

UNITED STATES FOREST SERVICE

IBLA 85-585

Decided June 24, 1987

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving a primary place of residence application filed pursuant to section 14(h)(5) of the Alaska Native Claims Settlement Act. AA-8612.

Set aside and referred to the Hearings Division.

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

In order for a parcel of land to qualify as a Native's primary place of residence under sec. 14(h)(5) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(5) (1982), and the applicable regulations, among other requirements, the land claimed must be used and occupied as of Aug. 31, 1971, and a "dwelling" must be located on the claimed tract. A dwelling located on a tract separate from the tract claimed as the primary place of residence will not satisfy the "dwelling" requirement of sec. 14(h)(5) and 43 CFR 2653.8-2(b)(1).

2. Alaska Native Claims Settlement Act: Primary Place of Residence: Criteria -- Words and Phrases

"Dwelling." Under 43 CFR 2653.8-2(b)(1) a "dwelling" is a house or other structure in which a person or persons live, reside, or habitate. A structure useable only as an emergency shelter is not a dwelling for purposes of this regulation.

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

Since, under 43 CFR 2653.8-1, an applicant for a primary place of residence is only entitled to such land as was actually used or occupied on August 31, 1971, the applicant must show the requisite use or occupancy for each aliquot 40-acre part of the lands applied for.

APPEARANCES: Michael A. Barton, Regional Forester, Juneau, Alaska, for the United States Forest Service; Dennis J. Hopewell, Esq., Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKE

The United States Forest Service (Forest Service) appeals from a decision of the Bureau of Land Management (BLM), dated April 1, 1985, approving, in part, primary place of residence application AA 8612 filed by Albert W. Wilson for lands located in the Tongass National Forest. As filed, the application embodied two discrete parcels. The first was described as the northern most lot in section 20, T. 56 S., R. 64 E., Copper River meridian, bordered by sec. 17 to the north, sec. 19 to the west, and Shipwreck Cove to the south and east, estimated to contain approximately 150 acres. The second parcel was described as a small island adjacent to and northwest of Berry Island. In its decision, BLM approved parcel 1 of AA 8612 but rejected parcel 2 of that application because it had been previously patented to the State of Alaska as lot 145 of U.S. Survey No. 3926 on February 15, 1968, under Patent No. 50-68-0194. The approved primary place of residence was estimated to contain approximately 120 acres. The Forest Service has timely appealed from the approval of parcel 1. Albert Wilson has apparently not appealed from that part of BLM's decision rejecting parcel 2. 1/

The Forest Service contends that BLM erred in deciding that Wilson had fulfilled the occupancy and residency requirements necessary to establish a primary place of residence under section 14(h)(5) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1613(h)(5) (1982). Specifically, it charges that Wilson does not now nor has he ever resided on parcel 1.

In his December 17, 1973, application for a primary place of residence, Wilson, in describing the improvements on the land, stated that he had a

1/ Inasmuch as we do not have the complete original case file we are unable to make this statement with total certainty. We note that the transmittal memorandum accompanying this appeal stated: "Transmitted herewith is a copy of the appeal from U.S. Forest Service and certified copies of the administrative record for pertinent parts of AA-8612." (Emphasis supplied). The transmission of copies of selected parts of a record under appeal is not correct procedure.

When an appeal is filed, BLM should transmit the complete original case file to the Board. Failure to do so may create difficulties for the Department in the event that a subsequent suit for judicial review is filed, as it would then be impossible to certify the original records of the Department as the records upon which the Board's decision was based. Moreover, since the Board may exercise de novo review in any appeal, it is impossible for a State Office to ascertain what documents are truly "pertinent." BLM is, of course, at liberty to make copies of the case file for its use, but the Board is to be sent the original case file.

Since we are referring this case for a fact-finding hearing, we need not further delay adjudication of this appeal at the present time. However, BLM is directed to lodge both the case file before the Board and the complete original case file with the administrative law judge assigned to the case.

smokehouse, a boat house at Shipwreck Cove, and a house, a dock shed, and light plant shed on Berry Island. He stated that all had been constructed in 1967. In addition, he stated he had another residence in Juneau. Wilson asserted in the application that, as of August 31, 1971, he occupied his primary place of residence from June to September of each year.

Apparently, on May 7, 1974, BLM informed the Forest Service of Wilson's pending application. On July 30, 1974, two Forest Service employees conducted a field examination of the land. The report of this field examination, dated August 14, 1974, noted that the small island described in the application had been patented to the State of Alaska. With respect to the parcel of land sought in section 20, the field examination disclosed an "old shack" which had recently been covered with plastic. While the report noted that it appeared that someone had recently used the area for overnight camping, the report suggested that the shack was "only useable for emergency shelter." The field examination disclosed no evidence of a boat house, though it did note that the remains of an old "boat shed or grid" did exist on Shipwreck Cove across from the claimed land. The report concluded that, since there was no present occupancy nor evidence that Wilson had occupied the land on August 31, 1971, the application should be rejected. The findings of this field report were summarized in a letter to the Alaska State Director, BLM, from the Regional Forester, dated September 3, 1974. Apparently, no further action was taken on this application in the ensuing decade. At least, the record before the Board discloses none.

On May 25, 1984, the Bureau of Indian Affairs (BIA) certified the eligibility of Wilson for the claimed primary place of residence. BIA found that (1) evidence supported the claim of a Native primary place of residence, (2) the applicant supplied documentary evidence supporting the claim, and (3) the applicant met qualification criteria set out in the regulations. BIA declared that Wilson stated in an interview that he had been using the claimed tract since 1960 and that, at that time, there was a cabin on the property. BIA stated, "According to the applicant, he has been residing at Berry Island since 1967. Berry Island is located * * * approximately 1/2 mile west of [parcel] 1," which was accessible by boat. BIA Report at 7. According to BIA, Wilson relied upon the fresh water source on parcel 1 to supplement water supplies on Berry Island because the only source of water on Berry Island was rain water collection. BIA noted that high winds and lack of docking facilities prevent winter use of the parcel. BIA reported that the applicant had stated that he used the land as of August 31, 1971, for berry picking, clam digging, and for a wood supply, and had used the cabin for camping and storage. BIA noted the "remains of a cabin at the cove," which was reportedly burned and vandalized during the spring of 1982. BIA observed a "visqueen" lean-to in the woods showing signs of habitation by an unknown occupant. BIA discounted the Forest Service report because it stated that parcel 1 "was not a primary place of residence on July 30, 1974, but made no mention of August 31, 1971." BIA Report at 6. 2/

2/ This assertion is factually incorrect. The Forest Service Report stated "there is no evidence that [Wilson] occupied the area on August 31, 1971." Forest Service Report at 2.

On July 16, 1984, the Forest Service objected to BIA's findings. Specifically, the Forest Service argued that Wilson admitted that his residence was on private land on Berry Island and that the use and occupancy of fee land did not entitle Wilson to National Forest land a mile or more from the occupied land.

In its April 1, 1985, decision approving Wilson's primary place of residence application, beyond noting that BIA had certified the eligibility of the applicant, BLM did not address the Forest Service objections.

On appeal, the Forest Service argues that parcel 1 is not Wilson's "primary place of residence" as defined in 43 CFR 2653.0-5(d). The Forest Service points out that Wilson, by his own admission, has a residence in Juneau part of the year and has a seasonal residence owned in fee title on Berry Island which is used from June until September of each year. The Forest Service contends that Wilson does not now, nor has he ever resided on parcel 1.

The Forest Service describes Wilson's use of the tract for camping, storage, water supply, berry picking, clamming and wood supply, as "only limited subsistence and recreational type use." It argues that Wilson failed to show any evidence of occupancy, permanent or seasonal, for substantial periods of time, as required by 43 CFR 2653.8-2(c).

Appellant also charges that the claimed property does not have a "dwelling" as required by 43 CFR 2653.8-2(b). Appellant states:

The Forest Service field examination made on August 14, 1974, identifies a small shack at Shipwreck Cove wrapped in visquine (exhibit B, page 5). The field examination states that the shack was only useable for emergency shelter. From photos it appears the cabin was approximately 8 x 8 ft. The Forest Service field investigation also states there was no other evidence of any prior residence or occupancy of the site. With evidence presented, there is indicated a possible casual use of the cabin at best. There is no evidence that even this emergency shelter was constructed or used by Mr. Wilson. The only other remains observed were across from the site and off the area applied for. This is confirmed by air photos before and after the application.

The finding of fact in the BIA field investigation states that there was a permanent dwelling constructed on the site. This finding is substantiated only by the remains of burned material. These possible remains have not been shown to have been a dwelling. It has not been shown that a cabin had ever existed there, who the owner of the cabin was if it did exist, and what actual frequency of use any such facility may have received.

(Statement of Reasons at 2).

Appellant contends that the BIA field examination was inadequate. Noting that the BIA report had related that "heavy rains and low ceilings prevented accurate reconnaissance of the site," appellant questions whether BIA conducted a thorough on-ground review of the area, as asserted by BIA.

Appellant argues that, even if Wilson were able to establish that a "dwelling" existed which he occupied as "a principal place of residence" on the critical date, Wilson is still only entitled to the land "actually occupied and used," citing 43 CFR 2653.8-1. Appellant notes that there is no evidence that would establish that Wilson used all 120 acres for which application was made.

In its answer, BLM argues that the record establishes that Wilson met the requirements for a primary place of residence as of August 31, 1971, and that the Forest Service arguments relate to "a time period [presumably the date of its field survey, August 14, 1974] later than the one required by the applicable regulation, [August 31, 1971]." Answer at 2. BLM requests that, if the record is found to be inadequate and the Board is unable to affirm BLM's decision, a fact-finding hearing be ordered under 43 CFR 4.415.

[1] The applicable regulation, 43 CFR 2653.8(a), provides that an application for a primary place of residence may be made by a Native who occupied land as a primary place of residence on August 31, 1971. A "primary place of residence" is defined 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." 43 CFR 2653.0-5(d). Under 43 CFR 2653.8-1, a Native seeking a primary place of residence under section 14(b)(5) of ANCSA is entitled to a "single tract not to exceed 160 acres" and the conveyance is "limited to the acreage actually occupied and used." In addition, under 43 CFR 2653.8-2(b)(1), a dwelling must be present upon the land claimed as a primary place of residence. A dwelling located on a tract separate from the tract claimed does not satisfy the requirement for a dwelling under 43 CFR 2653.8-2(b)(1). Donald Watson, 2 ANCAB 258 (1978). Cf. Vera Rossman, 36 IBLA 93 (1978) (a cabin on land adjacent to a mining claim can not be used to establish the claim as a principal place of residence under the Mining Claims Occupancy Act, 76 Stat. 1127, 30 U.S.C. § 701 (1982)).

The record establishes that Wilson resides in Juneau and, since 1967, has also maintained a residence on a seasonal basis on Berry Island, property separated from the subject land by at least one-half mile of water. The dwelling located on Berry Island, thus cannot satisfy the requirements of 43 CFR 2653.8-2(b)(1) that a dwelling be constructed on the claimed tract.

The record is unclear as to whether on August 31, 1971, there was a dwelling located on the claimed land. Wilson's application for a Native primary place of residence does not indicate that there was a dwelling on parcel 1. ^{3/} Of the items listed in his application, Wilson placed only 2 on

^{3/} The failure of a Native to aver on his primary place of residence application that he has a dwelling located on the claimed tract, is not a fatal error. However, the failure to have a dwelling located on the claimed tract is a fatal error.

subject land: a smokehouse and a boat house. Neither would be deemed to constitute a dwelling, within the meaning of the regulation.

We note that the Forest Service 1974 examination had referred to an "old shack in Shipwreck Cove which had recently been covered with plastic."

The Forest Service report noted that "the shack is only useable for emergency shelter." In its 1982 field investigation, BIA located a "'visqueen' lean-to" in the woods. However, in addition to this "lean-to," BIA also reported the presence of "the burned out remains of a cabin." BIA Report at 7.

Wilson alleged, in an affidavit dated January 28, 1983, that he had "maintained a structure on the land claimed for purposes of camping, storage and a workshop from 1960 until 1982 when it was destroyed by vandals." Two other affidavits were submitted in support of Wilson's claim. One, by Susan Sturm, noted that during the 17 years that she had known Wilson, he had "maintained a building on the land adjacent to Shipwreck Cove until it was destroyed in an act of vandalism sometime during the spring of 1982." To similar effect is an affidavit by Herman Kitka in which he averred that "Albert W. Wilson maintained a building and other improvements on the land claimed until such improvements were destroyed by vandals."

Certain observations are in order. First, though all affidavits state that a structure has been on the land since 1960, Wilson's application declares that all of the improvements mentioned were made in 1967. This discrepancy is unexplained. Moreover, while it is likely that the "shack" observed by the Forest Service in 1974 and the "lean-to" seen by BIA in 1982 are the same structure, this is not completely clear.

[2] In any event, a structure that is only usable for emergency shelter is not a "dwelling," which is defined as a "house or other structure in which a person or persons live; a residence; abode; habitation." Black's Law Dictionary 457 (5th ed. 1979). Therefore, if the burned out cabin referred to in BIA's report was the "shack" described by the Forest Service and was used only as an emergency shelter, the structure would not be considered a dwelling within the meaning of 43 CFR 2653.8-2(b)(1).

As we noted above, it is possible that the "visqueen lean-to" observed by the BIA and the "shack" which the Forest Service noted in 1974 are the same structure. In that event, the remains of the burned out "cabin" represent a different building. Even assuming this to be the case, however, there are certain questions which have yet to be resolved.

The first question is whether this structure was a "dwelling." It is interesting to note that none of the affidavits submitted refers to a "residence" or a "house" or a "dwelling." Thus, Wilson referred to the "cabin" as "a structure" and both Sturm and Kitka called it "a building." While the terminology used might be accidental, a fair reading of the affidavits tends to support the view that the building in question was used primarily for storage and not as a residence or dwelling place. Mere use of the land for camping, hunting, or woodgathering does not constitute residence on the land.

If there was no dwelling on the land that was allegedly used as a primary place of residence, the application cannot be granted. See Rose Perley Miller, 93 IBLA 147, 154 (1986).

[3] Moreover, even if the burned out cabin was a dwelling which was in existence on August 31, 1971, and which was a primary place of residence at that time, there is nothing in the record that supports the conclusion that Wilson is entitled to all 120 acres embraced in the application. Since the grant under sec. 14(h)(5) is limited to land actually occupied and used (see 43 CFR 2653.8-1) an applicant must show occupancy or use for each aliquot portion of the land sought. With respect to the instant appeal, it is certainly open to question whether the BIA investigator actually traversed the entire claim. ^{4/} While it may be appropriate to limit examination of use and occupancy to each 40 acre aliquot part (see Allotment of Land to Alaska Natives, M-36662, 71 I.D. 340, 360 (1964)), Wilson is still required to show, as a precondition to the grant of the entire 120-acre parcel, not only that there was a dwelling on the land which served as a primary place of residence, but also that he actually used or occupied each aliquot part thereof. This has not yet been done.

It is appropriate in the circumstances to refer this matter to the Hearings Division for the assignment of an administrative law judge for a fact-finding hearing under 43 CFR 4.415. If it is determined that Wilson had a dwelling within the confines of the claimed tract, then the administrative law judge should determine if the dwelling was a primary place of residence for Wilson as of August 31, 1971, and, if so, the extent of Wilson's actual use and occupancy. As the party claiming entitlement to the land, Wilson will bear the burden of preponderating on these issues. The administrative law judge shall issue an initial decision to be served upon the parties and that decision shall be final unless any party adversely affected thereby files a timely appeal.

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 set aside and the case is referred to the Hearings Division for action consistent with this decision.

James L. Burski
Administrative Judge

We concur:

John H. Kelly
Administrative Judge

Gail M. Frazier
Administrative Judge.

^{4/} Thus, the BIA report noted "[h]eavy rains and low ceilings prevented accurate reconnaissance of the site." BIA Report at 8.

