

UNITED STATES  
v.  
NORMA J. HODGE

IBLA 87-312

Decided September 26, 1989

Appeal from a decision of Administrative Law Judge Michael L. Morehouse upholding validity of trade and manufacturing site application AA-8307.

Reversed.

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

Where, prior to May 31, 1981, a Native corporation for which land in Alaska has been withdrawn filed a protest against a trade and manufacturing site application covering that land, legislative approval of the site did not occur under sec. 1328(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3215(a) (1982).

2. Alaska: Trade and Manufacturing Sites

An applicant for a trade and manufacturing site fails to establish her entitlement to that site under the Trade and Manufacturing Site Act where, at a hearing convened following initiation of a Government contest challenging the validity of her claim, she fails to prove by a preponderance of the evidence that she had a reasonable expectation of deriving a profit from her cabin rental/ recreational use business conducted on the site at the time she filed her application to purchase the site.

APPEARANCES: David A. Golter, Esq., and William F. Tull, Esq., Palmer, Alaska, for Norma J. Hodge; James R. Mothershead, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The Bureau of Land Management (BLM) has appealed from a decision of Administrative Law Judge Michael L. Morehouse, dated January 14, 1987, upholding the validity of the trade and manufacturing (T & M) site claim of Norma J. Hodge (AA-8307). We reverse.

On January 23, 1973, Hodge filed a notice of the location of T & M site claim AA-8307 on 40 acres of land (the NE<sup>^</sup> NE<sup>^</sup> sec. 25, T. 20 N., R. 9 E., Seward Meridian, Alaska) situated in the Talkeetna Mountains overlooking the Matanuska Glacier and the Matanuska River Valley. <sup>1/</sup> The site is located approximately 100 miles northeast of Anchorage, Alaska, just off the Glenn Highway at Mile 103.5. In her location notice, Hodge asserted occupancy as of November 1, 1972, with no improvements, for the purpose of engaging in the business of "cabin rentals."

Hodge's T & M site claim arises under section 10 of the Act of May 14, 1898, as amended (the T & M Act), 43 U.S.C. § 687a (1982) (repealed by section 703(a) of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2789, effective October 21, 1986, subject to valid existing claims). That statute provides as follows:

Any citizen of the United States or any association of such citizens or any corporation \* \* \* in possession of and occupying public lands in Alaska in good faith for the purposes of trade, manufacture, or other productive industry, may each purchase one claim only not exceeding eighty acres of such land \* \* \* upon submission of proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry.

Slightly earlier, Nancy Reese, Hodge's sister-in-law, had filed another notice of location for a T & M site claim (AA-8246) for 80 acres of land (the NW<sup>^</sup> NE<sup>^</sup> and NE<sup>^</sup> NW<sup>^</sup> sec. 25) immediately adjacent to Hodge's claim directly to the west. Hodge is the sister of Elden Reese, who is Nancy Reese's husband. Elden Reese is the owner of lands to the south of these claims, including 80 acres (the SW<sup>^</sup> NE<sup>^</sup> and SE<sup>^</sup> NW<sup>^</sup> sec. 25) immediately adjacent to Nancy Reese's claim to the south. These lands were patented to Elden Reese (Patent No. 50-80-0140) in February 1964, pursuant to his homestead claim.

As discussed below, Hodge's site was subsequently extensively developed as part of a joint project involving both her site and Nancy Reese's, as well as lands within Elden Reese's patented homestead. A full description of the physical layout at these sites is elucidating. <sup>2/</sup>

The Glenn Highway traverses sec. 25, running almost due east to west approximately 400 feet south of the line marking the southern boundary of Hodge's and Nancy Reese's claims, i.e., southern border of the NW<sup>^</sup> and NE<sup>^</sup> of sec. 25. Thus, it runs through Elden Reese's patented lands, and there is a strip of land approximately 400 feet wide belonging to Elden Reese that separates Nancy Reese's site from the highway. There is a similar strip of patented land separating Hodge's site from the highway, but it is not owned by Elden Reese.

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<sup>1/</sup> The lands in the vicinity have been surveyed.

<sup>2/</sup> The layout of the sites is described in Exhs. 1, 6, 7, 8, and 11.

Hodge's and Nancy Reese's T & M sites lie on the north side of the Glenn Highway on lands that slope upward sharply to the north, away from the highway. The Matanuska Glacier runs roughly east/west to the south of the highway, and the claims sit less than a mile from the glacier at its closest point. The Chugach Mountains also lie to the southeast of the sites, approximately 3 miles distant. Because of their elevation, the northern portions of the lands covered by Hodge's and Nancy Reese's T & M sites provide spectacular views of the glacier and mountains.

These sites were developed, beginning in 1973, by the construction of a substantial access road to both claim sites. Both Elden Reese and Buddy Hodge (Nancy Hodge's husband) initially contributed time to construction of the road, but Elden Reese did the vast majority of the work. The road, which climbs the ridge on the site in a large "switchback," is distinguishable as a clear "Z" on aerial photographs of the sites. The road was well constructed and provides access to the claims in all but the worst winter weather (Tr. 199, 247, 410).

The road was constructed in several steps. First, in 1973 a spur was driven off of the Glenn Highway across the 400-foot strip owned by Elden Reese (Tr. 255). This spur runs from southeast to northwest approximately one-fourth mile to an elevation approximately 100 feet above the highway and reaches into the southern portion of Nancy Reese's site.

Next, a road was driven eastward from the end of the spur, approximately three-fourths mile, that is, nearly to the eastern border of Hodge's site, in its southern half. This lower road was flat, as the contours of the slope run east to west.

Next, returning to the end of the spur, a "switchback" road was constructed up the steep slope. This switchback road runs from southwest to northeast approximately one mile, ending near the eastern border of Hodge's site very close to its northern border. The switchback road gained approximately 400 feet in altitude. Thus, it terminated approximately three-eighths mile to the north and 400 feet above the terminus of the earlier, lower road.

Finally, an "upper" road was constructed westward from the end of the switchback, approximately three-fourths mile, that is, nearly to the western border of Reese's site, very close to its northern border. This road was also flat, running along a high ridge parallel to the earlier, lower road. The views from this high ridge, as shown by photographs in the record, are indeed spectacular. <sup>3/</sup>

From January 1973 to January 1978, a total of five cabins were constructed on the two sites, two on Hodge's and three on Reese's (Tr. 275).

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<sup>3/</sup> The record shows that additional road work was done, including construction of a loop road off of the lower road, running to its south. Also, as of the date of the hearing, the road has evidently been constantly improved by Elden Reese.

One cabin (the lower cabin) was constructed on the lower road on Hodge's site; the other (the upper cabin) on the upper road. The record is not absolutely clear where the three cabins on Reese's site were situated or what amenities they contained. However, it is apparent that all cabins on the two sites were of similar design and were constructed of similar materials by Elden Reese, although they did vary in size (Tr. 128-29, 149, 191, 257).

Scenic lookouts were constructed, outhouses and picnic tables were placed on the sites, and garbage pits were dug (Tr. 251). A spring was developed on Nancy Reese's site to provide water to both sites (Tr. 252).

The history of the development of the facilities on Hodge's site just prior to and after the filing of Hodge's application to purchase on January 20, 1978, is reflected in contemporary documents, including BLM land reports and decisions, as well as Hodge's application documentation, and the sequence of development was generally confirmed by testimony at the hearing. <sup>4/</sup> On July 8, 1977, BLM realty specialists examined Hodge's claim, and, on July 21, 1977, described the claim as follows:

There has been additional road building on the site and an additional cabin has been constructed. Cabin construction has not reached the degree where the cabins could be rented. There [were] no signs or notices proclaiming any cabin rental business. As of this date the examiners must conclude that no cabin rental business exists.

(Exh. 9). The record confirms that the cabins on Hodge's site were not completed in July 1977. They had not been furnished with doors or windows and were therefore open to the elements (Tr. 173).

On October 14, 1977, the BLM realty specialists again examined Hodge's claim, the status of which was described in a memorandum to the Area Manager, Peninsula Resource Area, Alaska, BLM, dated November 11, 1977:

There has been additional site development and cabin construction since the July 8, 1977 examination. There has been picnic areas with tables and garbage disposal areas and sanitary facilities constructed.

The two cabins on the site do not appear finished to the degree that they could be rented.

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<sup>4/</sup> As discussed below, the critical date for determining whether the site complied with the requirements of the T & M Act was Jan. 20, 1978, the date Hodge filed her application for purchase, in which she averred that her business was established. The 5-year statutory life of the T & M entry expired on Jan. 23, 1978. Even if the critical date were the latter date, Hodge would be in no better position, as the record does not reveal that any additional development occurred on the site between Jan. 20 and Jan. 23, 1978.

No rental activity was observed by the examiners. No signs denoting a rental operation were observed.

The examiners conclude that no rental operation exists as of October 14, 1977.

(Exh. 10). Despite the pessimism of BLM's report, the record discloses that the two cabins on the Hodge site had been furnished with doors and windows by October 1977 (Tr. 148). Although Elden Reese was still working on the sites (Tr. 181), development of lookouts and picnic areas on the site (Tr. 458-59) had rendered it complete for many recreational uses by this time, and the record confirms that Reese's and Hodge's sites had been jointly used, on a small scale, for camping and other recreational uses between June and October 1977 (Tr. 422-23).

The question as to the state of completion of the cabins on Hodge's site as of the end of the compliance period on January 20, 1978, is at issue. It is clear from the record that these cabins were only very roughly finished at this time, but were nevertheless habitable, and, in fact, they were rented in January 1978. However, the record fails to disclose that additional work was done between October 1977 and January 20, 1978. Thus, the cabins were, as described in BLM's October 1977 land report, crude accommodations that could not be expected to command a high rental. As discussed below, the amount received for the January 1978 rentals was, in fact, very low.

The question of whether there was a sign at the entrance to the Glenn Highway denoting Hodge's rental operation was disputed. Although a small sign stating "Hodge's Retreat" was placed on a tree near the entrance at some time, we credit BLM's conclusion in its October 1977 report that there was no sign that would effectively draw potential customers specifically to Hodge's site.

On January 20, 1978, just prior to the expiration of the maximum 5-year statutory life of the entry on January 23, Hodge filed an application to purchase the tract. In that application, Hodge asserted that she was engaged in the business of "cabin rentals, camping & picnic facilities & scenic recreation area." She stated that she had expended \$63,375 in clearing the land, building and maintaining three-fourths of a mile of road, campgrounds, and garbage dumps, and constructing two cabins equipped with wood or oil heat, tables, bunks and cook stoves, two outhouses, and three picnic tables.

Also attached to the purchase application were documents indicating that the land on Hodge's claim had been cleared and the road there built and maintained between 1973 and 1976. These documents indicate that building and other supplies were purchased between August 3, 1976, and January 13, 1978, and that one cabin was started in 1976. That cabin and another cabin, along with the outhouses, garbage dumps, and picnic areas, were finished in 1977. The documents also show that Hodge obtained a State business license and advertised in the newspaper as "Hodge's Retreat, Cabin Rentals & Camp Grounds" in January 1978. Finally, the documents show that a total of \$270

in income was received as a result of renting the cabins on the Hodge site for two weekends in January 1978 and for the period January through the end of March 1978. Not all of the latter rental is cognizable, however, as the compliance period ended on January 20, 1978.

By decision dated June 20, 1978, BLM, while noting that Hodge's purchase application and attached documents indicated that she had expended much time and effort in placing improvements on the land, held her T & M site claim for rejection pending the submission of evidence that she was actually conducting a business on the land. Specifically, BLM required Hodge to submit additional information within 30 days showing the extent of the business conducted on the land prior to and as of the filing of her purchase application, to-wit: copies of signed lease agreements, statements from customers who had paid for use of the site, copies of business records showing her income from the business, and copies of business licenses.

On July 21, 1978, Hodge responded to the June 1978 BLM decision, submitting a copy of the lease agreement applicable with respect to the rental of a cabin for the period January through March 1978 and copies of the receipts for rent paid with respect to rental of a cabin for the two weekends in January 1978. In a cover letter, Hodge stated: "I did not have a business license prior to 1978, as I had no income prior to 1978, other than part of the park fees which I could not claim." She explained that, prior to that time, she and Nancy Reese had intended to operate their sites as a joint venture and that, for a time, "park fees" for the use of both T & M sites had been collected at the entrance to Reese's site. However, Hodge stated that the joint venture had been discontinued when BLM informed them that both sites had to be operated separately. She concluded: "I [did] have a business developed on my T & M site with income coming from it, at the time I turned in application to purchase."

In one document, Hodge stated that she had arranged for her brother Elden Reese to manage her T & M site. Indeed, the record is clear that Hodge personally played only a very small role both in the development of the site that was held in her name and the prosecution of the application to purchase the site. Hodge and her husband, who reside in Washington State, were evidently present at the site only twice after her brother filed her notice of location for her in January 1973, each time for an extended period. In the summer of 1973, they worked on the site and helped to clear it (Tr. 243). Buddy Hodge evidently helped to build the road, operating the bulldozer (Tr. 455). They did not return until the summer of 1976, when they worked to clear the site of trees and brush (Tr. 243, 298-99). They left the site and, as of the date of the hearing, had not returned, due to Norma Hodge's desire to avoid "stress" (Tr. 243, 277, 299-300).

In their absence, which became permanent in 1976, Elden and Nancy Reese assumed virtually complete control over Hodge's interest. Reese's address appears on most documentation concerning the site, although these documents were apparently signed by Hodge. Until 1977, Reese planned and operated the two sites together, effectively as one large recreational facility

(Tr. 314). 5/ In 1977, following a suggestion by BLM, some small efforts were made to distinguish the two claims, but it is evident that the two sites continued to be jointly run through the date of the hearing. There was no written agreement in place between Hodge and the Reeses governing the arrangement (Tr. 280-81). In 1983, Hodge gave her power of attorney to Elden Reese, and he and his wife appeared as Hodge's representatives at hearings convened in 1983 and 1986. Hodge did not attend either hearing.

On June 21, 1979, Lance Lockard, a BLM realty specialist, examined Hodge's T & M site claim in the company of two other BLM employees and Elden Reese. The results of that examination are contained in an August 20, 1979, Land Report (Exh. 1). The report notes that the access road is "well-built and maintained," but indicates that there were no signs that either cabin had been used. Specifically, the report noted that the chimneys above the roof showed no sign of use, a fact corroborated by testimony that no creosote or discoloration was noted on them (Tr. 45, 60, 99). Despite the evidence of nonuse, based on the evidence in the record, we are persuaded that one of the cabins was rented between January 1 and April 1, 1978, and the other for two weekends in January 1978. 6/ Thus, evidence to support

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5/ It is evident from the record that the recreation business for the combined T & M sites of Nancy Reese and Norma Hodge was conceived, planned, constructed, and operated as a single venture. Elden Reese, Nancy Reese, Buddy Hodge, and Norma Hodge were co-operatives in this venture. It was evident in 1977 that Elden Reese was working the two parcels as one parcel (Tr. 189), and that the sites were mutually dependent (Tr. 200).

The sites are served by a single access road that was planned to use the two sites together. No independent access was provided to any part of Hodge's site. Similarly, access to the upper part of Nancy Reese's site would be interrupted if Hodge's site were not included. All costs for the road were lumped together, and the road was constructed jointly by the parties. All cabins are roughly the same, being of similar materials and design, and were all constructed by Elden Reese. The sites were jointly run: income from the modest use of the sites was pooled and distributed without regard to which site was actually used by a customer (Tr. 436); this arrangement continued after Jan. 20, 1978 (Tr. 438). Records of use were kept for both sites together (Tr. 479). There was only one water source for both sites (Tr. 314).

6/ Occupancy of the cabins is established by the testimony of Nancy Reese, as corroborated by the rental receipts for the successive weekends in January 1978 and the signed lease agreement for the period January through March 1978. Although the June 1979 land report indicates that only the upper cabin was suitable for occupancy during the winter months, because it had a stove which was connected to the chimney (Tr. 36-37, 48, 61), the testimony of Elden Reese to the contrary provides a persuasive explanation. Reese stated that the lower cabin originally had an oil heater installed in the summer or fall of 1977, which was in operation over the winter months. Elden Reese explained that the oil heater was subsequently replaced with a wood stove, which BLM observed, unconnected to the chimney, during the June 1979 BLM field examination (Tr. 267, 331-32, 385). Thus, the record

the validity of Hodge's entry, which turns on the state of affairs as of January 20, 1978, the critical date, is limited.

The 1979 BLM land report admitted that the land encompassed by Hodge's T & M site claim was "generally suited for use as a cabin rental business." However, after reviewing all of the evidence submitted by Hodge in support of her purchase application, the report concluded that Hodge's actual use of her T & M site for the purpose of conducting a productive industry, which was confined to a "short period in January, 1978 (1 lease and 4 days of rentals)," was not sufficient to constitute compliance with section 10 of the T & M Act. Accordingly, the report recommended that BLM initiate a contest seeking cancellation of Hodge's T & M site claim.

On October 10, 1980, BLM filed a contest complaint, charging that Hodge had failed to comply with section 10 of the Act of May 14, 1898, and applicable Departmental regulations because (1) she had failed to actually use and occupy her T & M site for the purpose of trade, manufacture, or other productive industry "[either] during the life of the claim or at the time application to purchase was filed on January 20, 1978"; (2) she was attempting to acquire the land for a "prospective cabin rental, camping, picnic and scenic site"; and (3) she had "failed to make a good faith attempt to prove up on [her] claim." Hodge filed an answer timely and a hearing was subsequently held before Judge Morehouse on March 11 and 12, 1986, in Anchorage, Alaska. <sup>7/</sup> As noted above, Hodge did not appear her-self; Elden and Nancy Reese appeared as her representatives, assisted by counsel.

In his January 1987 decision, Judge Morehouse concluded that Hodge's representatives had established by a preponderance of the evidence that she had satisfied the requirements for a valid T & M site claim. Judge Morehouse noted the improvements constructed on the site and stressed the fact that she did receive revenue in connection with the operation of her site, although not a large amount. He held that the law did not require

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fn. 6 (continued)

indicates that both cabins were habitable during the winter of 1977-78. After the conclusion of the March 1986 hearing, Hodge submitted a copy of the receipt for the rental of the cabin for the period January through March 1978. BLM contends on appeal that this evidence should be disregarded where it was submitted "outside the record made at the hearing." Evidence submitted following the conclusion of a hearing will ordinarily only be considered for the limited purpose of determining whether to grant another hearing. United States v. Rice, 73 IBLA 128, 141 (1983); David A. Burns, 30 IBLA 359, 368 (1977). However, we need not entertain this question, because we regard the record as sufficient to establish that one cabin on Hodge's T & M site was rented for the period January through March 1978, and the other was rented for 2 weekends.

<sup>7/</sup> This hearing was actually a rehearing because, although a hearing was originally held in May 1983 in Anchorage, Alaska, no complete transcript of those proceedings was ever produced (Tr. 5).

that a profitable operation have been developed, but only that "a profit can be reasonably expected in the future."

[1] Before addressing the question of whether Hodge satisfied the requirements of section 10 of the T & M Act, we shall consider whether her T & M site application was legislatively approved by section 1328(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3215(a) (1982). That statute provides in essence that all T & M site applications (among other types of applications) were approved on May 31, 1981, the 180th day following December 2, 1980. However, section 1328(a)(3)(A) of ANILCA creates an exception, barring legislative approval where a Native corporation for whose selection the land has been withdrawn files a protest on or before May 31, 1981. If such protest were filed, the application must be adjudicated pursuant to the requirements of section 10 of the T & M Act.

On May 29, 1981, prior to the May 31 deadline, Cook Inlet Region, Inc. (CIRI), a Native corporation, did file a protest challenging approval of T & M site application AA-8307 and other applications, stating: "It has not been demonstrated that the applicants are entitled to the lands encompassed in their applications, which lands are also withdrawn for and selected by Cook Inlet Region, Inc." <sup>8/</sup> The master title plat for T. 20 N., R. 9 E., Seward Meridian, Alaska, as of June 5, 1978, confirms that the township was subject to CIRI's selection applications AA-11153-31 and AA-11153-33. By notice dated September 1, 1981, BLM notified Hodge that CIRI's protest appeared to meet the criteria set forth in section 1328 of ANILCA and that her application could not be considered legislatively approved.

In her answer to BLM's statement of reasons, Hodge contends that her T & M site application was legislatively approved by section 1328(a) of ANILCA, supra, because CIRI's protest was insufficient to require adjudication of the application. We disagree. Unlike other sections of ANILCA barring legislative approval when a protest is filed, section 1328(a) of ANILCA does not require that the Native corporation's protest set forth in any detail the basis for its contention that the applicant is not entitled to the land described in the application. <sup>9/</sup> While it is true that CIRI's

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<sup>8/</sup> The State of Alaska also filed a protest on June 1, 1981, after the 180th day following Dec. 2, 1980, challenging approval of T & M site application AA-8307. This protest was withdrawn by the State on Dec. 31, 1981.

<sup>9/</sup> Compare, secs. 1328(a)(3)(B) of ANILCA, 16 U.S.C. § 3215(a)(3)(B) (1982) and sec. 905(a)(5)(B) of ANILCA, 43 U.S.C. § 1634(a)(5)(B) (1982) (requiring the State of Alaska to file a protest "stating that the land described in the application is necessary for access" to certain lands, resources, or bodies of water, and further requiring the protest to state "with specificity the facts upon which the conclusions concerning access are based"); cf. State of Alaska (Elliot R. Lind) (On Reconsideration), 104 IBLA 12 (1988), and State of Alaska, 95 IBLA 196, 200 (1987) (holding that an affirmative statement in the words of the statute is required to meet the requirements of section 905(a)(5)(B) of ANILCA).

protest does not parrot the words of the statute, it is nevertheless implicit that it does not regard Hodge as entitled to the land sought. Section 1328(a) of ANILCA precludes legislative approval and compels adjudication of a T & M site application where a Native corporation objects to the applicant's entitlement, asserting that it also had an interest in the land. CIRI's protest is sufficient to compel adjudication of Hodge's T & M site application. 10/

[2] Under the T & M Act, any citizen or association of citizens claiming a T & M site must submit proof that the area embraces improvements of the claimant and is needed in the prosecution of the claimant's trade, manufacture, or other productive industry. Section 5 of the Act of April 29, 1950, 43 U.S.C. § 687a-1 (1982), instituted the requirement of the filing of notice of location of T & M claims, and also required that the proof or showing must be filed within 5 years after the filing of the notice of claim. 11/

It has long been the rule that a site for a prospective business cannot be acquired under the T & M Act, and that the land must actually be used and occupied for the purpose the trade, manufacture, or other productive industry when it was first so occupied. 43 CFR 2562.3(a)(1). This requirement has been consistently interpreted to mean that a T & M applicant must show, as a present fact at the time of filing of his application, that the land applied for was being utilized in connection with some business, trade, or industry. United States v. Crow, 28 IBLA 345, 349 (1977), aff'd, Crow v. Andrus, Civ. No. F77-12 (D. Alaska June 23, 1978); Carl A. Bracale, Jr., A-31149 (Apr. 20, 1970); Herschel E. Crutchfield, A-30876 (Sept. 30, 1968), and cases cited. Moreover, to make this showing, there must be evidence from which it can be concluded that, as of the date the application is filed, an applicant is engaged in a bona fide commercial enterprise from which he hopes to derive a profit. It is not essential to show that a profitable operation has been developed, but, in the absence of such showing, there must be evidence of an investment of such a nature that a reasonable return could be expected. United States v. Brandt-Erichsen, 46 IBLA 239, 251 (1980); United States v. Ward, 43 IBLA 333, 337 (1979); James E. Allen, A-30085 (Feb. 23, 1965). Significantly, it is the rule that "[t]he receipt of a few dollars over a period of years does not satisfy these criteria." Herschel E. Crutchfield, supra.

In circumstances very similar to those presented by this appeal, this Board held that a T & M site application citing use as a recreation site

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10/ In view of this holding, it is unnecessary to consider whether Hodge's failure to appeal from the Notice of Sept. 1, 1981, rendered BLM's determination final. We also note that our holding in this matter appears to render it unnecessary to adjudicate CIRI's protest, which is evidently still pending (Tr. 479).

11/ This provision was also repealed, subject to valid existing rights, effective Oct. 21, 1986, by section 703(a) of FLPMA, supra.

is properly rejected even though a cabin, campground, and access roads were completed on the site, where, during the 5-year life of the T & M claim, the land was used only intermittently for campsite rentals, and where the revenues derived from renting the site as a campground were not adequate to engender the belief that the applicant was engaged in a productive industry or that he could be reasonably expected to garner a profit from such endeavor. United States v. Crow, *supra*. In that case, the applicant had shown over \$750 in income for recreational use of his site (as shown below, this was more than three times that shown by Hodge's representatives), and had only \$3,000 in costs in developing the site (substantially smaller than those incurred at Hodge's site). 12/

Both Hodge's and Nancy Reese's sites were rented as a single facility for camping and other recreational uses during 1977. Customers were charged \$3 and \$5 per car, respectively, for day use and overnight camping upon entrance to Reese's site (Tr. 403, 435-36). Revenues and expenses were then divided between Nancy Reese and Hodge according to an informal cooperative agreement, based on the percentage of the total acreage encompassed by each site. Thus, Nancy Reese would receive two-thirds of the revenue for her 80 acres, Hodge one-third for her 40 acres.

Hodge's representatives roughly estimated that revenues for this period were estimated at between \$300 and \$400 (Tr. 423), but presented no con-vincing corroborative evidence. Further, there is no evidence at all as to how many cars actually used Hodge's, as opposed to Reese's, site. In any event, only one-third of that amount was attributed by the informal cooper-ative agreement to Hodge's site (Tr. 422-23). Thus, even overlooking the paucity of proof on the point and presuming that the cooperative agreement presents a valid basis for attributing the income, we can find that Hodge's claim earned no more than \$133 in camping fees for this period. 13/

The only revenue from the rental of the cabins on Hodge's site prior to the filing of the application to purchase derived from the rental of a cabin on successive weekends in January 1978 (\$20) and part of the rental of a cabin for the period January 1 through April 1, 1978 (\$55) (Tr. 423-25, 439-41). 14/ This amounts to a total of only \$208 in income for the entire

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12/ See also Jay Frederick Cornell, 4 IBLA 12 (1971), *aff'd*, Cornell v. Morton, Civ. No. 73-1230 (9th Cir. Sept. 3, 1974), where gross receipts of \$450 were held inadequate to support a T & M site for recreation, where an airstrip, picnic tables, campsites, trails, and an outhouse had been constructed on the site.

13/ BLM contends that the failure of Hodge's representatives to adequately substantiate the receipt of income from use of her T & M site for recreational purposes and the rental of cabins by supporting the receipt of income by corroborating evidence should compel rejection of her claim, citing United States v. Block, 12 IBLA 393, 403, 80 I.D. 571, 575 (1973). We need not decide this point, as, even assuming arguendo that the receipts were adequately proved, Hodge would not prevail.

14/ The rental of \$250 was for the period of Jan. 1 through Apr. 1, 1978, a period of 91 days. The revenue received as of the Jan. 20, 1978, cut-off is thus prorated at approximately \$2.75 per day, amounting to \$55.

statutory life of Hodge's T & M site claim. By itself, this income was inadequate to establish the validity of Hodge's claim. See United States v. Crow, *supra*; Herschel E. Crutchfield, *supra*.

This is not the end of the inquiry, however. Neither section 10 of the Act of May 14, 1898, nor its implementing regulations requires that a T & M site claimant establish that his business has operated for any specific period of time. James P. Seibert, A-30967 (Apr. 3, 1969). Of course, where a T & M site claimant fails to complete development of his site and, thus, fails to initiate operation of his business until just prior to the expiration of his claim, he runs the risk of not being able to prove that he has established a bona fide commercial enterprise. So it is here.

Nevertheless, the presence of a bona fide commercial enterprise cannot be ruled out merely because only small proceeds were received: a site could be finally developed only very late in its life and still present such great potential for profit that it could be valid. That is, evidence of great potential for profit may make up for the absence of a record of operations and income, but only if the evidence is sufficient to establish that the claimant has "commenced operation of a business reasonably calculated to return a profit." See James P. Seibert, *supra*. However, the burden of proving such income-generating potential of the business lay with Hodge, as applicant for patent to public land under the T & M law. See United States v. Crow, *supra*; Lynn E. Erickson, 10 IBLA 11, 80 I.D. 215 (1973); Lee S. Gardner, A-30586 (Sept. 26, 1966). She failed to meet this burden.

We do not question that the improvements made on Hodge's site were sufficient to attract paying customers seeking recreation, but are unable to conclude from the present record that such business could be reasonably calculated to return a profit. The record does not contain sufficient evidence to conclude that there was a reasonable expectation that Hodge's business, as it existed at the time she filed her purchase application, would ever generate a profit, especially given the substantial investment made in the project. 15/ Hodge's representatives failed to submit convincing evidence that the improvements made to her site, while possibly capable of attracting paying customers, were sufficient to attract such customers in such numbers that she had a reasonable prospect of keeping pace with maintenance costs, let alone recouping the initial investment in the site. 16/ Such evidence

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15/ In her purchase application, Hodge stated that she had improved her site at a total cost of \$63,375. She based this figure on the value of the labor and other costs involved in building the three-fourths of a mile of road to and through the site and otherwise clearing the land (900 hours x \$65/hour = \$58,500), the cost of building the two cabins (\$4,000), the cost of building the two outhouses (\$500), and the cost of building the three picnic tables (\$375). At the hearing, it was established that only a third of the cost of building the road and clearing the land was attributable to Hodge's T & M site, bringing the total cost down to \$24,375 (Tr. 312).

16/ Hodge relies on United States v. Marsh, which was decided by Administrative Law Judge E. Kendall Clarke on Mar. 2, 1979, who concluded that the T & M site claimant had proven that he was engaged in a productive

as was presented is to the contrary. In fact, no great number of people actually used the site, and many of these were admittedly friends of the Reeses (Tr. 428). The costs of admission and cabin rental were very low, and the accommodations at the site were such that it would not be reasonable to expect them to generate much income.

Hodge also failed to overcome certain facts which indicate that the site was not capable of generating a profit at the time she filed her purchase application. These facts are that, during the entire year of 1977, recreational use of the site was only able to generate at most \$133 (one-third of \$400). Further, while the lower cabin was evidently built in 1976 and finished in the summer of 1977 and the upper cabin was built and finished in the summer of 1977, no income was generated from rental of the cabins until January 1978, when they were rented for very insubstantial sums. Finally, although the hearing was convened long after the date of the application, no proof was presented that the enterprise had in fact been operated at a profit in the intervening years.

Elden Reese effectively admitted at the hearing that the site, in its state as of January 20, 1978 (and even as late as the date of the hearing), was not capable of making a profit without additional improvements:

Q [by counsel for Hodge] Now, there's been some talk that -- by [a BLM official], he testified that there was a lot of -- a lot of investment put in in improvements for what could be considered a relatively small return, a lot of work was done in improvements. How do you justify all the work that was done in the roads for what has been, up to date, relatively small return?

A [by Elden Reese] Well, I think like any business that I've ever been in, you start from zero and work up. In the future we intend to put 10, 12 more cabins on that site and it will one day make a profit. [Emphasis supplied.]

(Tr. 270-71).

It is clear from the testimony that the costs of improvements to the Hodge site were borne primarily by Elden and Nancy Reese who did most of the work. Indeed the Reeses acknowledged that the only cash investment in the property by Hodge was \$2,000 to defray some of the expenses (Tr. 309-10, 427). One apparent reason the Reeses were willing to carry the investment themselves was that it was contemplated all along that the Reese T & M site

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fn. 16 (continued)

industry during the statutory life of his claim. Of course, the Secretary of the Interior and the Board of Land Appeals, his delegate, are not bound by decisions of Departmental Administrative Law Judges. In any event, Marsh is notably distinguished by the fact that, as the Judge found, the cabins had been rented "on a rather regular basis" during the 6-month period prior to the expiration of the statutory life of the claim. The record in the present case demonstrates only minimal rental of the cabins.

and the Hodge T & M site would be jointly operated (Tr. 245, 251, 314; see note 5 supra). Elden Reese further acknowledged in his testimony quoted above that the investment was pinned to an expectation of additional cabins on the property in the future (Tr. 271). John Bowman concluded in his testimony on behalf of BLM that a prudent person would not make the kind of investment Elden Reese had made in the Hodge site on the expectation of returning a profit on two cabin rentals on 40 acres of land where the cabins were a thousand feet apart, although he felt "if you were viewing it as a real estate project, then it would be very valuable property" (Tr. 229). It is clear from the record that the Hodge T & M site itself did not encompass a viable productive enterprise at the time the purchase application was filed.

In the absence of proof of potential for profitability as of the date the application to purchase was filed, we cannot conclude that Hodge's representatives proved that her T & M site encompassed a productive industry at the time she filed her purchase application. See United States v. Crow, supra at 350. At best, Hodge established only that her T & M site was then "prospectively viable." Compare United States v. Hill, 33 IBLA 395, 400 (1978). That will not suffice. Id. at 399-401. As an applicant for patent to public land under the T & M law, Hodge had the burden of showing compliance with the law and regulations. United States v. Crow, supra; see Lynn E. Erickson, supra; Lee S. Gardner, supra. The ultimate burden of proof thus rested with Hodge, and we conclude that she failed to adequately establish her entitlement under section 10 of the Act of May 14, 1898. United States v. Ward, supra; United States v. Tippetts, 29 IBLA 348 (1977).

Because we conclude that Hodge failed to establish her entitlement to her T & M site, we need not address the other issues raised by BLM in the course of challenging her T & M site claim. 17/ To the extent not expressly considered herein, the parties' arguments have been considered and rejected.

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17/ We note that Nancy Reese's 80-acre T & M site claim was approved by BLM in 1981 (Tr. 23, 192). While our conclusion that there was a lack of potential for profit on Hodge's claim might equally have applied to Reese's claim, we are now powerless to address the validity of the latter, as the issuance of patent has deprived the Department of jurisdiction over the lands.

For the first time on appeal, BLM challenges Hodge's T & M site on the basis that Hodge and her sister-in-law Nancy Reese constituted an "association," within the meaning of section 10 of the T & M Act, which had exhausted its entitlement under that statute by virtue of the patent of 80 acres in Reese's T & M site in 1981. As discussed above at note 5, the record amply supports a conclusion that Hodge's site was planned, developed, and managed as part of a joint enterprise with Elden Reese, Nancy Reese, Hodge, and her husband. However, in view of our holding that Hodge is not otherwise entitled to her site, it is unnecessary to consider the legal effect of this association.

Accordingly, we conclude that Judge Morehouse erred in upholding the validity of Hodge's T & M site claim and, therefore, reverse that decision. Hodge's T & M site application is hereby rejected and her claim cancelled.

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.

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David L. Hughes  
Administrative Judge

I concur:

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C. Randall Grant, Jr.  
Administrative Judge