

UNITED STATES
v.
FLOYD R. EHMANN

IBLA 80-554

Decided September 17, 1980

Appeal from decision of Administrative Law Judge E. Kendall Clarke, rejecting headquarters site application AA-813.

Affirmed.

1. Alaska: Headquarters Sites

A headquarters site application which states that trapping, hunting, fishing, and renting cabins to hunters, fishermen, and snowmobiles is the commercial operation engaged in on the site is properly rejected when the applicant submits no evidence that he is engaged in a commercially productive industry there, or that he actually received substantial income from guests who used the site in connection with such purposes.

2. Alaska: Headquarters Sites--Words and Phrases

"Headquarters." A headquarters site application is properly rejected when the applicant has failed to sustain his burden of showing that the site has been used as a headquarters, i.e., as the usual place of business, principal office, or administrative center of his snowmobile camp. The term "headquarters" will not be construed so broadly as to include within its meaning use of a site for recreational purposes with occasional payment of use of the facilities occurring via rendering of services and helping transport building materials to the cabin sites, or by meager and incidental payments of cash.

APPEARANCES: Dan W. Burton, Esq., Wasilla, Alaska, for contestee; Bruce Schulteis, Esq., Assistant Regional Solicitor, Anchorage, Alaska, for the contestant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Floyd R. Ehmann, hereinafter appellant, has appealed from a March 3, 1980, decision of Administrative Law Judge E. Kendall Clarke rejecting his application to purchase a headquarters site and cancelling his claim. See 43 U.S.C. §§ 687a, 687-1 (1970); 43 CFR Subpart 256.

Essentially, Judge Clarke found that although some use of the premises and facilities had been made by persons who had provided recompense by contributing materials, labor, and a small amount of cash to the construction of the remaining facilities, a true commercial business enterprise never materialized. He concluded that at the statutory expiration of the term of the entry March 14, 1972, the cabin rental and snow machine camp was merely a "prospective business," and remained such to the time of the hearing in 1978.

Appellant asserts that Judge Clark's decision is based upon an erroneous interpretation of the law in concluding that the business was not bona fide because the rentals were on a barter rather than a cash basis (labor and materials having been contributed in lieu of cash rental payments). He further asserts that he received substantial labor and building materials, as well as cash from persons using the facility, and contends that he received \$900 in 1972. He argues that it is not necessary that he show a profitable business, but only that the site be used in connection with productive industry, citing Gustav O. Wiegner, 26 IBLA 123, 126 (1976). Finally, he contends that the decision was improperly influenced by Judge Clarke's finding that subsequent changes in the business climate (a curtailment of hunting by State law) adversely influenced the viability of the enterprise, whereas the "business enterprise" should have been evaluated as it existed at the time application to purchase was filed.

We agree with Judge Clark that the prospective business "died aborning." The barter payment of labor and material, mostly by friends, which contributed to the construction of the facilities, was not creditable as payment for services rendered as an ongoing business. Rather, it might be likened to one who gave free gasoline to those who helped to construct a filling station which, when completed, never did more than a token business because of a highway relocation. What appellant actually earned here was some part of the cost of constructing the facility during the time construction was in progress. At no time could it have been regarded as a viable business enterprise with an active clientele drawn from the general public. Although

appellant has alleged gross receipts of \$900 and \$1,000 for the last 2 years of the entry, it was established at the hearing that a substantial portion of those amounts was not in cash.

Accordingly, the decision of Judge Clarke (attached) is adopted as the decision of this Board.

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.

Edward W. Stuebing
Administrative Judge

I concur:

Anne Poindexter Lewis
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

The basic issue presented by this appeal is not whether barter, in and of itself, renders a business nonproductive. The determinative question is whether, in the absence of any other substantial, independent use of the facilities, the exchange of labor and materials used in constructing those facilities for the right to use the property can constitute a productive business. Is there, indeed, any real "business" extant at all?

The evidence, presented by the record and illuminated by the decisions of Judge Clarke and the majority, discloses a situation in which appellant has attempted to establish a camping and snowmobiling center. In order to accomplish the construction of the necessary facilities, appellant has apparently permitted relatives and friends to utilize the area embraced by his claim, in exchange for their help in constructing the various structures found thereon, without any out-of-pocket expenditures on their part. There is, of course, nothing dissonant with the laws and regulations in such an arrangement. The problem, however, arises from the fact that this has been the main, if not only, use of the subject tract. Certainly, appellant has, in one sense, "profitted" from this exchange. But absent other use, this profit is of a most ephemeral nature; one which is, in a monetary sense, incapable of realization until other people make use of the facilities.

Appellant points out that there is no requirement that a headquarters site, in contradistinction to a trade and manufacturing site, actually be the situs of a productive industry. This is correct. But the statute and regulations are clear in requiring that the headquarters site be used in connection with such a productive industry. See Gustav O. Wiegner, 26 IBLA 123 (1976). In the instant case the only "productive industry" which appellant alleges is use of the headquarters site as a camping and snowmobiling center. Thus, regardless of the technical difference between a headquarters site and a trade and manufacturing site, appellant must, by virtue of his own allegations, prove that a productive industry has been established within the confines of his headquarters site.

While appellant is not required to show that the land is used in conjunction with a "profitable business," appellant is required to establish that the land is being utilized in connection with a potentially "productive industry." As this Board has noted, the mere fact that land might be subject to use if a clientele chose to frequent the area does not establish a potentially productive industry; an applicant must present evidence of "at least, some customer trade and gross receipts." Kathleen M. Smyth, 8 IBLA 425, 427 (1972). The receipts

which appellant has presented, however, are fatally deficient, as they primarily represent the value of labor used in constructing the facilities rather than an income earned by appellant from the use of the facilities by others.

The only industry which can fairly be said to have been successfully established has been the construction of buildings. In the absence of any substantial use by paying customers, the mere erection of these structures on the subject site cannot be deemed a "productive industry" within the context of the statute and regulations. Accordingly, I agree that appellant's application to purchase must be rejected.

James L. Burski
Administrative Judge

March 3, 1980

United States of America	:	Contest No. AA-813
	:	
Contestant	:	Headquarters Site
	:	
v.	:	
	:	
Floyd R. Ehmann,	:	
	:	
Contestee	:	
	:	

DECISION

Appearances: Bruce Schultheis, Assistant Regional
Solicitor, U.S. Department of the
Interior, Anchorage, Alaska,
for the Contestant.

Noel Kopperud, Attorney,
Wasilla, Alaska,
for the Contestee.

Before: Administrative Law Judge Clarke.

Pursuant to the departmental regulations 43 CFR part 4, the Alaskan State Office of the Bureau of Land Management initiated this contest to cancel a headquarters site entry filed by Floyd R. Ehmann, March 14, 1967. Applications to purchase the subject entry were made on May 6, 1970 and again in March of 1972. The first Application to Purchase alleged that the entry was used in connection with trapping, during season, fishing and renting cabins to hunters, fishermen and snowmobilers. The 1972 Application to Purchase stated the purpose was for use in connection with renting cabins to snow machiners and for fishing. On May 26, 1978, the contestant filed a complaint alleging in Paragraph 5a and 5b as follows:

a. Section 10 of the act of May 14, 1898 (30 Stat. 413), as amended by the act of March 3, 1927 (44 Stat. 1364; 43 U.S.C. 687a), as amended, and the regulations issued thereunder, specifically 2563.0-3 and 2563.1-1(a)(2), Title 43, Code of Federal Regulations require that the land be actually used and occupied as a homestead or headquarters site in connection with contestee's own business or that of his employer. The actual use by the contestee was not primarily as a headquarters site in connection with trade, manufacture, or other productive industry. The contestee is not using the headquarters site for a viable business or in connection with a viable business.

b. Section 10 of the act of May 14, 1898 (30 Stat. 413), as amended by the act of March 3, 1927 (44 Stat. 1364; 43 U.S.C. 687a), as amended, and the regulations issued thereunder, specifically section 2563, Title 43, Code of Federal Regulations prohibit the acquisition of a headquarters site for use as a prospective business. Contestee is attempting to acquire the land for a prospective headquarters site or for another use not consistent with the intent of the applicable law.

A timely Answer was filed in which the contestee denied the charges in Paragraph 5 of the Complaint. A hearing was held in Anchorage, Alaska, on October 24, 1978. This headquarters site consists of five acres situated in the Chitina Recording District, Third Judicial Division, State of Alaska. This site is on a bluff overlooking Old Man Creek, approximately 50 air miles west of Glenallen, Alaska. It is accessible by airplane or by the Little Nelchina River Trail.

Summary of Testimony

Mr. Hirsh a Bureau of Land Management Realty Specialist, who has a Bachelor of Arts degree in forestry and a Masters Degree in recreation, made an investigation of the Application to Purchase which was filed by Mr. Ehmann. He testified that there were two Applications to Purchase and that the first one, which was accompanied by receipts showing only \$48 income was rejected by a decision issued on July 7, 1970, by the Bureau of Land Management, for the reason that there was not sufficient showing of a productive industry. Since the statutory life of the claim did not expire until March 14, 1972, the applicant was given the opportunity to refile.

A second Application to Purchase was filed in March of 1972. It is from this application that the present case arises. The second application was accompanied by receipts which showed in the neighborhood of \$1,000 and also by an income tax return for 1971 that showed income in excess of \$900 for that year. There were some discrepancies in the receipts which caused Mr. Hirsh to question their validity. Some of the dates on the receipts indicated that the sequence was not consistent with the dates the receipts were issued. Mr. Hirsh talked with at least one person who was shown as having paid for use of the cabins and was told that in fact he had not paid the \$200 the receipt showed but had contributed services or building materials. Investigating the site Mr. Hirsh found that the land was vegetated with a sparse open stand of Black Spruce and in some areas dense underbrush. There were five buildings located on the property. (Tr. 16). He stated that these buildings represented a great deal of work. He only entered the log cabin as the other buildings were locked. In addition to this he talked to several individuals in the area who has been in business in the general area for 10 to 15 years and was advised that none of these people were aware of the fact that Mr. Ehmann had a business in the area. Although they did know where the cabins were located.

Mr. Sam Shaw Herman testifying on behalf of the contestee stated that he had been familiar with the cabins since 1968 and 1969 when he was in high school with Mr. Ehmann's son. He first used the cabins in 1970 and through that time until March, 1972, he probably used them three or four times. He stated that he paid on the basis of rendering services and helping transport building materials to the cabin sites. (Tr. 49).

Leo Lucas testified on Mr. Ehmann's behalf, stating that he had done work for Mr. Ehmann and took payment out in the form of recreational use of the cabins, that no money exchanged hands. He believes that \$4 a night is a reasonable price for the use of the cabins. Mr. Floyd Ehmann testified in his own behalf stating that when he first found the area there was a dilapidated cabin located there. He discovered this while he was caribou hunting. (Tr. 61). This was about the time that snow machines were coming into extensive use. It was the general area of crossroads where snow machines could go various ways in connection with hunting. At that time the caribou season was open. He worked out deals with the various people who used the cabins to exchange services instead of cash which he believed to be a sensible method of keeping up a winter snow machine business. (Tr. 64). He was relying basically on winter use since the trail in the summer was difficult because it was nothing but swamps and bogs. (Tr. 65). He stated that he invested thousands of dollars and would not have built the five cabins just for himself. His tax returns for 1971 through 1977 were offered in evidence and showed the camp being claimed as a business use, although there was a tax loss every year after 1972. It was his intention to build more cabins but the state closed the caribou season and the traffic for snowmobiles was greatly reduced because of the lack of hunting.

Applicable Law

In a contest proceeding the Government has the burden of establishing a prima facie case of noncompliance with the requirements for 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 site for trade, manufacture, or other productive industry. United States v. Graham Keith Ward, 43 IBLA 333 (1979); United States v. Jack Zemmy Boyd, Jr., 39 IBLA 321 (1979). In a contest hearing on a headquarters site claim, evidence must be submitted from which it can be concluded that the applicant was engaged in an actual business operation from which he reasonably hoped to derive a profit. United States v. Maurice L. Wilson, 38 IBLA 305 (1978); United States v. Beaird, 31 IBLA 203 (1977). The receipt of a few dollars over a period of years does not satisfy these criteria. See United States v. Jerry L. Crow, 28 IBLA 345, 349 (1977).

To establish a right to land under the public land laws, an applicant is required to support his assertions with evidence which is within his sole control. United States v. Beaird, *supra*; United States v. Block, 12 IBLA 393, 80 I.D. 571 (1973).

A headquarters site application is properly rejected where the applicant fails to produce any probative evidence that the land claimed as a headquarters site was used in connection with a productive industry. Gustav O. Wiegner, 26 IBLA 123 (1976); United States v. Beaird, *supra*. The term "productive industry" cannot be construed so broadly as to include within its meaning an enterprise of short duration and meager gross receipts. John v. Vogt, 17 IBLA 87 (1974).

Discussion and Conclusion

Without a doubt Mr. Ehmann has expended substantial sums of money in construction of some new cabins and the reconstruction of the old log cabin which was in existence when he located the 5-acre tract here in question. It is rather apparent that the use which was made by individuals of the cabins before the end of the prove-up time was arranged for through a barter system. The cabins were constructed through the use of labor in exchange for the use of the facilities for hunting purposes for individuals who were basically friends of the contestee. By March 14, 1972 it does not appear that there was a viable business actually in being. The potential may have been there. Mr. Ehmann had plans for additional cabins and with the increased use of snow machines this project may have eventually been a viable business. But, it appears to have "died aborning" as a result of the State terminating caribou hunting in the area. The conclusion is inescapable that at the expiration of the entry time, March 14, 1972, the cabin rental and snow machine camp business, which Mr. Ehmann visualized, was as yet a prospective business. Events since March of 1972 show that as a prospective business it remained just that through the time of the hearing. Because Mr. Ehmann had no viable business activity on or before the time of

the filing of the Application to Purchase, I must and do hereby reject the Application to Purchase and cancel the entry.

E. Kendall Clarke
Administrative Law Judge

Appeal Information

An appeal from this decision may be taken to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations in 43 CFR Part 4 (revised as of October, 1978). Special rules applicable to public land hearings and appeals are contained in Subpart E. If an appeal is taken, the notice of appeal must be filed in this office (not with the Board) in order to facilitate transmittal of the case file to the Board. If the procedures set forth in the regulations are not followed, an appeal is subject to dismissal. The adverse party to be served with a copy of the notice of appeal and other documents is the attorney for the United States Department of the Interior whose name and address appear below. Additionally, rules that became effective February 25, 1980 state that, the Associate Solicitor of the Division of Energy and Resources must be served with a copy of the notice of appeal and any statement of reasons, written arguments, or briefs. (Address: Office of the Solicitor, U.S. Department of the Interior, Washington, D.C. 20240.)

Enclosure: Additional information concerning appeals.

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