

INTERIOR BOARD OF LAND APPEALS

Thomas B. Craig

134 IBLA 145 (November 7, 1995)

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THOMAS B. CRAIG

IBLA 93-614

Decided November 7, 1995

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying request for reinstatement and equitable adjudication of and rejecting application to purchase headquarters site claim. AA-55463.

Affirmed.

1. Alaska: Headquarters Sites—Equitable Adjudication: Substantial Compliance

BLM properly denies a request to reinstate a headquarters site claim canceled for failure to submit an application to purchase the claim and required proof within 5 years of filing a notice of location of the claim, as required by 43 U.S.C. § 687a-1 (1982) and 43 CFR 2563.1-1(c), and declines to equitably adjudicate the claim under 43 U.S.C. §§ 1161, 1164 (1988) and 43 CFR 1871.1-1(a), where the evidence establishes only that, during the 5-year statutory life of the claim, the claimant erected a cabin on the land which he rented to one party for 6 months and to others for unspecified periods under unspecified terms. In these circumstances, the claimant did not show substantial compliance with the requirements of the headquarters site law by establishing that he used the land in connection with a productive industry, as required by sec. 10 of the Act of May 14, 1898, as amended, 43 U.S.C. § 687a (1982).

APPEARANCES: Thomas B. Craig, pro se; Carlene Faithful, 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

Thomas B. Craig has appealed from the July 14, 1993, decision of the Alaska State Office, Bureau of Land Management (BLM), denying his request for reinstatement and equitable adjudication of his headquarters site claim (AA-55463), and rejecting his application to purchase the claim.

On March 25, 1985, Craig, who then resided in the town of Tok, Alaska, filed a notice of his location of a headquarters site claim under section 10 of the Act of May 14, 1898 (the Act), as amended, 43 U.S.C. § 687a (1982), in nearby sec. 12 of unsurveyed T. 12 N., R. 9 E., Copper River Meridian, Alaska, along the Bear Creek within the "North Slana" area. ^{1/} The location notice described a rectangular 5-acre parcel, bounded on the north by the northern boundary of sec. 12. Craig amended his notice on June 19, 1985, to shift the claimed area slightly to the west.

The Act, as amended, authorizes, inter alia, the purchase of headquarters sites:

[A]ny citizen * * * engaged in trade, manufacture, or other productive industry may purchase one claim, not exceeding five acres, of unreserved public lands * * * in Alaska as a homestead or headquarters, under rules and regulations to be prescribed by the Secretary of the Interior, upon payment of \$2.50 per acre.

43 U.S.C. § 687a (1982). Implementing regulations appear at 43 CFR Subpart 2563.

In his initial notice, Craig stated that he had initiated occupancy by setting up a "camp site" on March 1, 1985, but did not specify any particular use for which he desired the land, as required by 43 CFR 2563.1-1(a)(2). On June 3, 1985, BLM required him to notify it of the type of business he planned to conduct on the land. He responded on June 19 and 26, 1985, that he intended to engage in writing, making and selling crafts (particularly leather crafts), and trapping. On July 24, 1985, Craig notified BLM that he had hauled building materials to the site during the previous winter and erected a 16- by 16-foot two-story cabin.

On August 1, 1985, BLM formally acknowledged Craig's location notice and notified him that he should file an application to purchase his claim, along with the required proof, as soon as he had fulfilled the requirements of section 10 of the Act and its implementing regulations. BLM advised that he was required to file the application within 5 years after the filing of the notice of location.

No further communication occurred until September 19, 1989, when BLM reminded Craig that he had to file a purchase application and the required proof by March 24, 1990, that is, within 5 years after filing his location notice, and that no extensions of this deadline could be given. BLM stated

^{1/} Section 10 of the Act of May 14, 1898, as amended, was repealed by section 703(a) of the Federal Land Policy and Management Act of 1976, effective Oct. 21, 1986, subject to valid existing rights. 90 Stat. 2786.

that, absent a timely filing, the claim would be canceled and the case file closed. 2/

It is undisputed that Craig did not file a purchase application with BLM by March 24, 1990. On April 4, 1990, BLM accordingly notified him that his claim was cancelled and the case file closed. 3/

On May 2, 1990, Craig belatedly filed an application to purchase his headquarters site. He stated that he had not previously realized that the time for filing was running out and requested reinstatement of his claim to demonstrate that he had in fact complied with applicable legal requirements. He noted that, since June 1985, he had occupied the land and erected a 16-by 16-foot "A-frame" cabin (containing a wood heating stove, propane cooking stove, table, two chairs, bed, and "other basic items"), an outhouse, and a tree cache platform. He valued those improvements at \$5,000, stating that they encompassed about 1 acre of the land sought. He noted that he had personally used the site for trapping during the winter of 1987, as well as for "some writing," but that leather craft work had not occurred. He also stated that he had rented the site to local residents for residential use in connection with hunting and other recreational pursuits. He alluded to a rental during the winter of 1986 to Brian Kerley and Barbra Amagon and their family, who were building a house nearby. In general, Craig stated:

Obviously I have not come remotely near making a profit at this point. Trapping is not a profitable venture at this time in the North Slana area, and some of the other ideas I've pursued simply have not worked out. However, as a rental there has been and may still be some promise for the parcel. I believe I could successfully market the cabin as a hunting or recreational site and still make a return on the investment I have put in so far.

(Attachment at 2). Finally, Craig stated that he no longer lived in the North Slana area, having moved to Anchorage in 1988.

2/ There is no record that Craig ever received the September 1989 BLM notice, which was sent by certified mail to his address of record (Mentasta Lake, Tok, Alaska 99780). This was evidently because he had moved to Anchorage, Alaska, at the end of 1988, where he then lived and worked, without notifying BLM (Apr. 25, 1990, Application to Purchase, Attachment (Attachment) at 2). In these circumstances, Craig is deemed to have constructive notice of the contents of BLM's notice. See 43 CFR 1810.2(b); Reg Whitson, 55 IBLA 5, 6 (1981), and cases cited.

3/ The case record does not show whether Craig received BLM's April 1990 notice. However, he acknowledged receipt in the attachment to his May 2, 1990, purchase application. The record shows Craig visited the BLM State office on Apr. 16, 1990.

On November 7, 1990, BLM informed Craig that his application to purchase his claim might be amenable to equitable adjudication under 43 CFR 1871.1-1(a), despite the late filing and the absence of any required proof, if he submitted evidence that he had substantially complied with the headquarters site law. BLM afforded Craig 60 days to do so. In particular, BLM stated that he had to show that the land was actually used and occupied for the purpose of trade, manufacture, or other productive industry on and before March 24, 1990, which marked the expiration of the statutory life of his claim. BLM then outlined evidence that might be submitted as proof that Craig had in fact engaged in a "productive industry." ^{4/} BLM cautioned that a "business operation so meager in clientele and gross receipts that it will not produce at least a fair portion of the applicant's income" would not qualify as a "productive industry."

Craig responded on January 4, 1991. Noting that he was not required to demonstrate that he had conducted a profitable enterprise on the land, Craig claimed the land "based on the fact that I have invested very heavily in attempting to develop this property into a business." He alluded to the cabin built on the land and submitted a January 2, 1989, statement by Hobart (Dutch) Longnecker, which attested to Craig's purchase of building materials and construction of the cabin in 1986, as well as its rental in the winter of 1987 to Kerley and Amagon. Craig requested a 1-year extension of time, if BLM found this evidence insufficient, to gather and submit additional statements by other local residents documenting his use and occupancy of the land.

BLM granted that request on January 16, 1991, extending the time to submit evidence until January 4, 1992. In an April 14, 1991, statement, Kerley confirmed his rental of the cabin "during the winter of 1986-87 for a period of six months for \$50.00 per month." This was verified by an April 2, 1991, statement by Patrick M. Brandt, who added that Craig had also rented the cabin to others "on at least a couple of occasions" since it was built, but who was unaware of the details of those arrangements. In an April 14, 1991, statement, Rick Johnson stated that, under an agreement with Craig, he had stayed in the cabin in return for labor expended in assisting with its construction, and that he was aware that other "tenants" had resided there "from time to time since it was built."

^{4/} BLM defined "productive industry" as a commercial operation involving the receipt of other than infrequent revenues. It requested copies of applicant's business license, if any, for 1985 through 1990; copies of accounting advices, income tax records or other documents showing the nature and amount of applicant's income from the business located on the land; copies of materials used to advertise applicant's business; statements from other persons located in this area acquainted with applicant's operation and his use of the land as the site of a commercial enterprise; and statements from persons who have used the facilities provided by the business located on this land.

On August 20, 1991, BLM realty specialists examined his headquarters site claim. They found the "A-frame" cabin (which contained a wood heating stove, gas cooking stove, foam padding, love seat, coffee cups, and a broken radio cassette player) and a 5- by 5-foot raised log platform near the eastern boundary of the claim and Bear Creek. No outhouse was found. The cabin was found to be "in a complete state of disrepair": "The roof was leaking and starting to collapse. A good portion of the front wall was missing and the insulation was ripped out by animals." The trail leading to the site was "overgrown and showed no signs of significant use." The examiners reported:

An interview with neighboring claimant, and year[-]round resident, Rodney Lanpher, indicated that the applicant had rented the cabin to Brian [Kerley] once, but at the most only a few other people had ever stayed there. Mr. Lanpher also stated that the applicant had never done any regular trapping in the area.

(Dec. 18, 1991, Land Report at 3-4).

Based on the examination and evidence previously provided by Craig, the examiners concluded that he had not met the requirements of the Act and its implementing regulations. Although the land was suited to the claimed business use and occupancy, they found that there was no physical evidence (and Craig had otherwise failed to demonstrate) that he had used the land "in connection with an ongoing and potentially productive industry." Rather, they found that only one rental client (Kerley) could be verified; that the condition of the claim indicated that it had never seen "significant use" and had been abandoned "for some time"; and that "at best the applicant may have attempted some sporadic business over a five year period" (Land Report at 4). Accordingly, they recommended that Craig's purchase application be rejected. The District Manager, Glennallen District, Alaska, BLM, concurred in these findings and recommendation on January 8, 1992.

In its July 1993 decision, BLM concluded that Craig had not substantially complied with the headquarters site law and its implementing regulations and accordingly was not eligible to have his headquarters site claim reinstated and sent for equitable adjudication by the Director, BLM. It therefore denied his request for reinstatement and equitable adjudication and rejected his purchase application. Craig appealed.

It is undisputed that appellant's application to purchase his headquarters site claim was filed late, contrary to the requirement of 43 U.S.C. § 687a-1 (1982), which states: "Application to purchase claims, along with the required proof or showing, must be filed within five years after the filing of the notice of claim." See also 43 CFR 2563.1-1(c); Kathleen M. Smyth, 8 IBLA 425, 426 (1972). Appellant did not submit his purchase application or the statements of two corroborating witnesses until after the 5-year period following the filing of his location notice, which

ended on March 24, 1990. Thus, BLM properly cancelled appellant's claim in April 1990. See United States v. Bush, 40 IBLA 106, 113 (1979).

[1] However, as BLM recognized, it has authority in some circumstances to equitably adjudicate an entry even though the application to purchase was not timely filed. The Department's equitable adjudication authority derives from 43 U.S.C. § 1161 (1988), which provides:

The Secretary of the Interior, or such officer as he may designate, is authorized to decide upon principles of equity and justice, as recognized in courts of equity, and in accordance with regulations to be approved by the Secretary of the Interior, consistently with such principles, all cases of suspended entries of public lands and of suspended preemption land claims, and to adjudge in what cases patent shall issue upon the same.

43 U.S.C. § 1164 (1988) extends this authority to

all cases of suspended entries and locations, which have arisen in the Bureau of Land Management since the 26th day of June, 1856, as well as to all cases of a similar kind which may hereafter occur, embracing as well locations under bounty-land warrants as ordinary entries or sales, including homestead entries and preemption locations or cases; where the law has been substantially complied with, and the error or informality arose from ignorance, accident, or mistake which is satisfactorily explained; and where the rights of no other claimant or preemptor are prejudiced, or where there is no adverse claim.

The rules permitting equitable adjudication apply to trade and manufacturing (T & M) site and similar claims. National Park Service, 125 IBLA 335, 343 (1993); see Elizabeth Hickethier, 6 IBLA 306, 308-09 (1972); C. Rick Houston, 5 IBLA 71, 75 (1972).

Invocation of BLM's equitable authority here depends on whether appellant had "substantially complied" with the headquarters site law, particularly the substantive requirements of section 10 of the Act, as amended. See 43 CFR 1871.1-1(a); Marie M. Bunn, 100 IBLA 1, 5 (1987) (homesite); Ray W. Ferguson, 22 IBLA 160, 164 (1975); Carla D. Botner, 7 IBLA 335, 337 (1972). Appellant bears the burden of demonstrating substantial compliance with the law by a preponderance of the evidence. See United States v. Ehmann, 50 IBLA 69, 71, 77 (1980); William T. Criner, 19 IBLA 149, 152 (1975).

Under section 10 of the Act, as amended, a headquarters site claimant must arrive at the point where he "is * * * engaged in trade, manufacture, or other productive industry." 43 U.S.C. § 687a (1982) (emphasis added); see also 43 CFR 2563.0-3(a). Thus, sometime after the filing of a location

notice and before the expiration of the time required for filing an application to purchase, *i.e.* during the statutory life of his claim, a claimant must become engaged in some sort of productive industry. United States v. Tippetts, 29 IBLA 348, 352-53 (1977); LaVeta O. Schoephorster, 19 IBLA 90, 92 (1975). The land sought must be used "in connection with" that industry as a "headquarters." Gustav O. Wiegner, 26 IBLA 123, 126 (1976); Vernon L. Nash, 17 IBLA 332, 335, 336 (1974).

In the present case, the land claimed as a headquarters site was intended by appellant to be the actual situs of his productive industry. Investing \$5,000, he erected a cabin, outhouse, and cache platform on the 5-acre parcel of land sought, apparently initially for his own use during commercial trapping, writing, and crafts, and later for commercial rental to others. The construction of improvements on land claimed as a headquarters site, with the aim of setting up a business there, does not by itself constitute a "productive industry," within the meaning of section 10 of the Act, *as amended*, no matter how substantial the investment of time and money involved. United States v. Ehmann, 50 IBLA at 71, 73, 78; James E. Allen, A-30085 (Feb. 23, 1965) at 9 (T & M site). Rather, the expenditure of time and money must result in the creation of a bona fide commercial enterprise that, in fact, generates revenues. United States v. Ehmann, 50 IBLA at 70-71; *id.* at 73 (Burski, A.J., concurring); Vernon L. Nash, 17 IBLA at 336. Thus, we reject appellant's principal contention on appeal that he has substantially complied with the requirements of the headquarters site law merely by expending a substantial amount of time and money in building a cabin and otherwise improving the land.

Appellant is correct that it is not necessary that a claimant demonstrate that he has established a profitable venture as of the completion of the 5-year statutory compliance period. Gustav O. Wiegner, 26 IBLA at 126. The evidence proffered must simply be sufficient to show that the claimant had a reasonable hope of deriving a profit from the business operation. United States v. Hodge, 111 IBLA 77, 86, 88 (1989) (T & M site); United States v. Bush, 40 IBLA at 113; United States v. Tippetts, 29 IBLA at 353. However, there must be some evidence of paying customers and gross receipts, which are necessary for any active business. Kathleen M. Smyth, 8 IBLA at 427. As BLM informed appellant in its November 1990 notice, the revenues generated must not be infrequent or meager. United States v. Beaird, 31 IBLA 203, 209 (1977), *aff'd*, Beaird v. Andrus, No. F77-32 (D. Alaska June 19, 1979); James E. Allen, *supra* at 8.

Although BLM allowed him ample opportunity to do so, appellant failed to submit business records or other documents showing that he conducted a commercial enterprise on the land, such as a business license, accounting or income tax records, or advertising materials. *See* William T. Criner, 19 IBLA at 153 n.2. There is no evidence or even allegation that appellant advertised rental services or otherwise attempted to promote rental

as a business enterprise. This failure to demonstrate any sort of business relationship with actual or potential customers or to show a bona fide effort to secure customers casts considerable doubt on the existence of a productive industry.

Appellant did submit statements by four persons attesting to his use and occupancy of the land for limited commercial rentals and other purposes. Those statements conclusively establish only that appellant received \$300 for allowing Kerley to use the cabin constructed on the headquarters site for 6 months during the winter of 1986-87. However, the rental to Kerley (the only fully documented rental of the parcel) does not appear to have been a commercial endeavor. As appellant explained in his purchase application, Kerley and his family stayed in appellant's cabin while they were building a house on land "further up Bear Creek" (Attachment at 1; Apr. 14, 1991, Statement of Kerley). The fact that there was no "documentation" of the rental indicates that no lease was ever entered into. Although we have no reason to doubt that money exchanged hands, this "rental" can be seen as a temporary accommodation to a neighbor rather than the initiation of a commercial enterprise or part of an ongoing commercial enterprise.

There is evidence that other persons stayed at the cabin on "a couple of occasions" (Apr. 2, 1991, Statement of Brandt) and "from time to time" (Apr. 14, 1991 Statement of Johnson), although the BLM inspectors indicated that "at the most only a few other people [besides Kerley] had ever stayed there" (Land Report at 4). However, there is no evidence establishing that appellant received any revenues from such use, or, if so, what the particular rental periods were or the rates charged. In this respect, appellant has not met his obligation to supply details regarding the periods of actual commercial use and occupancy and the revenues derived from them. See Hershel E. Crutchfield, A-30876 (Sept. 30, 1968) at 2-4 (T & M site); United States v. Crow, 28 IBLA 345, 348, 350 (1977), aff'd, Crow v. Andrus, No. F77-12 (D. Alaska June 23, 1978); James E. Allen, supra at 8.

Johnson states that he was permitted to stay in the cabin in exchange for his previous efforts in its construction. However, a claimant is not properly deemed to be engaged in a productive industry on land claimed as a headquarters site where he barter or exchanges use of the land and improvements thereon for labor by others in their development and construction. United States v. Ehmann, 50 IBLA at 70. Evidence thereof does not demonstrate the existence of a "viable business enterprise." Id.; see also United States v. Tippetts, 29 IBLA at 353.

Appellant had admittedly moved to Anchorage by the end of 1988, and nothing shows that he attempted to rent out the cabin from Anchorage, journeyed to the North Slana area for that purpose, or secured a local agent to handle such enterprise. Also, by the time of the August 1991 BLM field examination, the cabin had fallen into what BLM examiner Mushovic described as a "complete state of disrepair" (Land Report at 3).

Photographs in the Land Report bear this out. Based on this, BLM concluded that the cabin had been abandoned "for some time." Id. at 4. Thus, it is unlikely that anyone would have rented the cabin in the years immediately preceding the 1991 examination.

In any event, even presuming that appellant received rental for all of the use to which he refers, the evidence as a whole fails to establish that appellant's commercial endeavors over the 5-year period were any more than infrequent and meager. Thus, they are not probative of a bona fide commercial enterprise, required by the statute. United States v. Hodge, 111 IBLA at 87-88 (\$208 paid for various rentals over a 13-month period); United States v. McLean, 50 IBLA 290, 294, 299, 300 (1980) (\$36 paid for 2-day rental); United States v. Boyd, 39 IBLA 321, 326, 327, 330-31 (1979) (average of \$150 paid each year for various rentals over 5-year period) (T & M site); John V. Vogt, 17 IBLA 87, 88, 89 (1974) (\$210 paid for nine rentals over a 25-day period); Lynn E. Erickson, 10 IBLA 11, 13, 16, 80 I.D. 215, 216, 217-18 (1973); Lee S. Gardner, A-30586 (Sept. 26, 1966) at 5 (\$36 paid for various rentals over a 2-month period).

Appellant also stated that he did "some trapping" on the land during the winter of 1987 (Attachment at 1), but there is no evidence that he sold any pelts or otherwise derived any income from trapping. Therefore, we hold that appellant's trapping did not constitute a productive industry, within the meaning of section 10 of the Act, as amended. See John C. Phariss, 134 IBLA 46 (1995); United States v. Bush, 40 IBLA at 113; United States v. Wilson, 38 IBLA 305, 307 (1978); United States v. Beaird, 31 IBLA at 206, 209; United States v. Tippetts, 29 IBLA at 351-52, 353; Kathleen M. Smyth, 8 IBLA at 427. Nor is there any showing that there was, at the expiration of the statutory life of appellant's claim in March 1990, any reasonable expectation that more significant revenues from commercial rentals or trapping might be forthcoming. Appellant conceded that trapping was unlikely to be successful. As to commercial rentals, he reported in April 1990 that the land showed "promise" as a rental property (Attachment at 2). However, he offered no evidence showing any market for renting the property. In a January 3, 1991, letter to BLM, he conceded that he had only attempted to develop this property into a business. As appellant had not established any good will or clientele, and as the site was in poor condition, it was not reasonable to expect that commercial rentals would increase or become profitable. Thus, the record does not show that appellant had created a business reasonably calculated to yield a profit. See United States v. Hodge, 111 IBLA at 88.

Appellant failed to meet his burden of proving that he had established a "productive industry" and therefore substantially complied with the requirement of section 10 of the Act of May 14, 1898, as amended, that he use the land claimed as his headquarters site in connection with a trade, manufacture, or other productive industry during the statutory life of his claim. Thus, he clearly had not substantially complied with

the overall headquarters site law and did not satisfy the essential pre-requisite for equitable adjudication under 43 CFR 1871.1-1(a). BLM properly declined to exercise its authority to equitably adjudicate his application.

Appellant has requested a hearing before an Administrative Law Judge. He does not state what material issue of fact requires a hearing, or what evidence would be submitted should one occur. The Board has the authority, under 43 CFR 4.415, to order a hearing before an Administrative Law Judge, at the request of an appellant. However, we will decline to do so where, as here, the appellant has failed to allege a material fact which, if proven, would alter the disposition of his appeal. Marie M. Bunn, 100 IBLA at 6; Woods Petroleum Co., 86 IBLA 46, 55 (1985). Appellant has not alleged any fact indicating that he has substantially complied with the headquarters site law, and specifically the substantive requirements of section 10 of the Act, as amended. Even accepting the truth of all of the facts asserted by him, his claim must fail. Compare with Lucille M. Frederick, 6 IBLA 47, 48 (1972). His request for a hearing is properly denied. See Vernon L. Nash, 17 IBLA at 336.

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

David L. Hughes
Administrative Judge

I concur.

James L. Burski
Administrative Judge