

HENRIETTA ROBERTS VADEN

IBLA 82-143

Decided January 20, 1983

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting application to purchase trade and manufacturing site. FF-76.

Reversed in part, set aside and referred to the Hearings Division in part.

1. Alaska National Interest Lands Conservation Act: Generally --
Alaska: Trade and Manufacturing Sites

Where lands embraced by a pending application for a trade and manufacturing site were included in a unit of the National Park System by sec. 201 of the Alaska National Interest Lands Conservation Act (ANILCA), 94 Stat. 2377, 16 U.S.C. § 410hh (Supp. V 1981), the trade and manufacturing site application was not legislatively approved by sec. 1328(a)(1) of ANILCA, 94 Stat. 2489, 16 U.S.C. § 3215(a)(1) (Supp. V 1981), but, rather, must be adjudicated under the laws pursuant to which it was initiated.

2. Alaska: Grazing -- Alaska: Trade and Manufacturing Sites --
Segregation: Generally

Where land is within a grazing lease issued pursuant to the Act of Mar. 4, 1927, as amended, 43 U.S.C.A. § 316 (West Supp. 1982), and that fact is properly noted on the public land records, the land is segregated from entry as a trade and manufacturing site under sec. 10 of the Act of May 14, 1898, as amended, 43 U.S.C. § 687a (1976). Where, however, the record indicates that the Bureau of Land Management treated the entryman's notice of

location of a settlement claim as a petition for determination under 43 CFR 4230.1 and approved it to the extent of any conflict with the grazing lease, the lease will not be a bar to the initiation of that settlement claim.

3. Alaska: Trade and Manufacturing Sites

Where a husband and wife are engaged in the same productive industry, they are properly treated as an "association of citizens" for the purposes of sec. 10 of the Act of May 14, 1898, as amended, 43 U.S.C. § 687a (1976), and, as such, are limited to a single trade and manufacturing site. However, where an applicant asserts otherwise, it is improper, to reject an application on this ground without affording the applicant an opportunity for a hearing to show that the spouses were, in fact, engaged in conducting separate productive enterprises.

APPEARANCES: Ernest Z. Rehbock, Esq., Anchorage, Alaska, for appellant; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Henrietta Roberts Vaden has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated October 8, 1981, rejecting her application to purchase a trade and manufacturing site, FF-76.

On September 23, 1966, appellant filed a notice of location of a settlement claim for approximately 80 acres of land situated in unsurveyed sec. 24, T. 1 S., R. 20 E., Copper River meridian, Alaska, pursuant to section 10 of the Act of May 14, 1898, as amended, 43 U.S.C. § 687a (1976). On October 26, 1966, in response to a BLM decision dated October 12, 1966, requiring in part that appellant indicate the date occupancy commenced, appellant filed an amended notice of location indicating that occupancy commenced on June 5, 1966. On June 7, 1971, appellant filed an application to purchase the land, indicating that occupancy commenced in June 1960. In a land report, dated March 14, 1972, the BLM examiner recommended that 46.85 acres of land be patented to appellant consistent with the requirements of the Act of May 14, 1898, supra. In a subsequent report, dated October 18, 1972, the BLM examiner reduced the recommended acreage to 16.73 acres. By decision dated December 8, 1972, BLM approved appellant's application as to the 16.73 acres actually occupied by appellant in the course of her guide and outfitting business, and rejected the application as to the remainder of the land sought. However, the decision also afforded appellant 30 days in which to submit evidence of occupancy of the remaining land. Appellant appealed to this Board.

By order dated February 27, 1973, the Board, noting that BLM had afforded appellant an opportunity to submit additional evidence in support of her application and that appellant had submitted such evidence on appeal, vacated the December 1972 BLM decision and remanded the case to BLM for reconsideration. In a supplemental land report, dated June 12, 1973, the BLM examiner accepted the recommendation in the October 1972 land report that the 16.73 acres of land be patented to appellant. By decision dated August 23, 1973, BLM rejected appellant's application in its entirety. On September 27, 1973, BLM vacated the August 1973 decision because it had erroneously rejected appellant's application in its entirety.

By letter to appellant dated July 14, 1976, BLM stated that appellant had occupied the 16.73-acre portion of the land sought in her application consistent with the requirements of the Act of May 14, 1898, supra, and that in order to proceed to patent "it would be necessary for you to relinquish the remainder of the land in your claim." On August 3, 1976, appellant filed a "Relinquishment of Application, Entry or Grant" in which she relinquished to the United States "any and all right, title, and interest" as to "all of lands described in Notice and Application to Purchase except: 16 acres more or less" surrounding the improvements placed on the trade and manufacturing site. (Emphasis in original.) By letter dated September 8, 1976, BLM informed appellant that 16.73 acres of land was excluded from the relinquishment. In a letter dated September 13, 1976, appellant agreed with this assessment.

In its October 1981 decision, BLM rejected appellant's application for two separate reasons. First, BLM concluded that since January 1, 1963, the land covered by appellant's application had not been open to occupancy under the Act of May 14, 1898, supra, and that "no rights could accrue to anyone claiming occupancy after that date." BLM noted that while appellant claimed occupancy since June 1960 in her application to purchase, she could not be given credit for any occupancy prior to the filing of a notice of location or application to purchase, since no notice of the claim had been filed in the proper BLM office within 90 days of initiation of the claim, as required by the applicable regulation, 43 CFR 2562.1(c). Accordingly, BLM held that June 5, 1966, the date originally indicated on appellant's amended notice of location as the date occupancy commenced, must be considered the date of initiation of the claim. At that time, however, the land was subject to a grazing lease, F-031469, which had issued on January 1, 1963, for a term of 10 years, to Douglas B. Vaden, appellant's husband at that time, pursuant to the Act of March 4, 1927, as amended, 43 U.S.C.A. § 316 (West Supp. 1982), and which served to segregate the land from entry. Thus, BLM held that the land embraced by appellant's trade and manufacturing site was not available for entry or settlement at the time settlement had been initiated.

As a second ground for rejection of the application, the State Office decision noted that appellant's former husband, Douglas B. Vaden, had received a patent for a different trade and manufacturing site (A 031451) for a business operating under the various names of Vaden Incorporated, Alaska Yukon Guide and Outfitters, and Alaska Yukon Guides. Noting that the information tendered in support of appellant's application had consisted of copies of income tax returns for Vaden Guiding and Alaska Yukon Guides, business licenses for Vaden Incorporated doing business as Alaska-Yukon Guide Service,

financial statements of both appellant and Douglas B. Vaden, as well as letters from previous customers stating that the Vadens had provided services, the State Office concluded that appellant and her husband had been involved in the same productive industry. Citing an old BLM decision, Alfred R. and Frances P. Cronin, Anchorage 060691 (July 2, 1968), the State Office held that appellant and her husband were, in effect, an "association" of citizens within the meaning of 43 U.S.C. § 687a (1976) and, as such, were jointly able to receive only a single trade and manufacturing site patent. Inasmuch as Douglas B. Vaden had already received a patent for one trade and manufacturing site, appellant's application was rejected.

In its decision, the State Office also took note of section 1328(a) of the Alaska National Interest Lands Conservation Act (ANILCA), Act of December 2, 1980, 94 Stat. 2371, 2489, 16 U.S.C. § 3215(a) (Supp. V 1981). Section 1328(a)(1) provides, in relevant part:

Subject to valid existing rights, all applications made pursuant to the Acts * * * [of] May 14, 1898 (30 Stat. 413) * * * which were filed with the Department of the Interior within the time provided by applicable law, and which describe land in Alaska that was available for entry under the aforementioned statutes when such entry occurred, are hereby approved on the one hundred and eightieth day following the effective date of this Act, except where provided otherwise by paragraph (3) or (4) of this subsection, or where the land description of the entry must be adjusted pursuant to subsection (b) of this section, in which cases approval pursuant to the terms of this subsection shall be effective at the time the adjustment becomes final.

The State Office noted, however, that the provisions of the Act which mandate automatic approval of an application did not apply herein because the land had not been subject to entry from January 1, 1963, to the present. Moreover, the State Office noted that the land embraced by the application had been included in the Wrangell-St. Elias National Park and Preserve established by section 201(a) of ANILCA, 94 Stat. 2381, 16 U.S.C. § 410hh (Supp. V 1981), and, therefore, under section 1328(a)(2) of ANILCA, the automatic legislative approval did not apply. Finally, the State Office adverted to an objection filed by the State of Alaska pursuant to section 1328(a)(3)(B) of ANILCA, alleging that the land described in appellant's application was necessary for access to other public lands. Inasmuch as a finding that section 1328(a)(1) of ANILCA legislatively approved appellant's trade and manufacturing site would obviate the need for any further consideration of the appeal, we will examine that question first.

[1] Appellant strongly objects to consideration of the protest filed by the State of Alaska, pointing out that the statute requires that the protest state "with specificity the facts upon which the conclusions concerning access are based and that no reasonable alternatives for access exist." Section 1328(a)(3)(B) of ANILCA. Appellant contends that "the form which was filed meets none of these requirements and affords not the slightest explanation documenting or explaining why access to public lands would require a cancellation of the entry" (Statement of Reasons at 9).

First, we would point out that a valid protest filed pursuant to this section does not necessarily require a cancellation of an entry, but, rather, simply results in adjudication of an entry pursuant to the law under which it was initiated. The protest filed by the State of Alaska was admittedly brief, inasmuch as it involved an existing road. While we would agree with appellant that a protest which fails to state with some particularity the grounds thereof would not meet the statutory requirements, it is unnecessary to adjudicate the substance of appellant's complaint as it relates to the protest filed by the State of Alaska, since it is clear that the lands which appellant seeks are within the Wrangell-St. Elias National Park and Preserve. Therefore, under section 1328(a)(2), appellant's trade and manufacturing site does not qualify for automatic legislative approval regardless of the specificity or lack thereof of the State of Alaska's protest.

The third ground for holding that the automatic legislative approval of section 1328(a)(1) did not apply to appellant's trade and manufacturing site was that the land was not available for entry when the entry was made. Since this is also one of the two grounds given for rejection of the application itself, we will examine this contention at some length.

[2] As noted above, at the time appellant filed her notice of location of settlement, the land was subject to grazing lease F-031469 issued to Douglas B. Vaden, who was, at that time, appellant's husband. The lease authorized the grazing of 40 horses on the following described land: "White River bar and adjacent meadows from the foot of Russell Glacier downstream to Ping Pong Mountain. Not leased by exact acreage." ^{1/} The status plat for unsurveyed T. 1 S., R. 20 E., Copper River meridian, Alaska, dated November 15, 1966, indicates that the entire township, including appellant's trade and manufacturing site, was within grazing lease F-031469. The record contains copies of grazing leases, with serial number F-031469, issued to Douglas B. Vaden for a term of 1 year in 1973 and 1975. In addition, the status plat of June 16, 1975, reflects that the entire township was still within the grazing lease.

It is well established that land within a grazing lease issued pursuant to the Act of March 4, 1927, supra, is not subject to appropriation under the public land laws. See, e.g., Sandra M. Pestrikoff, 23 IBLA 197 (1978). In Solicitor's Opinion, M-36454 (July 23, 1957), the Associate Solicitor, in construing the effect of grazing leases issued pursuant to the Act of March 4, 1927, supra, stated that

lands included in valid existing grazing leases must be considered as appropriated and segregated, and not available for entry under the homestead and similar public land laws relating to vacant unappropriated lands, unless and until such lands have been determined to be suitable for such purpose, and appropriate action to cancel the lease to the extent necessary has been taken.

^{1/} Section 7 of the Act of Mar. 4, 1927, as amended, 43 U.S.C.A. § 316f (West Supp. 1982), provides that leases "shall be made for grazing on a definite area except where local conditions or the administration of grazing privileges makes more practicable a lease based on the number of stock to be grazed."

Departmental regulations currently provide that lands leased under the Act of March 4, 1927, supra, are

not subject to settlement, location, and acquisition under the nonmineral public land laws applicable to Alaska unless and until the authorized officer of the Bureau of Land Management determines that the grazing lease should be canceled or reduced in order to permit, in the public interest and without undue interference with the grazing operations, the appropriate development and utilization of the lands * * * and that the lands are suitable for and otherwise subject to the intended settlement, location, entry or acquisition.

43 CFR 4230.1; see, e.g., Norman Opheim, 41 IBLA 338 (1979). This regulation was originally promulgated as 43 CFR 63.22 (23 FR 5169 (July 8, 1958)).

In her statement of reasons for appeal, appellant does not deny that a grazing lease has a segregative effect; rather, she argues that her occupancy of at least 16.73 acres of the trade and manufacturing site predated issuance of the lease. Even assuming that actual occupancy predated the lease, BLM was correct in concluding that appellant can be given no credit for that occupancy. Under the Act of April 29, 1950, 43 U.S.C. § 687a-1 (1976), a trade and manufacturing site claimant is required to file a notice of location of settlement in the appropriate land office within 90 days of initiation of the claim, failing in which the claimant "shall not be given credit for the occupancy maintained in the claim" prior to filing a notice of location or application to purchase. See Eugene M. Witt, 15 IBLA 378 (1974). Failure to notify BLM will not nullify a claim, however, it will prevent the claimant from obtaining any credit for his occupancy prior to a proper filing. Stuart Grant Ramsted, 55 IBLA 223 (1981); United States v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981). Accordingly, occupancy alone will not prevent a withdrawal from attaching. Stuart Grant Ramsted, supra; Kennecott Copper Co., 8 IBLA 21, 79 I.D. 636 (1972). Similarly, mere occupancy will not prevent the segregative effect arising from issuance of a grazing lease pursuant to the Act of March 4, 1927, supra.

Appellant also argues that the existence of a grazing lease cannot be a basis for rejecting her claim where the lease did not apply, by its terms, to any exact acreage. We recognize that grazing lease F-031469 did not apply to any specific acreage, but rather, consistent with the statute under which it was issued (see note 1), it was based on the number of stock to be grazed. However, the lease did describe with some particularity the area covered. This fact was reflected in the BLM land status plats. Moreover, the November 15, 1966, status plat clearly showed that appellant's trade and manufacturing site was within the area covered by the description in the grazing lease. Accordingly, we conclude that appellant's entry was within the area subject to grazing lease F-031469.

As indicated above, however, the Department has long provided for cancellation or reduction of grazing leases issued pursuant to the Act of March 4, 1927, supra, where it would promote appropriate development and utilization of the public lands. See 43 CFR 4131.3-1 (1967) (now 43 CFR 4230.1). Moreover, the applicable regulation, 43 CFR 4131.3-1 (1967), also

provided that "[a]n application on the appropriate form or a notice on a form approved by the Director if applicable to the class of entry contemplated, will be accepted and treated as a petition for determination." See Sandra M. Pestrikoff, supra.

The record indicates that BLM recognized that appellant's notice of location might be treated as a petition for determination under 43 CFR 4131.3-1 (1967). In a memo to the file, dated December 30, 1966, Joyce A. Fleischer, a BLM employee, states: "Since the grazing lease is based on number of livestock to be grazed, I do not feel it necessary to follow the procedures set forth in 43 CFR 4131.3-1 (1967). Further, Henrietta R. Vaden, is apparently wife or relative of Douglas B. [Vaden, the grazing lessee]." Attached to the memo is a note, presumably signed by Robert C. Hampson, Area Manager, Glennallen Resource Area, BLM, which suggests: "Just a note to the file which may be construed as 'determination' if question is ever raised." There subsequently followed a memorandum dated April 11, 1967, signed by Hampson, which states:

There appears to be no objection to the acknowledgement of the subject T&M Site. The grazing lease (F-31469) was not issued by area and it would not be necessary to reduce the lease for the T&M.

The T&M applicant is the wife of the grazing lessee and the lessee's written concurrence does not seem necessary.

It is recommended that the T&M Site be acknowledged.

Three days later, on April 14, 1967, the State Office sent appellant an acknowledgement of her claim which stated, "Our records show that the lands are subject to settlement or occupancy."

The question is whether the actions by BLM constituted a "determination" within the contemplation of 43 CFR 4131.3-1 (1967). It seems clear to us that the State Office personnel who handled this filing intended to make a "determination" that allowance of the notice of location of settlement would promote appropriate development and utilization of the public lands. While it is true that no specific notice of this determination was provided to the grazing lessee, we cannot blind ourselves to the fact that the lessee was the applicant's husband and that the letter of acknowledgement of the claim was sent to their joint address. Considering the unusual fact situation disclosed by this case file, we find that the State Office did, in effect, reduce the grazing lease by deleting the area embraced by the notice of location from the leased area.

We must point out, however, that the status plats were never altered to reflect this determination. There is no question that the general rule of public land law adjudication is that "land segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of the local land office." California and Oregon Land Co. v. Hulen and Hunnicut, 46 L.D. 55, 57 (1917). As we have recently noted:

Fairness to all members of the public dictates that, where records are improperly noted so as to appear to effectively foreclose the initiation of rights by individuals in a specific tract of land, the Department should treat the land in question as it is noted on the records, until such time as the records are changed to correctly reflect the true status of the land.

Carmel J. McIntyre (On Judicial Remand), 67 IBLA 317, 327 (1982). This "notation rule" is grounded on considerations of equity to all individuals who might be desirous of gaining rights to Federal land, and who rely on the records of the Department in attempting to acquire such rights. Thus, there can be little doubt that the failure to alter records indicating that land was segregated from public settlement on entry would normally preclude any remedial action by this Board to retroactively sanction a settlement perfected while the records of the Department indicated that the land was not available for entry.

The segregation created by grazing leases in Alaska, however, has a unique status. Unlike the situation that exists in virtually every other type of withdrawal or segregation, a petitioner who is successful in having land excluded from a grazing lease is accorded "a preference right to settle upon or enter the lands in accordance with the determination." 43 CFR 4131.3-1 (1967). This being the case, the fact that the grazing lease remained of record did not adversely affect any other potential settler, since all were free to petition for a reduction of the grazing lease, and if successful, would have been accorded a preference right of entry. Thus, in these limited circumstances, the improper notation of the records would not serve as a bar to the initiation of rights where, as here, BLM had made the requisite determination required by 43 CFR 4131.3-1 (1967). Therefore, we find that the land was available for entry and settlement as of April 14, 1967.

[3] BLM also rejected the trade and manufacturing site application on the grounds that appellant and her former husband were engaged in only a single productive enterprise, thereby constituting an "association" within the meaning of 43 U.S.C. § 687a (1976). Thus, this association was limited to a single trade and manufacturing site and, inasmuch as Douglas B. Vaden had already received a patent for one such site, the application of appellant must be rejected.

Appellant admits that prior to their divorce in 1972 "both spouses acted in some respects in common or joint capacities," but contends that further inquiries "would tend to show that the Vadens did not contemplate or have one productive industry by partners, but two individuals each of one seeking and carrying on a separate productive entity upon separate portions of larger tracts of land" (Statement of Reasons at 12).

The record before the Board, however, provides much support for BLM's conclusion that appellant and her former husband were properly treated as an "association," insofar as the guiding services provided at the site were concerned. This, however, is essentially a question of fact, and as we have noted in the context of other settlement claims, when the factual basis for a determination of noncompliance of a settlement claim is a matter of dispute due process requires that appellant be afforded a fact-finding hearing. Donald J. Thomas, 22 IBLA 210 (1975). Thus, we will set aside BLM's rejection of appellant's trade and manufacturing site application and refer the

matter to the Hearings Division for the assignment of an Administrative Law Judge who will make an initial decision on this question. Any party adversely affected by such decision may appeal to this Board as provided by 43 CFR 4.410. Appellant shall bear the burden of establishing her entitlement to the 16.73 acres as a trade and manufacturing site.

Appellant also contends that BLM is estopped to reject her application by virtue of the prior approval of 16.73 acres of land sought in her application and payment for a survey of the land. While we recognize that appellant's application was originally approved as to 16.73 acres of land by decision dated December 8, 1972, that decision was vacated by the Board. No other action was taken to approve appellant's application. The record indicates that appellant did submit \$3,000 as a deposit for a survey of the land covered by her trade and manufacturing site, as required by decision dated November 29, 1976, and section 13 of the Act of March 3, 1891, as amended, 43 U.S.C.A. § 687a-6 (1976). The latter decision stated that upon receipt of the deposit a survey would be executed and "upon filing of the official plat of survey, publication will be directed."

Under Departmental regulations regarding publication, publication relates to notices of intended final proof on entries of public lands, where the express purpose is to afford persons with an interest in the land or who have information concerning the validity of the entry to either object or communicate that information. See 43 CFR 1824.0-1. The clear intent of the regulation is to provide BLM an opportunity to evaluate the validity of an entry prior to patent. Moreover, the survey itself constitutes part of the final proof, which clearly served to allow BLM resolve any conflicts with other claims. George Mor, A-30914 (May 27, 1968). Accordingly, the fact that an applicant for a trade and manufacturing site pays the required deposit for a survey does not automatically entitle him or her to a patent of the land. At any time prior to the issuance of patent, the Department may reject an application to purchase where it does not comport with the law. Board of County Commissioners, 22 IBLA 182 (1975). No property rights inure to an applicant upon the mere filing of his application. Everett Elvin Tibbets, 61 I.D. 397, 401 (1954).

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 reversed in part, and set aside and referred to the Hearings Division in part.

James L. Burski
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Edward W. Stuebing
Administrative Judge

