was possibly open for entry until the summer of 1978.
3. The Neakoks did not put any improvements on the land until mid-summer 1978. To date the only improvement is a platform, and a shack they hauled out there.

The Trustee concluded his determinations as follows:

There has been no field examination made by the Trustee. However, based on the correspondence from the claimants and from personal knowledge of Tract "B" by the Barrow City Council members and the City Manager, the

settlement claim of Patsy Karl Neakok and Smiley A. C. Neakok to a settlement claim on unsubdivided Tract "B", U.S. Survey 4615, Barrow Townsite, is hereby rejected. All of Tract "B" will be deeded to the City of Barrow.

Appellants list the following contentions in their statement of reasons:

1. Our claim of entry was not adequately disapproved by statement of City. Trustee failed to make actual site inspection of the property and our improvements made at the times claimed.

2. Our claim of entry prior to October 21, 1976 was valid and property established.

3. Trustee's position based on Solicitor's Opinion of February 20, 1979 is unlawful and incorrect; that opinion is legally unsupportable.

[1] Regarding points Nos. 1 and 2, appellants have submitted no affidavits from witnesses or other substantiating proof that they occupied the site prior to October 21, 1976. A mere assertion that their claim of entry prior to October 21, 1976, was valid and properly established is not sufficient.

In Royal Harris, 45 IBLA 87, 89 (1980), 1/ the Board considered the applicability of FLPMA and stated:

It is not clear from the file under what statutory authority appellant first initiated his claim. One of the townsite statutes was the Act of May 25, 1926, 44 Stat. 629, 43 U.S.C. §§ 733-36 (1970), which allowed Alaska Natives to obtain townsite lots. This statute, as well as the other townsite laws, was repealed by section 703 of FLPMA, 90 Stat. 2790. The question then becomes whether appellant has a valid existing right under section 701 of FLPMA, which provides that nothing in the Act shall be construed as terminating any patent, or other land use right or authorization existing on the date of approval of the Act (Oct. 21, 1976). The events giving rise to this appeal postdate the effective date of the Act. Therefore, on October 21, 1976, appellant could have had no valid

1/ Judges Lewis and Thompson joined with the dissenting opinion in Royal Harris, 45 IBLA 87, 93 (1979), on the effect of repeal of the townsite laws as to claimants who initiate occupancy after repeal. We adhere to our position in that case. However, unless and until the Board's majority position is overturned, that position must be followed here. Only for that reason do we affirm the decision below.

existing right which would survive FLPMA. Stu Mach, 43 IBLA 306 (1979). When appellant wrote to BLM on May 9, 1977, he had only a hope or expectancy. However, use or occupancy of the public land granted subsequent to the effective date of FLPMA must be under authority of that Act, 43 U.S.C. § 1732(b) (1976); William J. Coleman, 40 IBLA 180 (1979), * * *.

The holding in Royal Harris, *supra*, has recently been followed in Thomas Taggart, 46 IBLA 350 (1980); Marko Lewis, 46 IBLA 257 (1980); Dorothea M. Taylor, 46 IBLA 198 (1980); Darrell P. Riggs, 46 IBLA 132 (1980).

In the present case, as in Royal Harris, *supra*, there was no proof that appellants had occupied the land prior to October 21, 1976, thus giving them a valid existing right which would have survived FLPMA. Accordingly, their claim must be rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the determination appealed from is affirmed.

Anne Poindexter Lewis
Administrative Judge

I concur:

Joan B. Thompson
Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN DISSENTING:

The main opinion properly recognizes that if appellants occupied the land in issue prior to enactment of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2743, and the repeal of the townsite laws effected thereby, they would have "valid existing rights" protected by section 701(h) of FLPMA. No opportunity for a hearing has been afforded appellants.

I believe that appellants are entitled to the opportunity for a hearing. Admittedly, the record is conflicting as to the date of commencement of their occupancy of the land in issue. On June 5, 1978, appellants wrote to the townsite trustee as follows:

We are in the process of choosing [sic] a homesite in Block B of the Barrow townsite. As this is not surveyed, we want to inquire if any other portions or rights-of-way in Block B have been granted.

If the government has given such permission to anyone, we would like a copy of the Plat or description of the areas so we are within our rights in settling in Block B.

If you have any other suggestions, please contact us soon.

However, their notice of appeal, filed September 24, 1979, asserted in part:

1. Our claim of entry was not adequately disapproved by statement of City. Trustee failed to make actual site inspection of the property and our improvements made at the times claimed.

2. Our claim of entry prior to October 21, 1976 was valid and property established.

The trustee's decision of August 30, 1979, which is the subject of the appeal, relies solely on statements from officials of the city of Barrow, which city will gain title if appellant's claim fails. The trustee's decision reads in part:

In subsequent visits to the Trustee's office, Patsy K. Neakok maintained he had entered and started to build upon Block "B" prior to October 21, 1976.

In a letter dated March 19, 1979, the City Manager of Barrow wrote to the Trustee "from my research, and the personal knowledge of the council members, it was determined that there were no claimants in Block 11A and Block 'B', with improvements, prior to October 21, 1976."

Again in a letter dated August 14, 1979 the City manager wrote to the Trustee, "I am aware that Mr. and Mrs. Neakok are claiming to have had improvements on the land prior to 1976. The City disputes claim for the following reasons:

1. Mr. and Mrs. Neakok were not married at that time.
2. The Neakoks are not aware that the land was possibly open for entry until the summer of 1978.
3. The Neakoks did not put any improvements on the land until mid-summer 1978. To date the only improvement is a platform and a shack they hauled out there."

There has been no field examination made by the Trustee. However, based on the correspondence from the claimants and from personal knowledge of Tract "B" by the Barrow City Council members and the City Manager, the settlement claim of Patsy Karl Neakok and Smiley A. C. Neakok to a settlement claim on unsubdivided Tract "B", U.S. Survey 4615, Barrow Townsite, is hereby rejected. all of Tract "B" will be deeded to the City of Barrow.

The trustee's reliance, inter alia upon the determination of the city that Neakoks were not on the land prior to October 21, 1976, because they "were not married at that time" is misplaced. We can take official notice that many households consist of two persons who have not been joined in matrimony. Similarly, even assuming that the Neakoks were not aware until 1978 that the land was open, does not necessarily preclude their prior settlement thereon.

Although the record is conflicting, we have afforded claimants under the Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed, but with a saving clause for applications pending on December 18, 1971, by 43 U.S.C. § 1617 (1976)) opportunity for hearing despite conflicting assertions in the record as to the date of commencement of occupancy.

I submit that the interest of a townsite lot applicant is at least as sufficient a property interest as a Native allotment applicant's interest.

In Donald Peters, 26 IBLA 235, 238-9, 83 I.D. 308, 310 (1976), we held:

The procedures followed by BLM in Native allotment cases came under judicial scrutiny in Pence v. Kleppe, 529

F.2d 135 (9th Cir. 1976) [Pence I], rev'g Pence v. Morton, 391 Supp. 1021 (D. Alaska 1975). Pence was initiated by certain Native Alaskans, on their behalf and on behalf of all other Natives similarly situated, who asserted entitlement to allotments of public land pursuant to the Alaska Native Allotment Act of May 17, 1906, supra. They alleged that the procedures utilized by the Secretary of the Interior in determining whether to grant allotments denied them due process and sought injunctive relief requiring the Secretary to adopt and utilize procedures guaranteed to afford applicants due process. The district court dismissed the action on the ground that the granting or denial of an allotment was committed to agency discretion and not reviewable by the courts.

The Ninth Circuit Court of Appeals reversed the district court, holding that Native applicants for allotments have a sufficient property interest to warrant due process protection. In discussing "what process is due," the court stated:

* * * [T]he Alaska Native applicants whose applications the Secretary intends to reject must be given some kind of notice and some kind of hearing before the rejection occurs.

* * * * *

* * * [A]t a minimum, applicants, whose claims are to be rejected must be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and, if they request, granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment. Beyond this bare minimum, it is difficult to determine exactly what procedures would best meet the requirements of due process. * * * It is up to the Secretary, in the first instance, to develop regulations which provide for the required procedures, subject to review by the district court and, if necessary, by this court.

Pence v. Kleppe, supra at 142, 143 (emphasis in original).

Thus, the court did not attempt to define those procedures necessary to effectuate its mandate, leaving that determination to the Secretary. Since the court did not

refer to the Administrative Procedure Act (APA), 5 U.S.C. § et seq. (1970), except in regard to its jurisdiction, it apparently felt that all of the procedural requirements of that act need not be met. Nevertheless, this Department has generally applied procedures consonant with the requirements of the APA when it has been determined that due process requires notice and an opportunity for hearing, and it shall do so here.

In Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978) [Pence II], the court held that the contest regulations comply facially with the due process requirements set forth in Pence I.

In lieu of affirming at this time the decision below, I would remand the case to afford appellants an opportunity to request a 43 CFR 4.415 hearing, at which they and the City of Barrow could offer evidence and cross examine witnesses.

Frederick Fishman
Administrative Judge

