

WALTER L. HURLBURT ET AL.

IBLA 71-296

Decided September 15, 1972

Appeal from decision (S-3613) by the Sacramento land office, Bureau of Land Management, rejecting application (S-3613) for purchase under the Mining Claims Occupancy Act.

Affirmed.

Mining Claims Occupancy Act: Principal Place of Residence --
Mining Claims Occupancy Act: Qualified Applicant

Under the Mining Claims Occupancy Act, as amended, 30 U.S.C. §§ 701-709 (1970), where a predecessor in interest of an applicant thereunder failed to use the improvements on the land as a principal place of residence during a substantial portion of the 7-year period immediately prior to July 23, 1962, the applicant does not meet the requirements of a qualified applicant as defined in the Act and the governing regulations, regardless of the extent of his own residence during his ownership of the claim.

Mining Claims Occupancy Act: Principal Place of Residence

In order to constitute "a principal place of residence" within the meaning of the Act of October 23, 1962, a mining claim site must have been, on that date, a principal place of residence for the applicant under the Act, and a site cannot qualify as a principal place of residence upon the basis of the cumulative use of a number of applicants, none of whom has used it as a principal place of residence.

Mining Claims Occupancy Act: Qualified Applicant

A person who acquired his interest in an unpatented mining claim after October 23, 1962, by a method other than devise or descent, cannot be considered a qualified applicant under the Mining Claims Occupancy Act and the regulations thereunder, which require that a qualified applicant must have been the residential occupant-owner of the improvements on an unpatented mining claim as of that date, or be the heir or devisee of such a residential occupant-owner.

Mining Claims Occupancy Act: Generally

An application under the Mining Claims Occupancy Act is properly rejected where the mining claim has not been invalidated or relinquished.

APPEARANCES: Alvin M. Cibula, Esq., of Cibula & Cibula, for appellants.

OPINION BY MR. FISHMAN

Walter L. Hurlburt, George S. Hurlburt, Joseph A. Wright, and Arthur E. Arp have appealed from a decision of the Sacramento land office, Bureau of Land Management, dated March 30, 1971, which rejected their application to purchase a portion of the Effie May placer mining claim on which improvements are located, in the NE 1/4 SW 1/4 sec. 10, T. 35 N., R. 8 W., M.D.M., within the Trinity National Forest and Recreation Area, Trinity County, California, under the provisions of the Act of October 23, 1962 (Mining Claims Occupancy Act), 30 U.S.C. §§ 701-709 (1970). The land office based its finding on the ground that none of the appellants is a "qualified applicant" as defined in the regulations promulgated under the Act:

The term "qualified applicant" means (1) a residential occupant-owner, as of October 23, 1962, of valuable improvements in an unpatented mining claim which constitute for him a principal place of residence and which he and his predecessors in interest were in possession of for not less than seven years prior to July 23, 1962 or (2) the heirs or devisees of such a residential occupant-owner. 43 CFR 2550.0-5(a) (1972).

The 7-year period required under the regulations must have occurred immediately prior to July 23, 1962, i.e., from July 23, 1955, through July 22, 1962. Henry P. and Leoda M. Smith, 74 I.D. 378, 382 (1967).

In their appeal appellants take exception to the conclusion of the land office that their predecessors in interest who occupied the claim from 1955 to 1961 1/ did not use the improvements as a principal place of residence during that period, and that consequently

1/ According to a chain of title included in appellants' application, filed February 10, 1970, the claim was owned at various times from July 23, 1955, to May 5, 1961, by Hillis and Katherine S. Hubbard jointly, by Katherine S. Hubbard as sole tenant, and by Barbara Rieger Hodsdon as sole tenant. On May 5, 1961, the claim was conveyed by quitclaim deed from the Hubbards to Arthur E. Arp

none of the present applicants can be considered qualified under the Act. They contend:

This finding is based on the activities of Mr. and Mrs. Hillis Hubbard, and the activities of Barbara Rieger Hodsdon. It should be remembered that this cabin is located in a section of Trinity County where the site is uninhabitable for a certain part of each year. The weather is very bad and unless people are willing to place themselves in a snowbound condition, it is impossible to reside on the premises during winter months. Mr. and Mrs. Hillis Hubbard did not attempt to live on the premises during those portions of the year when the cabin was snowbound. They did use the cabin to its fullest, however, considering that it is impossible to make living in the cabin on a full, year-round basis. They not only resided on the premises themselves, [2/] but they also let their friends use the cabin for vacations, and during part of the time they even rented the cabin for brief periods in order that they could keep somebody there and keep the place occupied.

In the years, 1957 or 1958, they introduced Barbara Rieger Hodsdon to the premises and she bought it, apparently intending to live in Trinity County a major part of the year while she could stay there. Naturally, when she bought it and was not going to stay there herself, she did exactly what the Hubbards did, and even accommodated Mr. and Mrs. Hillis Hubbard on the premises from time to time. However, when it became evident that she was not going to spend too much time there, she simply, in 1959, told this to

fn. 1 (Cont.)

and Joseph A. Wright, each of whom received an undivided 1/4-interest; and to Walter L. Hurlburt, who obtained an undivided 1/2-interest. On April 18, 1967, Walter L. Hurlburt conveyed his 1/2-interest to George S. Hurlburt, and on February 4, 1970, George S. Hurlburt and Walter L. Hurlburt became joint tenants, each with an undivided 1/2-interest.

2/ This description of the extent of occupancy by the Hubbards themselves contrasts with that contained in a letter from appellants' attorney to the land office, dated December 12, 1970, which indicates that Mr. and Mrs. Hubbard, who acquired the property in 1950, simply "went up and resided on the premises from time to time."

the Hubbards, and the Hubbards repaid Barbara Rieger Hodsdon and bought it back and that ended the matter.

This Department has held that, although the Act does not explicitly so provide, the 7-year possession immediately prior to July 23, 1962, must have been accompanied by physical occupancy of the improvements as a principal place of residence, either by the present owners or by their predecessors in interest, as the case may be. Frank O. and Dorothy B. O'Mea, A-31084 (January 27, (1970); see Henry P. and Leoda M. Smith, supra. The term "a principal place of residence" is defined in the applicable regulations as:

* * * an improved site used by a qualified applicant as one of his principal places of residence except during periods when weather and topography may make it impracticable for use. The term does not mean a site given casual or intermittent residential use, such as a hunting cabin or for weekend occupancy. 43 CFR 2550.0-5(d) (1972).

The use of the improvements on a claim as a principal place of residence must have been continuous for the entire 7-year period; a gap in time caused by the failure of a previous owner to maintain such residence is sufficient to prevent the present holder of the claim from acquiring the status of a qualified applicant. See Henry P. and Leoda M. Smith, supra at 385.

Viewed in the most favorable light, the evidence proffered by appellants fails to establish that the improvements on the claim were used continuously as a principal place of residence by their owners during that portion of the critical period when title to the claims was held by appellants' predecessors in interest. Even assuming, arguendo, that the Hubbards, their guests, and their tenants 3/ occupied the improvements to the maximum extent possible in view of the weather conditions, from July 23, 1955, until the sale of the interest in the premises to Barbara Rieger Hodsdon, it is not clear from the record whether the Hubbards resumed residence on the claim after it was deeded back to them in 1959. By their statements in their brief, appellants in effect admit that a gap in occupancy existed for at least 1 or 2 years, 4/ inasmuch as

3/ The fact that an owner-occupant of a claim rented the improvements for a portion of the critical period does not in itself warrant a finding that he has ceased to maintain a principal place of residence on the claim. Cf. Ola N. McCulloch Sibley, 73 I.D. 53, 61 (1966).

4/ There is some doubt as to the length of time the claim was owned by Barbara Rieger Hodsdon. As quoted above, appellants state that

Barbara Rieger Hodsdon reconveyed the claim to the Hubbards precisely for the reason that she either could not or would not use the improvements as a principal place of residence. 5/

With respect to the extent of their own occupancy of the improvements on the claim from May 5, 1961, when the property was purchased from the Hubbards, through July 22, 1962, appellants assert:

It is conceded that all of the three [excluding George S. Hurlburt, who did not acquire his interest until 1967; see note 1, supra] only spent some time on the premises, but certainly their combined occupation of the premises is sufficient to establish them as occupants, considering the bad weather conditions and the impossibility of living there during certain periods of the year.

The answer to this contention is that for the purposes of the Act residential occupancy may not be calculated on a collective basis.

* * * If fifty individuals use a site for one week each year, the fact that the site is occupied for fifty weeks of the year does not make it a principal place of residence for anyone. Regardless of the number of persons who may have used the site or the number that may participate in a joint application, it must appear that someone or some group among them has actually used such site as a principal place of residence during the prescribed period. * * * Cora Pruett et al., A-30524 (April 28, 1966).

As for appellant George S. Hurlburt, the fact that he could not have been a "residential occupant-owner, as of October 23, 1962," of the improvements on the claim, and that he acquired his interest in the claim through a method other than devise or descent

fn. 4 (Cont.)

she acquired it in "1957 or 1958". The chain of title furnished in connection with appellants' application for purchase of the claim contains no entry for the deed to her. The document does, however, contain an entry for a deed of August 13, 1959, from Barbara Rieger Hodsdon to Hillis Hubbard and Katherine S. Hubbard.

5/ In his letter of December 12, 1970, to the land office, appellants' attorney, discussing Barbara Rieger Hodsdon's reason for reconveyance of the land to the Hubbards, pointed out: "* * * but residing in Philadelphia is a long way from Trinity County * * *."

(see note 1, supra), in any event precludes considering him as a qualified applicant.

In view of appellants' inability to show that the improvements were continuously occupied as a principal place of residence by themselves and by their predecessors in interest for the 7-year period immediately preceding July 23, 1962, we find that the land office acted correctly in rejecting the application.

Moreover, the record shows that the mining claim has not been invalidated or relinquished. Therefore, the application at bar could not be allowed, in any event. See 43 CFR 2551.2(c)(7) (1972).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

Frederick Fishman
Member

We concur:

Joan B. Thompson
Member

Anne Poindexter Lewis
Member

