

ROSE PERLEY MILLER

IBLA 84-585

Decided July 30, 1986

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting primary place of residence application AA 8590.

Affirmed.

1. Alaska Native Claims Settlement Act: Primary Place of Residence: Criteria

In order to establish a primary place of residence there must be evidence that the applicant resided on the tract applied for as a primary place of residence on a regular or seasonal basis for a substantial period of time.

2. Alaska Native Claims Settlement Act: Primary Place of Residence: Criteria

Where a Native has resided in a dwelling for a 3-1/2 week period (including the critical date, Aug. 31, 1971) on land subsequently applied for as a primary place of residence, such occupancy does not meet the regulatory requirements for conveyance because it is neither regular nor seasonal, nor for a substantial period of time.

APPEARANCES: Paul Mann II, Esq., Sitka, Alaska, for appellant; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Rose Perley Miller (Miller) ^{1/} appeals the April 6, 1984, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting her application, AA 8590, for 160 acres which were selected by her as a primary

^{1/} The original application was in the name of Rose Pauline Perley. In 1977, she married David L. Miller, and thereafter became known as Rose Perley Miller.

place of residence pursuant to section 14(h)(5) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1613(h)(5) (1982). 2/ The selected area was later reduced to 4.38 acres. 3/

In its April 6, 1984, decision, BLM rejected the application because:
The regulations in 43 CFR 2653.8-2(b) and (c) require that an applicant must have a dwelling on the land and that there must be evidence of permanent or seasonal occupancy for substantial periods of time. On July 28, 1983 the Bureau of Indian Affairs certified AA-8590 as ineligible as the applicant has not met these requirements.

BLM noted that the BIA field examination showed there was "no evidence to confirm that Miller has occupied or used the land as a primary place of residence for substantial periods of time." In addition, BLM stated that Forest Service inspections revealed an "uninhabitable structure and a trail maintained and used by residents in the area for access to Pelican Creek."

In her statement of reasons for appeal appellant argued that the BLM determination that she had not occupied or used the land as a primary place of residence for substantial periods of time was incorrect as a matter of fact and law. Appellant further argued that she was entitled to a hearing as a matter of due process of law. After reviewing the record, we concluded that issues of fact required a hearing before an Administrative Law Judge in accordance with 43 CFR 4.415. By order of December 12, 1984, we set aside BLM's April 6, 1984, decision and referred the case to the Hearings Division for a fact-finding hearing. In our order, we directed the Administrative Law Judge to make findings of fact as to: "1) [W]hat application procedures the

2/ The selected lands were originally described as: U.S. Survey No. 2861 A & B, lots 1, 2, 3, 6, 7, 8, 9, 14, and 15, excluding any existing leases, sec. 20, T. 45 S., R. 57 E., Copper River Meridian, Alaska. BLM informed Miller that U.S. Survey No. 2861 A & B was the Pelican Townsite Survey and that those lots included only 2.47 acres. Miller responded in a letter received by BLM on Apr. 22, 1974, that she was actually referring to U.S. Survey No. 3305. She claimed the same lot numbers, except lot 9, and additional acreage described by metes and bounds totaling 160 acres. She subsequently more particularly described the land claimed by metes and bounds in a Feb. 19, 1975, amendment. The record indicates U.S. Survey No. 3305 is the Lisianski Residence Group, formerly the Lisianski Homesite Group, which lies immediately south of the Pelican Townsite boundary. The lands claimed are within the Tongass National Forest.

3/ At the fact-finding hearing ordered by the Board in this matter appellant's counsel stated that the land applied for was being reduced to 4.38 acres (Tr. 9-11, Exh. 1 at 22). This was the amount of acreage described in the Bureau of Indian Affairs (BIA) Claim Examiner's 14(h)(5) Report (BIA Report) as being used by Miller. The report recommended the BIA issue to Miller a certificate of ineligibility for a primary place of residence. On July 28, 1983, BIA issued the certificate of ineligibility.

applicant followed; 2) whether and when the applicant had a dwelling on the land and for what periods of time the land was occupied; and 3) how much acreage was 'actually occupied and used.'"

At the hearing held before Administrative Law Judge L. K. Luoma, on February 6, 1985, in Pelican, Alaska, counsel for the parties stipulated that Miller had properly followed the required application procedures, thereby dispensing with the first issue.

Judge Luoma issued his findings of fact on May 13, 1985. The Judge's findings include the following:

6. On August 15, 1971, appellant abruptly terminated her residence on the fishing boat. That night on the boat she was physically beaten up by her then husband, causing her to go ashore into hiding out of fear for her safety. She took with her their three children, twin five year old daughters and a 15 year old son.

7. Appellant knew of no place to go in Pelican and wandered through the town to the end of the road at the south-eastern city limits. There she found a little shack with no lights, no smoke in the chimney, and the door wide open. Upon closer inspection she concluded that no one was living there and decided that she and the children would hide out there until someone kicked them out.

8. Appellant and her children commenced occupancy of the shack as their sole living quarters, on August 15, 1971.

9. The shack, as of that date, is described as follows: a single room frame structure covered with tar paper, 10 feet by 10 feet in size, with a roof, a linoleum covered floor, some windows, and a door. It is generally referred to as a tar paper shack. Inside the shack was a woodstove, a small cot and a small table. There was no plumbing in the shack and no toilet or bathroom facilities of any kind.

10. The tar paper shack was, and is presently, located on the parcel of land selected by appellant as her primary place of residence under ANCSA.

11. Appellant and her twin daughters occupied the shack as their living quarters for a period of three and one-half weeks, beginning on August 15, 1971, and ending on or about September 10, 1971. Her son stayed only a couple of days in the shack, returning to Juneau to be with his father. During the stay in the shack the family mostly ate sandwiches and cornflakes and heated some items such as beans, on the stove. They obtained water for culinary, laundry and bathing purposes from a pool in a creek, about 30 feet away.

12. Following the three and one-half week period the family moved to a log cabin on property adjacent to the selected land. The cabin was owned by a Native woman, Eliza Monk, who sold it to appellant. Appellant was informed that the cabin had been erected in some other town and was later moved to Pelican. The cabin, though in a deteriorated condition, was larger than the tar paper shack and, with some improvements, provided the family with somewhat better living quarters. It was appellant's intention to dismantle the logs and reconstruct the cabin on the selected land. With that objective in mind she spent the latter part of September and all of October 1971, clearing a site for the cabin on the selected land. Burning of the brush attracted the attention of the townsfolk and thereafter, representatives of the Forest Service, who informed her that she was clearing on National Forest lands without authorization. She then ceased that operation. She had also used the selected land for raising a garden, cutting firewood and picking berries. She had also placed swings and other play things on the property for use by her children.

13. After being told by the Forest Service that she could not use the selected land, appellant learned of the provision of ANCSA under which application could be made for the so-called primary place of residence. Following the advice of a BIA employee she, in the early spring of 1972, staked the outlines of the selected land and ultimately filed the application which is the subject of this proceeding. She was again advised by the Forest Service that she could not proceed with her plans to move the cabin onto the selected land until her application had been approved. However, she did continue using the land for gardening, cutting firewood, berry picking and hunting.

14. Appellant was emphatic in her testimony that had not the Forest Service forbidden her from occupying the land until approval of her application she would have moved the log cabin onto the selected land and continued living there. I accept that testimony as fact.

15. Throughout the years to the present time other people in the area have also used the selected land for berry picking and cutting firewood. Appellant would have excluded such use by others had she had the power to do so.

16. Appellant lived in the log cabin on the property adjacent to the selected land for about one year, after which she purchased a bar in Pelican where she has lived ever since.

17. An examination of the selected land made in 1982 by a BIA representative revealed the existence of a cleared area, garden, a four-foot by four-foot smokehouse made of wood and corrugated tin and the tar paper shack referred to above. The shack was no longer habitable, with a decayed floor and no door or windows.

BLM, in a brief filed with the Board, argues that Miller did not enter upon the public domain and construct a dwelling as her permanent or personal residence. BLM claims it was "pure happenstance" that she was there at all. The BLM decision should be affirmed, BLM contends, because Miller never occupied the land in question as her primary place of residence, and she never resided on the land on a permanent or seasonal basis for a substantial period of time. In her brief Miller asserts Judge Luoma made an undisputed finding of fact that "Appellant would have occupied the land until approval of her application had she not been prevented from doing so by the U.S. Forest Service, although as set forth in finding No. 13, she did continue to use the land for other purposes not forbidden by the U.S. Forest Service" (Appellant's Brief at 1). Miller contends she met the requirement for establishing a primary place of residence, given the restrictions placed on her occupancy by the Forest Service.

[1] Section 14(h)(5) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(5) (1982), provides in pertinent part:

The Secretary may convey to a Native, upon application within two years from December 18, 1971, the surface estate in not to exceed 160 acres of land occupied by the Native as a primary place of residence on August 31, 1971. Determination of occupancy shall be made by the Secretary, whose decision shall be final.

"Primary place of residence" is defined at 43 CFR 2653.0-5(d) as "a place comprising a primary place of residence of an applicant on August 31, 1971, at which he regularly resides on a permanent or seasonal basis for a substantial period of time." Application procedures are set forth at 43 CFR 2653.2, 2653.8, and 2653.8-1. Criteria for the approval of a conveyance are that the applicant must have a dwelling on the land (43 CFR 2653.8-2(b)(1)) and must show evidence of permanent or seasonal occupancy for substantial periods of time (43 CFR 2653.8-2(c)). Casual or occasional use will not be considered as occupancy sufficient to make the tract applied for a primary place of residence. 43 CFR 2653.8-2(a). Conveyances in accordance with 43 U.S.C. § 1613(h)(5) "shall be limited to the acreage actually occupied and used." 43 CFR 2653.8-1.

The evidence shows that the applicant actually resided on lot 6 in the tar paper shack for a 3-1/2 week period beginning August 15, 1971. She also did some clearing and gardening on lot 6 thereafter. From our review of the circumstances leading to this short period of occupancy, we conclude that, out of necessity, this land constituted a principal place of residence for Miller on August 31, 1971, the crucial date in the Act. However, the question still remains whether this short occupancy taken together with subsequent developments should be considered as qualifying as occupancy of a primary place of residence for substantial periods of time under the regulations (43 CFR 2653.8-2(a) and (c)). This necessarily involves consideration of the critical issue of whether Miller should be entitled to credit for occupancy for those periods of time she occupied land adjacent to lot 6, when she was told by the Forest Service she could not occupy lot 6.

Testimony adduced at the hearing shows that after living on lot 6 for approximately 3-1/2 weeks with at least two of her children, appellant voluntarily moved to a cabin on adjacent lot 5. Appellant's intent was to move that cabin onto lot 6 because lot 6 was a better location (Tr. 44-45; 52). She spent the latter part of September and all of October 1971 clearing the land for a site for the cabin. Smoke from the burning of brush caused attention and the Forest Service came and told appellant that she "couldn't be using that land" (Tr. 49). She continued to pick berries and cut wood there, but she did not clear any more land. At that time in 1971, ANCSA had not been passed and the Native Allotment Act had not been repealed. ^{4/} Appellant did not file a Native allotment application.

Appellant testified that in early spring 1972 she staked the boundaries of the land in question for her primary place of residence (Tr. 53-54), apparently after learning about the primary place of residence provision of ANCSA. She subsequently filed her application in December 1973. ^{5/} Prior to the filing of appellant's primary place of residence application, Joseph Ott applied to the Forest Service for a special use permit for lots 6 and 7, and on November 30, 1972, the Forest Service issued a permit to Ott for lot 6 (Tr. 56). The BIA Report states at page 11 that Miller stated "that she had attempted to obtain 'use permits' from the U.S. Forest Service for this property, but had been turned down by the agency. According to Mrs. Miller, the Forest Service refused to grant her any permit until her claim was adjudicated one way or the other." At the hearing Miller testified that she talked to the Forest Service to determine if there was some way she could use the land

^{4/} Native allotments in Alaska are allowed in a National Forest if the application is founded on use and occupancy prior to the inclusion of the lands within the forest or the authorized officer of the Department of Agriculture certifies that the land described in the application is chiefly valuable for agricultural or grazing purposes. Shields v. United States, 698 F.2d 987 (9th Cir.) cert. denied, 104 S. Ct. 73 (1983); Andrew Gordon McKinley (On Reconsideration), 61 IBLA 282 (1982); Jimmie A. George, Sr., 60 IBLA 14 (1981). See also Akootchook v. United States, 747 F.2d 1316 (9th Cir. 1984) cert. denied, 105 S. Ct. 2358 (1985). This could be contrasted with Indian allotments under the Indian Allotment Act of 1887, 25 U.S.C. § 331 (1982). Section 31 of the Act of June 25, 1910, 25 U.S.C. § 337 (1982), authorized the allotment of National Forest Lands to Indians who settled thereon upon a showing that the lands were more valuable for grazing or agricultural purposes than for the timber found thereon. See generally James R. Hensher, 85 IBLA 343, 92 I.D. 140 (1985). Not only was no similar provision ever made applicable to Native allotments in Alaska, but Congress, in 1956, expressly provided that no Native allotment could be granted unless it was "founded on occupancy of the land prior to the establishment of the particular forest." See 43 U.S.C. § 270-2 (1970) (emphasis supplied). Thus, nothing in the applicable laws authorized the initiation of residency within the borders of a National Forest in Alaska, save with the permission of the Secretary of Agriculture under 16 U.S.C. § 497a (1982).

^{5/} Although the land described in her original application was not that which she was claiming at the hearing, (see note 2, *supra*), she indicated at the hearing the land she staked was that which she had described in the amendments to her application.

and she was told she could not use it "until this thing is settled, your claim is settled" (Tr. 49). Since the reason for refusal was that a permit would not issue until her claim was adjudicated or settled and her claim was not filed until December 1973, it appears that at the time Miller may have sought a use permit, the Ott permit had been issued.

Miller stated at the hearing that the Forest Service told her she could not live on the property in question "[m]aybe about ten times" (Tr. 57). The first time was when she was "burning the brush up there on my property" (Tr. 51). It is not clear when the other times were, although some were obviously after the filing of her claim (Tr. 49).

Judge Luoma found Miller to be a credible witness and specifically found that, but for the Forest Service prohibition, she would have moved the cabin onto the land in question and lived there. On these facts Judge Luoma also found it was her intent to live on the land. We agree with those findings; however, they do not answer the question whether the Forest Service occupancy prohibition was improper. We find it was not.

In October 1971 when the Forest Service told appellant she could not use the land, ANCSA had not been enacted, and, thus, the primary place of residence provision was not in existence. There is no indication she communicated to the Forest Service any intent to occupy such lands as a Native allotment, and there is no record an allotment was sought by appellant. Thus, it appears the Forest Service was acting properly in October 1971 in prohibiting appellant from further clearing lot 6 without authorization. Likewise, we find the enactment of ANCSA in December 1971 established no inherent right in Miller to move the cabin from lot 5 to lot 6 and occupy it. The primary place of residence provision included only the reference to the critical date of August 31, 1971. Moreover, following the filing of her primary place of residence application in December 1973, she was properly denied occupancy of lot 6 because it was subject to the Ott permit issued in November 1972.

Section 18(a) of ANCSA, 43 U.S.C. § 1617(a) (1982), repealed the Native Allotment Act subject to applications pending with the Department on December 18, 1971; however, the primary place of residence provision of ANCSA provided the Secretary of the Interior with authority to convey title to a Native of the surface estate of up to 160 acres occupied on August 31, 1971, as a principal place of residence. ^{6/} The only statutory requirement was that the application had to be filed within 2 years of December 18, 1971. See *Theodora M. Whitman*, 1 ANCAB 20, 83 I.D. 449 (1975). The intent of the primary place of residence provisions was apparently to provide relief to Natives residing on lands withdrawn by 43 U.S.C. § 1613(h) (1982), who did not have Native allotment applications pending with the Department on December 18, 1971.

^{6/} 43 U.S.C. § 1617(a) (1982) provides that receipt of a patent under the Native Allotment Act precludes a Native from receiving a primary place of residence patent under 43 U.S.C. § 1613(h)(5) (1982).

The regulations require a dwelling on the claimed land; that the dwelling constitute a primary place of residence; and that the claimant provide evidence of permanent or seasonal occupancy for a substantial period of time. 43 CFR 2653.0-5(d); 43 CFR 2653.8-2. At the time of the passage of ANCSA, Miller was not residing on the claimed land. Although Miller was occupying lot 6 on August 31, 1971, she admitted she never actually lived on the land in question for more than 3-1/2 weeks. This short occupancy alone is not adequate under the regulations to satisfy the primary place of residence requirements. It was neither a regular nor a seasonal occupancy, nor an occupancy for a substantial period of time. In addition, Miller's occupancy of lot 5 is not qualifying. As the Alaska Native Claims Appeal Board held in Donald Watson, 2 ANCAB 258, 84 I.D. 1015 (1977), occupancy of a dwelling in the vicinity or adjacent to the land sought is not sufficient to meet the primary place of residence regulatory requirements.

The Forest Service prohibition may not be utilized to bolster Miller's evidence of occupancy because, as explained above, at the times it advised against occupancy its action was proper. We must conclude based on the evidence presented that Miller has failed to satisfy the regulatory requirements for conveyance of a primary place of residence.

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.

Bruce R. Harris
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

James L. Burski
Administrative Judge

