

Editor's note: Reconsideration denied by order dated Feb. 25, 1981; Reconsideration granted; decision vacated in part -- See Stephen Kenyon, et al. (On Reconsideration), 65 IBLA 44 (June 23, 1982); Further reconsideration denied by order dated Aug. 6, 1982; appealed - vacated and remanded sub nom. Ouzinkie Native Corp. v. Watt A80-196 (D. Alaska Nov. 6, 1984); Referred to Hearings Division by order dated Nov. 25, 1985 -- See 65 IBLA 49A & B.

STEPHEN KENYON ET AL.

IBLA 80-453, etc.

Decided December 30, 1980

Consolidated appeals from decisions of Alaska townsite trustee rejecting townsite claims in the Ouzinkie townsite, U.S. Survey 4871.

Affirmed in part as modified; vacated in part and remanded with instructions.

1. Alaska: Townsites -- Townsites

Where lands have been identified as being within a townsite by inclusion in an approved U.S. survey of the exterior boundaries of the townsite; where the townsite trustee duly receives title to these lands by patent and opens the area to settlement under the townsite laws; and where individuals, acting in reliance on explicit statements by the trustee that it is legal to do so, timely initiate settlement under governing Departmental regulations, a decision by the trustee to cancel the settlers' claims in order to reduce the size of the townsite to conform with the statutory limit will be vacated, and he will be directed instead to correct the patent by eliminating lands other than those occupied by the settlers.

2. Alaska: Townsites -- Alaska Native Claims Settlement Act: Generally -- Alaska Native Claims Settlement Act: Withdrawals and Reservations: Withdrawals for Native Selection: Generally -- Townsites

A Native village corporation has no interest in lands included in a townsite

prior to the enactment of the Alaska Native Claims Settlement Act, as the lands were segregated prior to this date so that ANCSA did not withdraw the lands for selection by the corporation. Accordingly, the rights of settlers and of the municipality which derive from an entitlement created prior to the Alaska Native Claims Settlement Act, are superior to the corporation's rights.

3. Applications and Entries: Generally -- Bureau of Land Management -- Mistakes -- Segregation -- Townsites Withdrawals and Reservations: Generally -- Words and Phrases:

"Notation rule." Under the "notation rule" when the official records of the Bureau of Land Management have been noted to reflect the devotion of land to a particular use which is exclusive of other conflicting uses, no incompatible rights in that land can attach by reason of any subsequent application or entry until the record has been changed to reflect that the land is no longer so segregated. The rule applies even where the notation was posted to the records in error, or where the segregative use so noted is void, voidable, or has terminated.

4. Alaska: Townsites -- 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, and the initiation of an occupancy claim pursuant to any of the repealed laws after the effective date of FLPMA, Oct. 21, 1976, does not constitute a valid existing right which would survive FLPMA.

APPEARANCES: Stephen Kenyon, et al., 1/ pro sese; Melvin M. Stephens II, Esq., Kodiak, Alaska, for appellant Frances Kelso;

1/ See Appendix.

Robert H. Hume, Jr., Esq., and David Wolf, Esq., Anchorage Alaska, for respondent Ouzinkie Native Corp.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On February 10 and 26, 1980, George E. M. Gustafson, townsite trustee for the Alaska State Office, Bureau of Land Management (BLM), issued decisions rejecting settlement claims on undivided Tract "D" in the Ouzinkie townsite, as described by U.S. Survey 4871. These claims were made under the Alaska townsite laws 2/ and, with one exception, were initiated prior to the repeal of these laws on October 21, 1976, by section 703(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 2789.90 (FLPMA). The chronological history of these claims is as follows.

On February 14, 1956, Native and non-Native residents of the village of Ouzinkie petitioned BLM to establish the village as a townsite pursuant to the townsite laws. The residents requested that BLM survey the exterior limits of the village, appoint a townsite trustee, and further survey the village into lots, blocks, streets, and alleys. BLM apparently granted this petition and began to survey the village. 3/

In addition to surveying the exterior boundaries of the village, the cadastral surveyor divided the area into four sections, Tracts "A, B, C, and D." The surveyor then subdivided Tracts "A" and "C." The final survey was designated as U.S. Survey 4871 (USS 4871) and was approved by the Chief, Division of Cadastral Survey, on September 21, 1971.

Tract "B" which consists of just 2.09 acres, was not subdivided in USS 4871. Tract "D," which consists of 313.39 acres, also was not subdivided. This fact is significant, as a townsite remains open to settlement only until approval of subdivisional survey. As Tract "D" was not subdivided, it remained open to settlement.

On December 13, 1971, Gustafson, acting as townsite trustee, applied for entry and patent. The cover memorandum accompanying this application expressly notes his request that BLM issue a patent to him "for the entire survey with no exclusions in the patent." Thus, Gustafson requested title to all lands in USS 4871, including Tract "D" and totalling 802.32 acres.

2/ Section 11 of the Act of March 3, 1891, 26 Stat. 1099, 43 U.S.C. § 732 (1976); Act of May 25, 1926, 44 Stat. 629, 43 U.S.C. §§ 733-736 (1976); both repealed by section 703(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 2789-2790.

3/ On June 17, 1980, we requested the complete administrative record regarding the Ouzinkie townsite from BLM. BLM has forwarded to us photocopies of just a few pertinent documents. Attachments to the pleadings of the parties show that there is more documentation than BLM has submitted. In view of BLM's failure to assemble or forward to us a complete record, it is impossible to speak with absolute certainty about some of the history of the matter.

However, on September 14, 1973, Gustafson filed a second application for patent covering only Tracts "A, B, and C." This application was internally inconsistent, in that it mentions only these three tracts and their total acreage (488.93), while, at the same time, it mentions USS 4871 (which includes Tract "D" and totals 802.32 acres) with no exclusions.

On June 24, 1974, BLM issued the patent for all 802.32 acres of USS 4871, including Tract "D", to Gustafson, in trust for the several use and benefit of the occupants of the townsite of Ouzinkie, Alaska.

The records amply show that Gustafson actively encouraged settlement on Tract "D" after receiving this patent. His actions were consistent with Departmental regulations governing initiation of settlement claims under the townsite laws, which provide that "those who were occupants of lots or entitled to such occupancy at the date of approval of the final subdivisional townsite survey * * * are entitled to the allotments herein provided." 43 CFR 2565.3(c). As Tract "D" had not been subdivided, Gustafson repeatedly encouraged settlement there and informed settlers that they were within the law in doing so, in accordance with the terms of this provision.

Acting in response to these representations, appellants each expended time and resources in developing the lots on which they had settled. In many cases, appellants undertook expensive construction and relocation only after first writing Gustafson and being advised by him that Tract "D" was open and that they were completely free to do so. Appellant Daniel Konigsberg even resigned his employment position and moved to his lot on the strength of these representations.

Apparently, on February 12, 1979, the Ouzinkie Village Corporation, ^{4/} (the Corporation), a legal entity created by section 11(b)(1) of the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. § 1610(b)(1) (1976), wrote Gustafson to advise him that it believed that Tract "D" should not have been patented to him because he had never entered it nor applied for it, and because he was entitled to no more than 640 acres under the townsite laws. The Corporation had applied to select Tract "D" under ANCSA on December 13, 1974.

On February 10, 1980, Gustafson issued the decisions in question, in which he advised the claimants that he agreed with the Corporation, that he would return his trustee patent to BLM to eliminate Tract "D" from it, and that the lands would then be conveyed to the Corporation. Seventeen claimants (appellants) filed appeals of this decision. The Ouzinkie Village Corporation has appeared as respondent in these matters. In view of the similarity of the issues presented for consideration, we have consolidated these appeals.

^{4/} The City of Ouzinkie and the Ouzinkie Village Corporation are different legal entities.

[1] BLM erred by declaring appellants' claims invalid, with one exception discussed below. Tract "D" was patented to Gustafson on June 24, 1974, in trust for "occupants" of the Ouzinkie townsite. Appellants duly became "occupants" by timely initiating their claims prior to the repeal of the townsite laws by FLPMA and prior to approval of final subdivisional survey of Tract "D", which is the cutoff date under 43 CFR 2565.3(c). Accordingly, appellants are legally entitled to receive deeds to these lots, if they complete the requirements for them. See Leona R. Strang, 45 IBLA 156 (1979); James T. Friedman, 39 IBLA 229 (1979); Nancy A. Delkittie, 35 IBLA 370 (1978). ^{5/}

BLM's decision purports to erase the interests patented to Gustafson, and the derivative rights subsequently earned by appellants, by reforming his patent nunc pro tunc. Its reasons are that Gustafson should not have received title to Tract "D" because he had never applied for it ^{6/} and because USS 4871, with Tract "D" included, exceeded the 640-acre statutory maximum for townsites. BLM's action is an effort to alter rights created under the law by the issuance of the patent to Tract "D" and derivative rights earned by compliance with Departmental regulations in order to correct what it perceives as an erroneous grant. While we appreciate BLM's efforts to take corrective action, we cannot condone its doing so at appellants' expense, in view of the substantial countervailing equities which appellants have earned by investing their time, money, and labor in developing these lots in direct reliance on BLM's positive assurances that it was "legal" to do so, especially as it is possible to correct the patent without erasing appellants' rights.

Section 316 of FLPMA, 43 U.S.C. § 1746 (1976), grants the Secretary the authority to correct patents where necessary in order to eliminate errors. Accordingly, BLM is hereby directed to correct the erroneous patenting of excess acreage by amending the patent so that it will contain 640 acres. However, BLM may not eliminate any of the lands on which appellants, including Stephen Kenyon, have settled.

[2] Ouzinkie Village Corporation has responded and argued that it has superior legal rights to Tract "D" and that BLM properly canceled appellants' claims. We hold that appellants' rights are superior to respondent's. The passage of ANCSA on December 18, 1971, recognized respondent as an entity, gave it the right to select and receive title

^{5/} While Strang and Delkittie concerned Native townsites, the rules for determining the cutoff date for initiating claims are the same for Native and non-Native townsites. James T. Friedman, *supra*; Nancy A. Delkittie, *supra*; Leona R. Strang, *supra*; City of Klawock v. Andrew, 24 IBLA 85 (1976), *aff'd*, City of Klawock v. Gustafson, Civ. No. K-74-2 (D. Alaska Nov. 11, 1976).

^{6/} As noted above, Gustafsons' application of September 14, 1973, is somewhat ambiguous, although it does appear that he did not intend to apply for Tract "D."

to lands in Alaska, and withdrew lands for it to select. Respondent filed a selection application for Tract "D" on December 13, 1974, pursuant to ANCSA.

However, prior to the enactment of ANCSA, Tract "D" was segregated from devotion to any use other than as a townsite. On June 13, 1970, the Department promulgated a regulation, 43 CFR 2091.4, segregating from entry all public lands which were settled upon and occupied as townsites. Approval of USS 4871 in September 1971 officially established that Tract "D" was part of the area making up the Ouzinkie townsite. Thus, prior both to the enactment of ANCSA in December 1971 and to the filing of respondent's application in December 1974, Tract "D" was segregated from any entry unrelated to use as a townsite.

The segregation of these lands for use as a townsite created rights in those who were presently occupants and those who would become occupants before the cutoff of the opportunity to do so upon approval of final subdivisional survey, which rights in time could lead to acquisition of title. These rights were extant prior to the passage of ANCSA, which set aside the lands from which to satisfy Native claims in Alaska. Section 3(e) of ANCSA expressly excluded from the lands withdrawn for Native selection any lands which were subject to valid existing rights. Thus, Tract "D" was not withdrawn and is not subject to selection by respondent. ^{7/} While it may appear that respondent is

^{7/} We note that the Regional Solicitor, Alaska, advocated a similar position in his memorandum of February 20, 1979, to Gustafson, concerning the effect of FLPMA's repeal of the townsite laws on occupants who entered after October 21, 1976, albeit on a different legal basis:

"[I]t is doubtful that townsite lands which had been patented to the Townsite Trustee prior to ANCSA's enactment would be considered 'Federal lands' within the meaning of Sec. 3(e) of ANCSA. Nevertheless both patented and unpatented townsite lands are excepted from the ANCSA Sec. 11(a)(1) withdrawals because they are 'valid existing rights.'

"Section 2091.4 of 43 CFR (1977) provides the 'Public lands settled upon and occupied as a townsite are segregated from entry and may be entered under the [townsite laws].' The predecessors to this section, 43 CFR 2242.3-1 (April 1, 1964) and 43 CFR 255.26 (1933) are almost identical except that they permitted nonagricultural entries.

"At the moment the land is segregated for disposal under the townsite laws, occupants of the segregated land acquire certain rights under the Department's regulations (43 CFR Parts 2564 and 2565) which, in time, will lead to the acquisition of title. Land that is unoccupied when the segregation takes effect is open to occupancy until the date of subdivisional survey approval. If still unoccupied at that date the land can be acquired by the municipality. All of the land within the segregated townsite is therefore covered by preexisting rights held by either individual occupants or the municipality itself. Accordingly none of the land within the exterior boundaries is available for selection under ANCSA." (Emphasis supplied.)

being barred from achieving its entitlement to core lands, there is ample provision in section 11(a)(3)(A) of ANCSA to make up for this loss by making an alternate ("in lieu") selection.

[3] Respondent argues that it was not proper to convey Tract "D" as part of the townsite, as 43 U.S.C. § 719 (1976) limits townsite entry to "land occupied by the town" and 43 U.S.C. § 720 (1976) restricts the amount of land which the trustee may receive to 640 acres. It is too late to question whether the townsite unlawfully exceeded the limits of the area occupied by the town. This matter was resolved in September 1971 with the approval of the survey of the exterior boundaries of the townsite of Ouzinkie. At that time, the lands in USS 4871, including Tract "D", were formally devoted to disposition under the townsite laws to the exclusion of disposition under other laws.

Aside from the segregative effect which arose from the promulgation of the regulation segregating townsite lands, as discussed above, there are additional reasons for holding that selection of this land by Ouzinkie Village Corporation is barred. Every patent for public lands carries with it an implied affirmation of every fact made prerequisite to its issue, and no executive officer of the Government is authorized to reconsider the facts on which it was issued. Solicitor's Opinion, M-36539 (November 19, 1958); Amos D. Ruhl, 52 L.D. 262 (1928). Government officers may examine an issued patent to see if there is a possible basis either for recommendation of initiation of a judicial suit seeking cancellation or modification or correction of such patent pursuant to 43 U.S.C. § 1746 (1976). See Lee E. Williamson, 48 IBLA 329 (1980). However, the patenting of Tract "D" to Gustafson presumptively determined for the Department that respondent has no rights therein.

Moreover, even prior to the issuance of the patent, the notation of BLM records that this was townsite land served to bar its acquisition for other purposes under what has come to be known as the "notation rule." The notation rule was explained in an enclosure to a letter dated April 20, 1964, to the United States Attorney, Salt Lake City, from Attorney General Clark re Jay P. Nielson v. J. E. Keogh, Civ. No. C-158-63, as follows:

[I]t was held long ago that when a homestead entry is made, even though erroneously, the land is considered as withdrawn from further entry until such time as the entry has been cleared from the records. Bunker Hill Co. v. United States, 226 U.S. 548, 550 (1913); McMichael v. Murphy, 197 U.S. 304, 310-312 (1905); Hodges v. Colcord, 193 U.S. 192, 194-196 (1904); Hastings etc. Railroad Co. v. Whitney, 132 U.S. 357, 360-366 (1889); Putnam v. Ickes, 64 U.S. App. D.C. 339, 342, 78 F.2d 223, 226 (1935); Germania Iron Co. v. James, 89 Fed. 811, 814-817 (C.A. 8, 1898), app. dism. 195 U.S. 638.

Historically, then, no rights can be obtained in that part of the public domain which has been segregated by reason of a pre-existing appropriation -- even one subsequently found to be invalid. This same principle has long been applied by the Secretary to oil and gas leases. Within two years of the enactment of the Mineral Leasing Act, it was held in Martin Judge, 49 L.D. 171, 172 (1922) that "until an outstanding permit is canceled by the Commissioner and the notation of the cancellation made in the local office, no other person will be permitted to gain any right to a permit for the same class of deposits by the filing of an application therefor, or by the posting of notice of intention to apply for such a permit." None of the numerous amendments of the Act since 1922 has questioned the Martin Judge decision which has been uniformly followed by the Department of the Interior. Joyce A. Cabot, 63 I.D. 122-123 (1956); R. B. Whitaker, 63 I.D. 124, 126-128 (1956); Albert C. Massa, 63 I.D. 279, 286 (1956). [Emphasis added.]

We agree with respondent that the patent in question improperly exceeded the 640-acre maximum prescribed by 43 U.S.C. § 720 (1976) but, as discussed above, disagree that the matter should be resolved by deeding back all of Tract "D" in derogation of appellants' rights in lots located there. There is no reason to hold that the trustee's patent is void as to the entirety of Tract "D," but only so much of it as causes the townsite to exceed 640 acres. This, of course, will require a survey, which can be accomplished coincident to the subdivision of that portion of Tract "D" which is not excluded.

Following reduction of the size of the townsite to 640 acres, BLM should proceed to consider the merits of appellants' claims. It would seem that there will be a substantial amount of the townsite area unoccupied, even if all claims for townsite lots are found valid. Under the controlling regulations, the trustee must deed the unoccupied lands to the City of Ouzinkie, as it has applied for these lands. 43 CFR 2565.5(b). 8/ For the same reasons set out above, the City's rights are superior to respondent's. The City is the rightful successor to an interest in the area recognized prior to respondent's creation by ANCSA, 9/ and vested in Gustafson by patent in June 1979 prior to respondent's applying for Tract "D."

8/ This section provides as follows:

"(b) Sales to Federal, State and local governmental agencies. (1) Any lot or tract in the townsite which is subject to sale to the highest bidder by the trustee pursuant to this section may in lieu of disposition at public sale be sold by the trustee at a fair value to be fixed by him to any Federal or State agency or instrumentality or to any local governmental agency or instrumentality of the State for use for public purposes."

9/ See the Regional Solicitor's memorandum quoted above at n.7.

[4] BLM correctly informed Stephen Kenyon that his claim was invalid, but not for the reasons stated in its decision. Kenyon did not initiate his claim until November 20, 1976, after Congress had repealed the homesite laws in section 703(a) of FLPMA, 90 Stat. 2743, 2789-2790, on October 21, 1976. Homesite claims initiated after October 21, 1976, are invalid. Royal Harris, 43 IBLA 87 (1980). While we recognize that Kenyon relied to his substantial detriment on misrepresentations by Gustafson, we are powerless to help him, as the repeal of the townsite laws on October 21, 1976, subject only to valid rights existing on that date, removed the Department's authority to recognize townsite claims initiated after that date. Ibid. However, equity requires that the land occupied by him be included in the townsite, so that when it is deeded to the City of Ouzinkie by the trustee, Kenyon can seek to acquire it from the municipality.

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 in part as modified, vacated in part, and remanded for action consistent herewith.

Edward W. Stuebing
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Anne Poindexter Lewis
Administrative Judge

Douglas E. Henriques
Administrative Judge

APPENDIX

<u>IBLA No.</u>	<u>Appellant</u>
80-453	Stephen Kenyon
80-454	David Nysewander
80-455	Daniel Konigsberg
80-456	Bruce Swanson
80-457	Janey Wing
80-469	Charles Konigsberg
80-470	Lisa Konigsberg
80-471	Frances Konigsberg
80-478	David McIntosh
80-479	Bill Mann
80-480	Ircing Warner
80-481	Patrick Holmes
80-519	Frances Kelso
80-520	Matthew Dick
80-521	Andrew Konigsberg
80-522	Jan Konigsberg
80-586	Fred and Margaret Ogden

