

**Editor's note: 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 below.**

STEPHEN KENYON ET AL.  
(ON RECONSIDERATION)

IBLA 80-453, etc. 1/

Decided June 23, 1982

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

Petition for reconsideration granted: Stephen Kenyon, et al., 51 IBLA 368 (1980), vacated in part; townsite trustee's decisions affirmed.

1. Alaska: Townsites -- Segregation -- Townsites

Where the descriptive language accompanying a United States survey of the exterior of an Alaskan townsite notes expressly that the "townsite" of Ouzinkie is comprised of three tracts ("A, B, and C") and mentions elsewhere a fourth tract ("D") as being part of the "village" of Ouzinkie, Tract "D" is not properly regarded as being within the "townsite" under the regulations, and approval of the survey does not segregate it as part of the townsite.

2. Alaska: Townsites -- Mistakes -- Townsites

Where a tract of land (Tract "D") was included in a patent to a townsite trustee of four tracts (Tracts "A, B, C, and D"), but the trustee had not applied for or entered Tract "D," and where the inclusion and patenting of Tract "D" resulted in the transfer of acreage in excess of the maximum allowed by statute to be included in the townsite, the patent was erroneous insofar as it included Tract "D" and should be corrected by eliminating that tract.

Stephen Kenyon, et al., 51 IBLA 368 (1980), vacated in part.

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1/ See Appendix.

APPEARANCES: Robert H. Hume, Jr., Esq., Anchorage, Alaska, for Ouzinkie Native Corporation.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On December 30, 1980, this Board issued its opinion in Stephen Kenyon, et al., 51 IBLA 368 (1980), concerning 17 consolidated appeals from decisions of the townsite trustee for the Alaska State Office, Bureau of Land Management (BLM), rejecting settlement claims on undivided Tract "D" situated in the village of Ouzinkie, Alaska, as described by U.S. Survey (USS) 4871. In all but one appeal we held that BLM had improperly rejected these applications.

The one exception concerned the appeal of Stephen Kenyon (IBLA 80-453), where we held that Kenyon's application was properly rejected, but for reasons other than those announced by BLM. Kenyon's claim was not staked until November 20, 1976, after Congress had repealed the townsite laws in section 703(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 2789-90, on October 21, 1976. Applying the rule announced in Royal Harris, 43 IBLA 87 (1980), we held that Kenyon's claim was invalid because the repeal of the townsite laws removed the Department's authority to recognize townsite claims initiated after October 21, 1976. Stephen Kenyon, et al., supra at 376. Kenyon's petition for reconsideration of this holding was denied by order dated February 25, 1981.

On May 11, 1981, Ouzinkie Native Corporation (petitioner), which had appeared as respondent in the consolidated appeals, filed a petition for reconsideration of Stephen Kenyon, et al., supra. 2/ This petition is meritorious. Accordingly, we grant it and vacate the decision of December 30, 1980, except insofar as it concerned Kenyon's appeal.

[1] In Stephen Kenyon, et al., supra at 373, we held as follows:

[P]rior to the enactment of \* \* \* [the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. § 1601 (1976)] 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 \* \* \* [United States Survey] 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. [Emphasis supplied.]

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2/ Petitioner also requested that the matter be certified to the Alaska Native Claims Appeal Board for reconsideration. This request is denied.

The decision relied on the approval of USS 4871 as the critical event that designated Tract "D" as part of the Ouzinkie townsite, concluding that it therefore fell within the ambit of 43 CFR 2091.4 and was segregated from entry and appropriation for other purposes.

Petitioner correctly notes that USS 4871 actually specifically limited the Ouzinkie townsite to tracts "A, B, and C." The pertinent language appears on sheet 1 of USS 4871 and provides as follows:

U.S. SURVEY No. 4871, ALASKA  
TRACTS "A" THROUGH "D"  
IN FIVE SHEETS

SITUATED AT THE VILLAGE OF OUZINKIE, ALASKA  
COMPRISING TRACTS A, B, C, AND D

AND  
THE SUBDIVISION OF TRACTS A AND C  
AND

THE DEPENDENT RESURVEY OF LINES 1-3, and 3-2,  
U.S. SURVEY No. 1702, LINES 1-2, AND 2-3, U.S. SURVEY NO. 1974  
AND LINES 2-3, 3-4, and 4-1, U.S. SURVEY NO. 3169  
TRACTS A, B, AND C COMPRISE THE TOWNSITE OF OUZINKIE

APPROXIMATE GEODETIC POSITION OF TRACT A

LATITUDE 57 degrees 55.4' N. LONGITUDE 152 degrees 29.9' W.

AREA 802.32 ACRES

SURVEYED BY  
MASON W. THAYER, SUPERVISORY CADASTRAL SURVEYOR  
OCTOBER 7, 1966 to JUNE 23, 1971

UNDER SPECIAL INSTRUCTIONS DATED OCTOBER 4, 1966

AND APPROVED OCTOBER 5, 1966

AND

SUPPLEMENTAL SPECIAL INSTRUCTIONS DATED  
AND APPROVED MAY 13, 1971

[Emphasis supplied.]

This language states first that USS 4871 was a survey of tracts "A" through "D" and that these four tracts are "situated at the village of Ouzinkie, Alaska." The word "village" is used here in its conventional sense, helping to describe the geographical position of the survey near the

existing collection of abodes known as the "Village of Ouzinkie." This language later specifies that "Tracts A, B, and C comprise the townsite of Ouzinkie." (Emphasis supplied.) We must presume that this use of the word "townsite" in USS 4871 had legal significance, since the regulations provide that the survey itself determines the extent of the "townsite," as well as any exclusions. 43 CFR 2565.1. Thus, although Tract "D" is described in USS 4871 as being situated at the village of Ouzinkie, it is excluded from the description of the lands comprising the townsite of Ouzinkie. Accordingly, our finding that approval of USS 4871 in September 1971 officially established that Tract "D" was part of the Ouzinkie townsite was erroneous, since, by its own terms, USS 4871 excluded Tract "D" from this townsite. Moreover, our concomitant holding that Tract "D" was segregated as of the approval of USS 4871 in September 1971 from any appropriation unrelated to use as a townsite was also erroneous, and there were no townsite rights created in Tract "D" by this approval.

We now hold that approval of USS 4871 did not bar either the operation of the withdrawal of Tract "D" by section 11(a)(1) of ANCSA, 43 U.S.C. § 1610(a)(1) (1976), on December 18, 1971, or the application for selection of Tract "D" filed by petitioner on December 13, 1974, pursuant to ANCSA, supra. Since the lands in Tract "D" were withdrawn under ANCSA, they were not available for subsequent inclusion in the Ouzinkie townsite or for the subsequent establishment of townsite settlements, and BLM correctly so found.

[2] Thus, the patent issued to the townsite trustee, Gustafson, on June 24, 1974, which transferred to him not only tracts "A, B, and C," but also Tract "D," was erroneous insofar as it included Tract "D." We held originally that the propriety of this patent was resolved in September 1971 with the approval of USS 4871, including (as we held then) Tract "D." Id. at 374. In view of our present finding that approval of the survey in September 1971 did not include Tract "D" in the townsite, this holding was incorrect.

As we noted in our original decision, it did not appear that Gustafson intended to apply for patent to Tract "D" in September 1973. Id. at 372 n.6. Gustafson stated expressly in the decisions or appeal and in other correspondence that he had not entered or applied for Tract "D," probably because USS 4871 did not include it within the townsite. Additionally, including Tract "D" in the patent in addition to the other three tracts that were clearly intended to be included resulted in the establishment of a townsite in excess of the 640-acre maximum prescribed by 43 U.S.C. § 732 (repealed 1976). This fact, along with Gustafson's admission that he did not intend to apply for Tract "D," firmly establishes that tract "D" was erroneously included in the patent to Gustafson. BLM should consider initiating appropriate action to cancel the patent insofar as it granted Tract "D" to Gustafson.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the townsite trustee's

decisions appealed from are affirmed, and our decision in Stephen Kenyon, et al., supra, is vacated in part to conform 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	Irving 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

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\* Although Stephen Kenyon's case presented unique facts constituting separate grounds for rejection of his application (see above), the holding in the decision on reconsideration also affects his interests. Accordingly, he is named as a party herein.

November 25, 1985

IBLA 80-453	:	USS 4871
		: 65 IBLA 44 (1982)
		: Alaska Townsite Claims
STEPHEN KENYON ET AL.	:	:
		: Referred for Hearing

### ORDER

By decision filed on November 6, 1984, the United States District Court for the District of Alaska vacated our decision in Stephen Kenyon (On Reconsideration), 65 IBLA 44 (1982) and remanded the matter to the Department for further proceedings. The Court found that this decision was correct, "except insofar that it did not consider the estoppel issue." Ouzinkie Native Corp. v. Watt, et al., Civ. No. A80-196, D. Alaska, Nov. 6, 1984, slip op. at 2.

The Court ruled that it was necessary to remand the matter to the Department for a hearing on the estoppel claims of Kenyon, et al., both against the Federal government and against Ouzinkie Native Corp., (ONC), holding that there are questions of genuine fact regarding what notice Kenyon, et al., had of ONC's equitable claims to Tract D of USS 4871, and whether or not ONC in fact failed to notify defendants of its claims. The Court also held that, if the facts alleged by Kenyon, et al., are correct, "then potentially estoppel will lie against both the Federal government and Ouzinkie." Slip op. at 7.

On October 7, 1985, the Bureau of Land Management, through Departmental counsel, filed a report of remand pursuant to 43 CFR 4.29, recommending that the matter be referred to an administrative law judge to conduct a hearing on the estoppel issue. This report was duly served on opposing counsel, who have not responded.

The matter is hereby referred to the Hearings Division, office of Hearings and Appeals, for assignment to an administrative law judge who shall

65 IBLA 49A

(1) conduct a hearing on the questions identified by the Court in its decision, and (2) issue a decision on the matter, which, in the absence of timely a@l to this Board, will be final for the Department.

Philip Horton  
Chief Administrative Judge

We concur:

Franklin D. Arness  
Administrative Judge

Gail M. Frazier  
Administrative Judge

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65 IBLA 49B

