

CITY OF KLAWOCK

IBLA 85-404

Decided October 7, 1986

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving an interim conveyance to a Native village corporation. AA-6984-A.

Affirmed.

1. Appeals--Rules of Practice: Appeals: Failure to Appeal

The failure to file a timely appeal from a decision approving an interim conveyance of land to a Native corporation precludes a later appeal as to that land. Such an appeal must be dismissed.

2. Alaska: Townsites--Segregation--Townsites

Where a tract of land was segregated for townsite purposes but not entered or surveyed as a townsite as of Dec. 18, 1971, the land is eligible for conveyance to a Native village corporation despite a reservation in that conveyance of valid existing rights.

APPEARANCES: Robert W. George, Jr., Mayor, City of Klawock, Alaska, James N. Reeves, Esq., and James E. Torgerson, Esq., Anchorage, Alaska, for appellant; John M. Allen, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management; Leslie Ching Allen, Esq., and J. J. Leary, Esq., Seattle, Washington, for Klawock Heenya Corporation.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The City of Klawock, Alaska, a municipal corporation, appeals from decisions of the Section Chief, Branch of Alaska Native Claims Settlement Act Adjudication of the Alaska State Office, Bureau of Land Management (BLM), dated January 18, 1985, and April 7, 1980. By these decisions, BLM declared land on Klawock Island, Alaska, proper for village selection and approved interim conveyances of the surface estate to the Klawock Heenya Corporation, a Native corporation eligible for land selection pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1615 (1982).

In order to determine the extent of appellant's interest in Klawock Island as of December 18, 1971, it is necessary to examine the somewhat convoluted history of the area known as the Klawock townsite. Klawock Island was among the islands of the Alexander Archipelago withdrawn by Presidential Proclamation No. 37 (Aug. 20, 1902), for a forest reserve which later became the Tongass National Forest. Klawock townsite was inaugurated by a pair of executive orders: Executive Order (E.O.) 4712, dated August 30, 1927, and E.O. 4955, dated August 30, 1928. Each order excluded land from the Tongass National Forest. The lands described in the executive orders were "reserved to be disposed of for townsite purposes as provided by section 11 of the Act of March 3, 1891 (26 Stat. 1095, 1099), and the Act of May 25, 1926 (44 Stat. 629)." E.O. 4712 excluded approximately 195 acres from the Tongass National Forest. This acreage constituted Klawock Island, excluding a trade and manufacturing salmon cannery site (U.S. Survey 1101). E.O. 4955 described approximately 230 acres of Prince of Wales Island, commonly called "Bayview."

In 1938 an exterior survey (No. 1569) was conducted for the purpose of designating lands included in E.O. 4955 (Bayview) in a townsite. In 1940, these lands were entered by the trustee. However, the trustee declined to enter lands on Klawock Island and no similar survey was conducted on the Klawock Island lands described in E.O. 4712. On July 17, 1962, the townsite trustee filed the following letter with the Manager, Anchorage Land Office:

Restoration of Klawock TS Elimination, E.O. 4712

The conclusion reached as a result of a field examination made jointly by the Townsite Trustee and Terry Robbins, Supervisory Cadastral Officer, Juneau, on June 25, 1962 is that the lands described in E.O. 4712 are surplus to the needs of Klawock Townsite. There are sufficient lands included in E.O. 4955 to accommodate a town many times larger than the present town of Klawock.

Therefore, action is requested to restore the lands described in E.O. 4712 and an administrative survey made so the lands not occupied or claimed can be subject to selection by the State.

There are no doubt some valid claims within the area that will be surveyed at the time the exterior boundaries are being surveyed. The restoration case should be serialized.

On December 18, 1971, ANCSA section 11(a)(1) withdrew public lands surrounding Native villages "from all forms of appropriation under the public land laws," except for the lands already "subject to valid existing rights." 43 U.S.C. § 1610(a)(1) (1982).

On May 6, 1974, Klawock Heenya Corporation filed selection application AA-6984-A for Klawock Island and other lands in its core township, pursuant

to section 16(b) of ANCSA, 43 U.S.C. § 1615(b) (1982). On April 7, 1980, BLM issued a decision approving interim conveyance for patent to Klawock Heenya Corporation. The lands approved for interim conveyance included a portion of Klawock Island but excluded a parcel which had previously been included in a Native allotment application. 1/ By interim conveyance (IC) No. 348, dated July 18, 1980, BLM transferred this portion of Klawock Island to Klawock Heenya Corporation. 2/ The City of Klawock did not then file an appeal from the April 7, 1980, conveyance decision, although it appears the city was served with a copy of the decision.

As previously noted, a portion of Klawock Island was excluded from the first conveyance because the land was subject to Native allotment application AA-7957 (parcel B) (the Hanlon application), filed on April 24, 1972. On April 21, 1975, BLM rejected the Hanlon application because the applicant had not established 5-years use and occupancy prior to withdrawal of the land for inclusion in the Tongass National Forest. Although the case record does not contain a copy of either the Native allotment application or the ultimate rejection of the application, BLM states the Hanlon application was finally rejected on March 2, 1984, with no appeal.

The case record also contains a letter dated January 8, 1985, to the Mayor of Klawock from the Chief, Native Allotment Section, BLM, stating the Hanlon application was rejected by notice issued March 2, 1984, "on the basis of the Shields class action lawsuit," which determined that Native allotment applicants had "to establish personal, rather than ancestral, use and occupancy of land prior to withdrawal for National Forests." The letter also acknowledges that:

Although a portion of the lands in Mrs. Hanlon's application are on Klawock Island and Klawock Island was excluded in the withdrawal for the Tongass National Forest, the exclusion of Klawock Island from Tongass did not permit Native allotment entry. Therefore, the case file of Fannie Hanlon has been closed and the application removed from our plats. [3/]

On January 18, 1985, BLM issued the decision that the northern portion of Klawock Island, which had been included in parcel B of AA-7957, should be

1/ "T. 73 S., R. 81 E. [Copper River Meridian]

Sec. 9, that portion identified as Klawock Island, excluding Native allotment application AA-7957 Parcel B, and U.S. Survey 1101;

Sec. 16, that portion identified as Klawock Island. Containing approximately 84 acres."

(Apr. 7, 1980, Decision at 4).

2/ "T. 73 S., R. 81 E.

Sec. 9, lots 1, 3 and 4, excluding Native allotment application AA-7957 Parcel B;
Sec. 16, lot 2.

Containing approximately 70 acres." [After survey.]

3/ A portion of the Hanlon application was rejected also because it included patented land within U.S. Survey 1101.

conveyed to the Klawock Heenya Native corporation. In this decision, BLM found that the application was properly filed as to this parcel, met the requirements of ANCSA and the regulations, and did not conflict with any lawful entry. BLM described the parcel as lots 3 and 4, excluding interim conveyance 348, in sec. 9, T. 73 S., R. 81 E., Copper River Meridian. The grant was subject to patent confirming boundary description and acreage; to the restrictions of section 14(c) of ANCSA, 43 U.S.C. § 1613(c) (1982), as to conveyance by the grantee; and, in particular, to:

Valid existing rights therein, if any, including but not limited to those created by any lease (including a lease issued under Sec. 6(g) of the Alaska Statehood Act of July 7, 1958, 48 U.S.C. Ch. 2, Sec. 6(g)), contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. Further, pursuant to Sec. 17(b)(2) of the Alaska Native Claims Settlement Act of December 18, 1971 (ANCSA), 43 U.S.C. 1601, 1616(b)(2), any valid existing right recognized by ANCSA shall continue to have whatever right of access as is now provided for under existing law * * *.

(Decision at 2).

It was Departmental practice to recognize lands in a townsite as constituting valid existing rights and hence not withdrawn for village selection under ANCSA if the occupants had filed their petition (made application) for townsite survey before the December 18, 1971, enactment of ANCSA. Aleknagik Natives Ltd. v. Andrus, Civ. No. A-77-200 (D. Alaska, Mar. 19, 1985, Slip Op. at 7-8). Aleknagik cited a memorandum dated June 30, 1972, from the Director of BLM to the Secretary of the Interior concerning the treatment of ongoing townsites after the passage of ANCSA. This memorandum stated that the townsite land would be considered subject to valid existing rights if either: (1) an application for townsite survey is on file; (2) the trustee has applied for patent; or (3) the trustee has made final entry. The Court in Aleknagik affirmed the Secretary's interpretation that vacant land within the exterior surveyed boundaries of a townsite was subject to valid existing rights under ANCSA and that unsurveyed unoccupied lots within such boundaries were to be deeded to the municipality. See Aleknagik, slip op. at 22.

The Federal Land Policy and Management Act of 1976, commonly known as FLPMA, expressly repealed the townsite laws, 90 Stat. 2789, but its savings provision, section 701(a), 90 Stat. 2786, preserved any land use right or authorization existing on the date of approval, *i.e.*, October 21, 1976. The Secretary interpreted FLPMA to foreclose new townsite entries and occupancy while preserving existing rights of individuals or municipalities as they existed on October 21, 1976. Thus, FLPMA preserved the municipalities' rights to vacant, unsubdivided townsite lands to the extent those rights existed on October 21, 1976. Aleknagik Slip Op. at 44.

[1] In its initial statements of reasons, appellant refers only to the January 18, 1985, decision to convey the northern parcel. ^{4/} Its supplemental statement of reasons, however, states that this appeal is taken from both the January 18, 1985, and the April 7, 1980, decisions (which together approved the conveyance of all of Klawock Island except for the patented trade and manufacturing site, U.S. Survey 1101). However, there was no timely appeal from the 1980 decision and the lands approved for conveyance by that decision (including the southern portion of Klawock Island) were described in the interim conveyance issued on July 18, 1980.

At the time of the 1980 decision, the Alaska Native Claims Appeal Board (ANCAB) existed to consider appeals taken from such conveyance decisions. ^{5/} At that time, 43 CFR 4.903(a) (1981) set forth the procedure for filing an appeal.

Notice of appeal. Appellant shall file a written notice of appeal, signed by him or his authorized representative, with the Alaska Native Claims Appeal Board within 30 days after the date of receipt of the decision by appellant, or if publication of the decision in the Federal Register is made, within 30 days after publication of the decision in the Federal Register, whichever shall occur first; provided that, with respect to any decision on an application for conveyance of a primary place of residence which was received by the applicant or published in the Federal Register prior to August 6, 1975, appellant shall have 45 days from the effective date of this subpart in which to file a notice of appeal.

The functions of ANCAB have since been transferred to this Board, which also has a 30-day mandatory time limit for the filing of appeals. 43 CFR 4.411. The requirement of timely filing is jurisdictional. Lavonne E. Grewell, 23 IBLA 190 (1976). The purpose of such a rule is to establish a definite time when administrative proceedings are at an end in order to protect the public interest, thus strict adherence is required. Compare Browder v. Director, Department of Corrections of Illinois, 434 U.S. 257, 264 (1978). Appellant cannot now challenge the 1980 decision. Virgil V. Peterson, 66 IBLA 156 (1982); see Ralph Dickinson, 39 IBLA 258 (1979). The failure to file a timely appeal from the 1980 decision approving interim conveyance of the southern portion of Klawock Island precludes a later appeal as to that parcel. See State of Alaska, 22 IBLA 229 (1975). Therefore, this appeal is dismissed as to the land approved for conveyance by the April 7, 1980, decision. We note also that interim conveyances of land to Native Corporations

^{4/} Klawock Island was also surveyed at this point, and determined to contain 118 acres instead of the 195 acres estimated in E.O. 4712.

^{5/} ANCAB was abolished by Secretarial Order 3078 dated Apr. 29, 1982, effective June 30, 1982, which transferred all responsibilities delegated to ANCAB to the Interior Board of Land Appeals (IBLA). An interim rule implementing the Secretarial Order, published June 18, 1982, enlarged IBLA's scope of authority to include jurisdiction to make final Departmental decisions in appeals relating to land selections arising under ANCSA. 43 CFR 4.1(b)(3)(i), 47 FR 26390 (June 18, 1982).

have been recognized by Congress as conveyances having the legal effect of patents, 43 U.S.C. § 162(j)(1) (1982), and hence, BLM lacks jurisdiction to adjudicate appellant's claim to the land previously embraced in IC No. 348. However, appellant's challenge to the 1985 decision is timely.

[2] The issue in this appeal is whether "segregation for townsite purposes" was a "valid existing right" sufficient to preclude selection by and later conveyance to the village corporation. The City of Klawock claims Klawock Island was and remains segregated townsite land and this segregation constitutes a valid existing right sufficient to preclude conveyance to the Native corporation. The City of Klawock makes the following statements in support of its claim. The City of Klawock petitioned for survey before 1925. Klawock Island was surveyed in 1925. In 1929, a letter issued reserving Klawock Island for homesteading. Therefore, it argues, the island was unavailable for conveyance to the Native corporation. Appellant acknowledges the procedures of the Alaska Native Townsite Act were not strictly followed, *e.g.* no formal petition was made, but points to the standard used in Aleknagik Natives Ltd. v. Andrus, *supra* Slip Op. at 7. In Aleknagik, a town was found to have valid existing rights in lands segregated for townsite purposes, prior to the December 18, 1971, effective date of ANCSA. Appellant asserts Klawock meets Aleknagik's tests. First, the area or its exterior boundaries must have been surveyed. Second, it must have been reserved for disposal before December 18, 1971. Here, appellant claims the island was surveyed in 1925. E.O. 4712 and E.O. 4955 reserved Klawock Island. Appellant contends the townsite trustee's actions support its conclusion that the island has been segregated for townsite purposes since August 30, 1927, and was never restored to the public domain.

BLM, through counsel, responds that conveyance to Klawock Heenya Native Corporation is proper because the parcel was available public land. BLM maintains that E.O. 4712 did not create a land entitlement because acceptance of a townsite petition is not automatic. The trustee had discretion to determine that Klawock Island was not part of the Klawock townsite. BLM asserts that although the island was segregated for townsite purposes prior to December 18, 1971, it was never actually included in the townsite. To apply Aleknagik the land must have been part of the townsite, not simply segregated.

Section 11 of the Act of March 3, 1891, 26 Stat. 1095, 1099, 43 U.S.C. § 732 (1970), repealed, Federal Land Policy and Management Act of 1976, section 703(a), 90 Stat. 2790, provided for entry of Alaska lands by a trustee named by the Secretary of the Interior for townsite purposes for the benefit of the occupants to be disposed of in a manner consistent with the townsite provisions applicable in the lower 48 states, *i.e.*, 43 U.S.C. § 718 (1970). The Act of May 25, 1926, 44 Stat. 629, 630, 43 U.S.C. §§ 733-736 (1970), provided that land occupied by Alaska Natives as a townsite could be surveyed, patented, and deeded to the occupants. As noted above, these cited townsite laws were repealed by FLPMA, 90 Stat. 2789.

Klawock Heenya Corporation filed its selection application on May 6, 1974, before FLPMA repealed the townsite laws. Because Klawock Island lies within its core township, the Native corporation was obliged by ANCSA to

file for this land. ANCSA requires each Native village to select all of the township in which it is located. 43 U.S.C. § 1611(a) (1982).

Appellant's heavy reliance on Aleknagik is misplaced. Although both Aleknagik and Klawock Island involve unpatented lands, Aleknagik involved unsubdivided land within a surveyed townsite. Unlike the disputed land in Aleknagik, Klawock Island was neither embraced in an interior subdivided survey, an exterior survey, nor a townsite entry filed by the townsite trustee. In fact, the record indicates the trustee had determined the land to be surplus for townsite purposes. In this case, the amount of land reserved for a Klawock townsite exceeded the land entered and patented. ^{6/}

It appears from the record that the disputed parcel of Klawock Island was reserved by executive order but was never included in a townsite application. The townsite trustee did not make formal entry for townsite purposes, nor was the required exterior survey conducted. Klawock claims the 1925 measurements were tantamount to a survey. However, this "survey" was apparently conducted to provide a land description for the executive order itself. ^{7/} Klawock also claims the executive order was the functional equivalent of an application sufficient to vest rights to the townsite. Supplemental Statement of Reasons at 11. It was not. The executive order excluded land from the forest reserve so it could be disposed of under the townsite laws. It is clear from the wording of the executive order that further action had to be taken to establish a townsite by fulfilling the requirements of those townsite laws cited in the executive order. Further we cannot find the trustee's assumption of authority rendered the land part of the townsite.

After FLPMA repealed the townsite laws this land was no longer eligible for disposal in the manner contemplated by E.O. 4712. A townsite trustee had the discretionary authority to determine whether or not to grant requested lands. Stephen Kenyon (On Reconsideration), 65 IBLA 44 (1982). The trustee did not request a townsite survey of the island, but recommended it revert to public domain. Even though this did not take place, the lands were public lands for purposes of ANCSA and therefore subject to selection by the village corporation under 43 U.S.C. § 1615 (1982).

^{6/} In City of Klawock, 24 IBLA 85, 83 I.D. 47 (1976), the city challenged the decision of the townsite trustee to grant Native townsite lots in the area encompassed by U.S. Survey No. 1569, not on Klawock Island, to non-Natives who occupied the lots at the time of subdivisional plat of survey. The city was also an applicant for those lots and argued that only the individuals who occupied lots at the time of patent to the trustee were entitled to deeds. The Board affirmed the trustee's decision, citing the discretion given the trustee by the general regulations under the non-Native townsite law when there is no conflict with the 1926 Act. However, the Board declined to rule on the status of unoccupied lots.

^{7/} The "survey" was conducted for the purpose of defining the exclusion from the forest reserve to be included within the townsite reserve and was carried out by Forest Service personnel rather than public land surveyors employed by the Interior Department.

We hold, therefore, that the interim conveyance of the disputed parcel of Klawock Island to Klawock Heenya Corporation was proper. The City of Klawock had no valid existing right which would preclude the interim conveyance.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Alaska State Office is affirmed.

R. W. Mullen
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

