

TRUE E. WESS

IBLA 71-294

Decided December 3, 1973

Appeal from decision (S 3984) of the California State Office, Bureau of Land Management, rejecting an application filed under the Mining Claims Occupancy Act.

Affirmed.

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

An application filed under the Mining Claims Occupancy Act, as amended, 30 U.S.C. §§ 701-709 (1970), is properly rejected on the basis that the applicant is not qualified for relief under the Act where the record shows that the applicant did not live on the claim or use it as a principal place of residence during the qualifying period of time set forth in the Act.

APPEARANCES: H. S. Gilmore, of Gilmore and Gilmore, Sacramento, California, for appellant; Charles F. Lawrence, Esq., Office of the General Counsel, U.S. Department of Agriculture, San Francisco, California, for the U.S. Forest Service.

OPINION BY MR. FISHMAN

True E. Wess has appealed from a decision of the California State Office, Bureau of Land Management, dated March 29, 1971, rejecting his application, S 3984, to purchase a portion of the Maynard placer mining claim located in the Plumas National Forest. The application was filed under the Mining Claims Occupancy Act of October 23, 1962, as amended, 30 U.S.C. §§ 701-709 (1970).

The application was denied on the basis of a report from the Forest Service which recommended that appellant be denied relief on the ground that he was not a "qualified applicant" under the Act. Appellant asserts that he is a qualified applicant within the meaning of the Act, and that he is entitled to relief thereunder.

The Mining Claims Occupancy Act authorizes the Secretary of the Interior to convey to qualified applicants an interest up to and including a fee simple, in and to an area of five acres or less, within an unpatented mining claim. A qualified applicant is defined in section 2 of the Act which provides:

For the purposes of this Act a qualified applicant is 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.

The record discloses that appellant's father, George Wess, had an interest in the Maynard placer mining claim in 1917, and was the sole owner of the claim from 1939 until 1958, at which time he conveyed by deed an undivided one-half interest in the claim to his son, the appellant in the case at bar. Appellant's father died testate in 1961, and appellant acquired the remaining interest in the mining claim by devise. Appellant's father occupied the claim as a principal place of residence from 1924 until his death in 1961. From 1961 to 1966 the claim was occupied by various tenants under leases from appellant. During this period of time, appellant reserved rooms on the premises for his occasional use, but did not occupy the premises as a principal place of residence.

While this Board originally was disposed to grant the relief requested by appellant, the Forest Service has filed extensive briefs in this matter to support its position that appellant is not a qualified applicant under the Act.

Appellant contends that "a logical and legal reason" could be "searched out" to support a determination that he is a qualified applicant under the Act. He asserts that his father would have been a qualified applicant had he lived until October 23, 1962. He states that he owns no other real property individually and that a hardship would be worked upon him if he were required to give up his claim.

By his own admission appellant was not a residential occupant-owner of the improvements on the claim as of October 23, 1962, or at any time following the death of his father in 1961. He states:

After my father's death on July 9, 1961 until four years ago I kept the mine under lease to different miners who lived in the house, but I retained my own right to spend any vacations and weekends or longer in the house in rooms set aside for the occupancy of myself and my family.

* * * * *

I have not lived on the land since my father's death, but I never failed to return to it with my family for varying periods on weekends to as much as a week and using it as a property belonging entirely to me, and always keeping in the house household equipment and extra clothing for immediate use of any of us any time we were there, so all we had to carry in with us was our provisions for whatever days of stay we would remain.

The main case relied on by appellant is Ola N. McCulloch Sibley, 73 I.D. 53 (1966). Sibley, however, is distinguishable. The applicant in Sibley lived on her claim for more than five years of the qualifying seven-year period and was a residential occupant-owner as of October 23, 1962. In contradistinction, appellant never occupied the premises as a principal place of residence during any portion of the qualifying period, and was not a resident or occupant of the premises as of October 23, 1962. As stated in the decision of the Bureau, appellant lived, worked and raised a family elsewhere.

The Department has noted, with judicial approval, that the Mining Claims Occupancy Act was enacted by Congress as a relief measure designed to aid qualified people on whom a hardship would be visited if they were required to move from their long-established homes. Scott V. Brown, 13 IBLA 319 (1973); Walker v. Udall, 409 F.2d 477 (9th Cir. 1969); Funderberg v. Udall, 396 F.2d 638 (9th Cir. 1968); Christian E. Wicks, 73 I.D. 166 (1966); H. T. Crandell, 72 I.D. 431 (1965).

In the case at bar, we are not of the opinion that the "hardship" contemplated by the Act would be visited on appellant by determining that he is not a qualified applicant. Our result

in this decision does not require appellant to move from his actual "long-established home," which the record shows is in Paradise, California.

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 affirmed.

Frederick Fishman, Member

I concur:

Douglas E. Henriques, Member

Mr. Goss concurring specially:

I concur that appellant has not presented sufficient evidence as to fully document his position that he was a residential occupant-owner of the claim on October 23, 1962, and that the claim was a principal place of residence for him during the period from his father's death on July 9, 1961, through July 23, 1962, as required under 30 U.S.C. § 702 (1970). However, appellant's affidavits allege that:

1. The two story building on the claim was appellant's only family home from 1924, when he was three months old, until 1949, and the claim was his second home since then.
2. Appellant owned a 1/2 interest in the home from 1954 and full interest following his father's death July 9, 1961.
3. Appellant's father's only home was the claim.
4. Appellant was required to leave the claim in 1949 in order to find work to support and educate his family, but until 1963 he lived in trailers at a series of temporary construction jobs.
5. The claim has been appellant's permanent address, and he has kept a post office box nearby.
6. At some point after his father's death, appellant rented a part of the home but reserved rooms for use of his family.
7. Since the death of his father appellant "has never failed to return to it [the claim] with my family for varying periods on weekends to as much as a week."
8. Appellant intends to retire to the claim.

In the February 22, 1971, Forest Service report to the Bureau of Land Management, the Chief, Division of Lands and Minerals, states:

We recognize and understand True Wess' obvious emotional attachment to the residence on the claim and his feeling that it is "home."

In Ola N. McCulloch Sibley, 73 I.D. 53 (1966) the Deputy Solicitor concluded:

It is a common practice for the owner of a house, who for one reason or another temporarily moves to another locality, to rent his house during his absence without any intention of abandoning it as his principal or permanent place of residence. Such rental is generally occasioned by sheer economic necessity rather than by a desire on the part of the owner to convert the house from his personal residence to commercial rental property. On the other hand, such an owner may move from his house and rent it with no intention of returning to live in it, in which case the house will clearly have ceased to be a place of residence for him. In still other cases, the owner's intent may be exceedingly difficult to determine. This is not to say, however, that intent alone to return to the claim can be substituted for occupancy on the critical date of October 23, 1962. The act specifies that on that date the claimant must be the "residential occupant-owner." While, as we noted earlier, the Senate Committee indicated that physical presence was in some circumstances not required on that date, the language of the act seems to negate the acceptability of occupancy at the time by someone other than the claimant. Thus, there may be no absolute standards as to what constitutes a principal place of residence for a person as of the critical date, but the facts of each case must be scrutinized to determine whether the purposes, as well as the specific requirements, of the statute have been satisfied.

Some of the factors that are of relevance in making the determination are length of occupancy by the claimant and his predecessors in interest, i.e., whether there has been, at best, occupancy for the bare minimum period required or whether the claimant made the mining claim his home for many years before the required period; suitability of the improvements constructed for permanent year-round residence; reasons for absence from the mining claim residence during the required period of occupancy, i.e., voluntary or involuntary; and evidence tending either to show that the claimant intended, during the period of absence, to resume residence on the mining claim when it became possible or to show that he took up residence elsewhere during the 7-year period with no intent to return to the mining claim again on a regular residential basis.

The Mining Claims Occupancy Act does not require that a claimant be otherwise evicted from his only home, for the Act specifically provides that the residence must be "a principal place of residence." Frank O'Mea, 10 IBLA 187 (1973). Because of the unusual equities, I would request additional information from appellant as to the period from July 9, 1961 through October 23, 1962, including the time spent physically at the claim, his whereabouts during other periods and the reasons therefor.

Joseph W. Goss, Member

