

INTERIOR BOARD OF LAND APPEALS

Joan A. (Anagick) Johnson

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JOAN A. (ANAGICK) JOHNSON

IBLA 99-160

Decided May 22, 2003

Appeal of a decision by the Alaska State Office, Bureau of Land Management, rejecting application for a primary place of residence selection. AA-53294, Parcel A.

Affirmed as modified.

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

In order for a Native Alaskan to obtain a primary place of residence under section 14(h)(5) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(5) (2000), among other requirements, the land claimed must have been used and occupied by the claimant as of August 31, 1971, and located on land unreserved and unappropriated under the public land laws on the date the application was filed. An application for a primary place of residence must be rejected where the lands applied for were withdrawn from entry under the authority of section 17(d) of ANCSA on the date the application was filed, and where those lands were subsequently included in the Wild and Scenic River System.

APPEARANCES: Bruce L. Brown, Esq., Anchorage, Alaska, for appellant; Lisa M. Toussaint, Esq., Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Joan A. (Anagick) Johnson appeals from a December 29, 1998, decision of the Alaska State Office, Bureau of Land Management (BLM), entitled "Alaska Native Primary Place of Residence Selection Application Rejection." The decision rejected Johnson's application AA-53294 for a primary place of residence, which she submitted in October 1973 under section 14(h)(5) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1613(h)(5) (2000).

Legal Background

Prior to the passage of ANCSA in 1971, the Alaska Native Allotment Act (Act of May 17, 1906), as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), provided legal authority for transferring ownership of Federal lands to Alaska Natives. It permitted the Secretary of the Interior to allot up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Native Alaskan Indian, Aleut, or Eskimo, 21 years old or the head of a family, upon satisfactory proof of substantially continuous use and occupancy for a 5-year period. Forest Service, U.S. Department of Agriculture, 143 IBLA 175, 177-78 (1998). In addition, prior to 1971, various statutory enactments provided authorization for individual Alaskan Natives and groups to apply for land transfers. See, e.g., Alaska Native Township Act of 1926, 43 U.S.C. §§ 733-36 (repealed 1976).

By the late 1960's, a number of issues and legal actions had arisen with respect to lands within the State of Alaska and land claims by Native Alaskan individuals and groups, leading to the consideration of new legislation dealing with Native claims and land rights. See generally S. Rep. No. 92-405, at Part VI (Oct. 21, 1971). To preserve the status of Alaska lands pending potential legislation, on January 17, 1969, the Secretary of the Interior issued Public Land Order No. (PLO) 4582, which withdrew all unreserved public lands within Alaska from appropriation or selection under the public land laws. (34 FR 1025 (Jan. 22, 1969).) This PLO was to run through December 31, 1970, but was extended by a series of PLO's and continued in effect until the passage of ANCSA. (PLO 4962 (Dec. 11, 1970); PLO 5081 (June 24, 1971).)

Congress enacted ANCSA on December 18, 1971, with general goals of enhancing the standard of living of the Native Alaskan by settling Native land claims and disputes, establishing a compensation fund, and permitting selections of land by Native village and regional corporations. Section 17(d)(1) of ANCSA expressly revoked PLO 4582, but, at the same time, put in place a 90-day temporary withdrawal of "all unreserved public lands in Alaska from all forms of appropriation under the public land laws * * *." 43 U.S.C. § 1616(d)(1) (2000). During these first 90 days after the December 18, 1971, date of ANCSA's passage, the Secretary was ordered to "review the public lands in Alaska and determine whether any portion of these lands should be withdrawn under authority provided for in existing law to insure that the public interest in these lands is properly protected." Id. Further withdrawals required an "affirmative act the by Secretary." Id.

Section 17(d)(2)(A) authorized the Secretary to

withdraw from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from selection

under the Alaska Statehood Act, and from selection by Regional Corporations pursuant to section 1610 of this title [section 11 of ANCSA], up to, but not to exceed, eighty million acres of unreserved public lands in the State of Alaska, including previously classified lands, which the Secretary deems are suitable for addition to or creation as units of the National Park, Forest, Wildlife Refuge and Wild and Scenic Rivers Systems: *Provided*, That such withdrawals shall not affect the authority of the State and the Regional and Village Corporations to make selections and obtain patents within the areas withdrawn pursuant to section 1610 of this title.

43 U.S.C. § 1616(d)(2)(A) (2000). Section 17(d)(2)(B), 43 U.S.C. § 1616(d)(2)(B) (2000), provided that the Secretary had to withdraw lands under section 17(d)(2)(A) within 9 months of December 18, 1971. Subsection (B) further provided that any lands not withdrawn under the terms of section 17(d)(1), or under section 17(d)(2)(A), became available for State selection and appropriation under the public land laws.

Section 17(d)(2)(C) required that in the first 2 years after passage of ANCSA, the Secretary had to advise Congress in 6-month intervals of the Department's recommendations for lands that were withdrawn under section 17(d)(2)(A) quoted above. If such lands were not recommended for inclusion within the National Park, Forest, Wildlife Refuge and Wild and Scenic Rivers Systems at the end of the 2-year period, those lands would be available for appropriation under the public land laws. 43 U.S.C. § 1616(d)(2)(C) (2000).

Other provisions of ANCSA permitted Native village and regional corporations to select lands within Alaska. Section 12(a) of ANCSA permitted Native village corporations (identified in ANCSA section 11) to select, within 3 years from December 18, 1971, certain lands within townships in which any part of the village is located. 43 U.S.C. § 1611(a)(1) (2000). Section 11(a), 43 U.S.C. § 1610(a)(1) (2000), withdrew land within townships enclosing a Native village subject to valid existing rights. Section 16 of ANCSA specified further withdrawals of land, subject to valid existing rights, within particular townships and villages. 43 U.S.C. § 1615 (2000).

ANCSA section 14(h) authorized additional conveyances, including conveyances to individuals with primary places of residence in Alaska on August 31, 1971:

The Secretary is authorized to withdraw and convey 2 million acres of unreserved and unappropriated public lands located outside the areas withdrawn by sections 1610 and 1615 of this title, as follows:

* * * * *

(5) 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. * * *

43 U.S.C. § 1613(h)(5) (2000) (emphasis added). Section 14(h) also permitted this acreage to be conveyed for other purposes, such as cemeteries or historical sites, and particular lands surrounding villages and municipalities. 43 U.S.C. § 1613(h)(1) through (5) (2000).

While establishing an option for Native Alaskans to apply for conveyance of lands as a primary place of residence, ANCSA elsewhere abolished existing claims against the United States based on “aboriginal right, title, use or occupancy of land or water areas in Alaska” and claims based on statute or treaty relating to Native use and occupancy. 43 U.S.C. § 1603(a) through (c) (2000). Consistent with extinguishing all such prior claims, section 18(a) of ANCSA, 43 U.S.C. § 1617(a) (2000), expressly repealed the Act of May 17, 1906, but preserved applications for Native allotments pending on ANCSA’s 1971 date of enactment. Section 18 expressly stated that, where such a Native allotment application was pending on ANCSA’s date of enactment, the application “may, at the option of the Native applicant, be approved and a patent issued * * * in which case the Native shall not be eligible for a patent under” ANCSA section 14(h)(5). 43 U.S.C. § 1617(a) (2000). Accordingly, a Native allottee could not obtain a primary place of residence conveyance if he or she chose to pursue an allotment application that had been filed under the Act of May 17, 1906, and was pending on December 18, 1971.

Subsection 18(b) made clear that any such allotments approved under the terms of the repealer provision during the first 4 years after passage of ANCSA “shall be charged against the two million acre grant provided for in section 1613(h) of this title.” 43 U.S.C. § 1617(b) (2000). Thus, both Native allotments and patents based on primary place of residence applications were to be granted from lands withdrawn under section 14(h), 43 U.S.C. § 1613(h) (2000).

BLM promulgated regulations implementing ANCSA, and, relevant here, governing applications for primary places of residence. 43 CFR Subpart 2653. BLM defined a “primary place of residence” 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).

No applications for primary place of residence could be accepted after December 18, 1973. 43 CFR 2653.4(a). The application would segregate the lands from all other forms of appropriation under the public land laws, with certain exceptions, until such time as the application was rejected. 43 CFR 2653.2(d). These provisions are repeated at 43 CFR 2653.8.

The rules established that the acreage to be conveyed for a primary place of residence had to be limited to a single tract to the extent that it was actually occupied and used by the applicant: "A native may secure title to the surface estate of only a single tract not to exceed 160 acres under the provisions of this subpart, and shall be limited to the acreage actually occupied and used." 43 CFR 2653.8-1.

The rules also identified evidence that must be established to demonstrate a primary place of residence.

(a) *Periods of occupancy.* Casual or occasional use will not be considered as occupancy sufficient to make the tract applied for a primary place of residence.

(b) *Improvements constructed on the land.* (1) Must have a dwelling.

(2) May include associated structures such as food cellars, drying racks, caches etc.

(c) *Evidence of occupancy.* Must have evidence of permanent or seasonal occupancy for substantial periods of time.

43 CFR 2653.8-2.

Factual and Procedural Background

On October 23, 1973, Joan Anagick submitted to BLM an application on a form entitled "Alaska Native primary place of residence and evidence of occupancy." However, she applied for two parcels of land near Unalakleet, Alaska. She did not identify which parcel was the "primary" place of residence. The application described the two parcels as follows:

Parcel A. Approximately 80 Acres, Unsurveyed land in Unalakleet river, No 1 post beginning North bank of Unalakleet river.

Parcel B. Approximately 80 acres. Unsurveyed land in North river, No 1 posting beginning south bank of North river.

(Application (sic) at part 2a.) Anagick asserted on the application form that she occupied “the above described land on August 31, 1971” as a “summer season camp site” from summer to fall. Id. at parts 2 and 3. The application described the primary place of residence as a “tent site” but again failed to specify which of the two parcels contained the relevant site. The application identified the source of entitlement as the “Native Allotment Act.” The word “Allotment” is crossed out, however, and “Claims” is written in below the crossed-out word. The record does not indicate when the edit was made or who made it.

The record reflects that on December 17, 1975, the Bering Straits Native Corporation (Bering Straits), a Native regional corporation, filed a regional selection application for a conveyance of “cemetery sites and historical places” under ANCSA section 14(h)(1). (AA-10695.) This application covered a portion of the land covered by Anagick’s primary place of residence application in protracted sec. 23. Likewise, Bering Straits filed an application for lands covered by Johnson’s application in surveyed sec. 14, also under section 14(h)(1) of ANCSA. (AA-11789.)

On January 24, 1984, Anagick, now Joan A. Johnson, submitted a letter to BLM, stating that she did “not know why her land claims application was turned down.”^{1/} An unsigned, undated, handwritten memorandum appears in the record stating “[p]lease serialize this application under case type (2561) * * * Then send to T & LS to plat to records. When processed please return to Native allotment section.” The application was serialized as AA-53294, as “case type: 256100 Alaska Native allotments,” in a case file abstract dated February 21, 1984.

According to the abstract, the application was listed as received on February 16, 1984.^{2/} A subsequent abstract listed the two parcels as applications for Native allotments. Parcel A was identified as located in protracted secs. 14 and 23, T. 18 S., R. 8 W., Kateel River Meridian. Parcel B was located in surveyed secs. 15 and 22, T. 18 S., R. 10 W., Kateel River Meridian. (Mar. 2, 1984, Case File Abstract.)

^{1/} If Johnson’s application was formally rejected in the period between Oct. 1973 and Jan. 1984, the record does not so indicate.

^{2/} The reason for BLM’s 11-year delay in acknowledging the application is unclear. However, on its face, Johnson’s application generated confusion as to whether she meant to apply for a Native allotment or a primary place of residence, for the reasons described above. A primary place of residence was limited to the parcel used for a residency while the “use and occupancy” requirements for a Native allotment application under the Act of May 17, 1906, permitted an allottee to obtain multiple parcels comprising a maximum of 160 acres. Forest Service, U.S. Department of Agriculture, 143 IBLA at 177-78.

In 1984, Johnson sent two letters to BLM asking for the case file reports for AA-53294. (May 16 and Sept. 25, 1984, letters from Johnson to BLM.) The Alaska Legal Services Corporation (ALSC) reviewed the records and notified BLM that BLM had misidentified Johnson's application for primary place of residence submitted in 1973 as a Native allotment application submitted in 1984. (Nov. 29, 1984, letter from ALSC to BLM). Memoranda indicate that BLM forwarded the file to appropriate officials for notation as an application for a primary place of residence. (Dec. 3 and Dec. 19, 1984, BLM memoranda.)

A case file abstract dated December 26, 1984, identified Johnson's application as one for a primary place of residence, case type 265306. Parcel A was identified as located in the protracted S1/2 S1/2 sec. 14 and the protracted N1/2 N1/2 N1/2 of sec. 23, T. 18 S., R. 8 W., Kateel River Meridian. Parcel B was identified as located in the SE1/4 sec. 15 and the N1/2 NE1/4 sec. 22, T. 18 S., R. 10 W., Kateel River Meridian. (Dec. 26, 1984, Case File Abstract.)

On January 2, 1985, the Branch of ANCSA Adjudication, BLM, sent a letter to Bering Straits, stating that Johnson had filed a primary place of residence application on October 23, 1973. BLM asked for Bering Straits' "concurrence or non-concurrence of the subject 14(h)(5)." (Jan. 2, 1985, letter from BLM Section Chief to Bering Straits.) The Unalakleet Native Corporation (Unalakleet Corp.), a Native village corporation, sent a letter to Bering Straits on April 3, 1985, supporting Johnson's claim and asserting that "to deny her continual use and ownership would be contrary to the implications of" ANCSA.

On August 7, 1985, BLM issued a decision to Johnson, the Unalakleet Corp., and Bering Straits. BLM expressly approved the Unalakleet Corp.'s village selection applications F-14952-A and B, dated May 20 and October 2, 1974, under ANCSA section 12. BLM also rejected Johnson's primary place of residence application as it pertained to Parcel B because BLM stated that the lands had been withdrawn under ANCSA section 11 and selected by the Unalakleet Corp. under section 12. (Aug. 7, 1985, BLM decision at 2.) BLM stated that the "remainder of the lands within [Johnson's application] AA-53294 will be adjudicated at a later date." *Id.* Johnson did not appeal that decision and its conclusion is final for the Department with respect to Parcel B.^{3/}

On September 17, 1985, Johnson sent a letter to the BLM's Native Allotment Section, reiterating her desire for Parcel A of AA-53294. Johnson stated that she and

^{3/} The record indicates that the State of Alaska appealed the decision to the Board in IBLA 85-926, on issues not related to Johnson. The parties settled (Order dated Apr. 11, 1990), and BLM issued a decision modifying in part the Aug. 7, 1985, decision. (Feb. 15, 1991, BLM decision.)

her husband were hoping to build a cabin and fish rack on the land, but were not sure whether it would be allowed. (Sept. 17, 1985, letter from Johnson to BLM.)

On September 23, 1985, Bering Straits sent a letter to BLM expressing support for Johnson's acquisition of Parcel A as a primary place of residence. (Sept. 23, 1985, letter from Director, Bering Straits, to BLM.) Bering Straits also sent a letter to Johnson supporting her application. (Sept. 2, 1985, letter from Director, Bering Straits, to Johnson.) On October 7, 1985, the Bering Straits Regional Office, BLM, notified Johnson that it was sending her application for Parcel A to the Bureau of Indian Affairs (BIA) for a field report. (Oct. 7, 1985, letter from BLM to Johnson; see also Dec. 19, 1985, memorandum from BLM to BIA.)

In 1986, Johnson requested the status of her application and asked whether she could build a cabin and fish rack on the remaining parcel. (Oct. 15, 1986, letter from Johnson to BLM.) On January 13, 1987, BLM responded that a field examination for Parcel A would be conducted during the summer of 1987. A memorandum to the file indicates that the "letter was not answered [earlier] due to [a] reorganization." (Jan. 12, 1987, telephone report.)^{4/}

The record indicates that the field examination took place in 1987 but no field report was prepared. A note to the file regarding AA-53294 dated June 10, 1988, states "[h]old off survey -- no permanent structure sighted during field exam." (June 10, 1988, short note transmittal.) While the lack of a structure constituting a dwelling would be an impediment to approving the application, 43 CFR 2653.8-2, the record contains no indication whether BLM conveyed this concern to Johnson.

On November 3, 1988, BLM issued a decision rejecting Bering Straits' section 14(h)(1) application (AA-10695) for cemetery sites and historical places. Not mentioning Johnson's competing application for the same lands, BLM stated that the Native corporation's application was rejected because the land on which it was located had been continuously withdrawn under provisions of ANCSA and therefore were not "unappropriated and unreserved and were not available for selection under Sec. 14(h) * * * ." (Nov. 3, 1988, decision at 2.) While no decision appears in the record, Bering Straits' section 14(h)(1) application for other lands coinciding with Johnson's application (AA-11789) was apparently rejected on December 29, 1988. (Feb. 4, 1998, Township Summary.)

^{4/} A case file abstract continued to indicate that Johnson had filed her application in 1984. (May 19, 1987, Case File Abstract.) Sometime during or before 1991, BLM amended the case file abstract to reflect that the application for primary place of residence was submitted on Oct. 23, 1973. (Mar. 4, 1991, Case File Abstract.)

Although the record is devoid of further communication between Johnson and BLM in the ensuing decade, it appears Johnson went forward with her plans to build a cabin. Johnson sent the following letter and information to the BIA ANCSA Office:

[T]his letter is in response to your recent visit in Unalakleet to my home concerning my land on the Unalakleet River. Back in the 1980's I thought my land was settled because I did not hear from your office after the field report made by a Mr. Dale Slaughter over ten (10) years ago. Why wasn't my application processed then?

To date I had built a cabin on said lot. My regional corporation stated that they would back me on my claim. If I can assist in any way for my claim to be processed any faster now, please don't hesitate to call me or write * * *.

(June 26, 1997, letter from Johnson to BIA.)

On July 10, 1997, BLM advised Johnson it had conducted another field investigation. BLM stated:

A field investigation of your applied-for lands was completed in 1987 but was inadequate. Therefore, a report was never written. In an effort to correct the situation, the BIA investigated your applied-for lands again last month (June 1997). A report is being prepared at this time and is expected to be completed this fall.

(July 10, 1997, BLM letter to Johnson.)

The report of the investigation was issued in June of 1997, and on September 26, 1997, the BIA ANCSA Office issued a "Certificate of Eligibility for Native Primary Place of Residence application BLM AA-53294, Joan Anagick Johnson," pursuant to 43 CFR 2653. The report described Parcel A as an 80-acre tract "within a south-looping meander bound on three sides by the [Unalakleet] river," (Report at 5), and indicates that the 1987 field examiners

identified Johnson's use area. It consisted of a large grassy clearing * * * just above the river near the southeast meander bend * * *. There the crew noted several upright stakes and fallen posts from a * * * wall tent frame, several fishing nets, a wood pile and other debris * * *. It appeared the clearing had been used for a considerable time, easily dating from the early 1970s or before. Occupation evidence was photographed and its distribution roughly sketched.

* * * * *

Over the winter of 1987-88 a partial draft was prepared, but the unfinished report languished at the BIA ANCSA Office for another eight years. When it was “rediscovered” in 1996, notes and draft materials on file were deemed insufficient to properly evaluate the claim, now 24 years old. Consequently, a second site visit was organized for the 1997 field season.

On 19 June 1997 BIA * * * reexamined the clearing identified in 1987, locating tent stakes and associated debris. * * *

Since the 1987 field visit, Johnson had erected a cabin on the high-cut bank roughly 200 [meters] downstream from the tent * * * .

Id. at 7-9 (emphasis added). The report documented Johnson’s ties to the vicinity, ancestral connections, and her use and occupancy of Parcel A “since 1969,” and stated that her uncle used the location to camp and fish even earlier. Id. at 10.

The report stated that “[a] tent camp, which served as her principal seasonal residence, was established there in 1969,” presumably during the season of use from summer to fall. Id. The report distinguished between that part of the 80-acre parcel on which the tent camp had been located, identified as the old camp, and the area on which the cabin was constructed, identified as the new site. Id. at Figure 2. The two sites are connected by a foot trail. Id.

Another year passed. Johnson wrote to BLM again asking the status of her claim. (Sept. 1, 1998, Johnson letter to BLM.)

BLM issued its decision on December 29, 1998, rejecting the application for primary place of residence. Complicating matters considerably, BLM reversed Parcels A and B in its description, incorrectly stating that the 1985 decision had rejected Johnson’s application as to Parcel A. BLM proceeded to discuss the relevant lands as Parcel B. We refer to Parcel A as it is correctly identified in the record.

The BLM decision stated that the lands in question, within protracted secs. 14 and 23, T. 18 S., R. 8 W., Kateel River Meridian, had been withdrawn on March 9, 1972, pursuant to ANCSA section 17(d)(1), and then again under section 17(d)(2) for possible recommendation to Congress and additions to units within the national park, forest, wildlife refuge, or wild and scenic river systems. The decision explained that the Secretary extended the withdrawal until December 18, 1978, and again withdrew and reserved the public lands pursuant to section 204 of the Federal Land

Policy and Management Act of 1976, 43 U.S.C. § 1714(e) (2000), for a period of 3 years. 43 FR 59756 (Dec. 21, 1978). During this period, BLM explained, Congress passed the Alaska National Interest Lands Conservation Act (ANILCA), which classified and further segregated lands along the Unalakleet River as a wild river pursuant to the Wild and Scenic Rivers Act, as amended. 16 U.S.C. § 1274(a) (2000). BLM stated that the lands were continuously withdrawn from entry and were therefore unavailable for selection pursuant to section 14(h)(5) of ANCSA from March 1972 forward, including the 1973 date on which Johnson submitted her application.^{5/}

Johnson timely appealed and submitted a statement of reasons (SOR). BLM submitted its Answer, to which Johnson submitted an Additional Response. (Answer, Johnson Response.) BLM further responded to that pleading. (BLM Response.)

Johnson's primary argument is that, even though she submitted her application on October 23, 1973, under the terms of ANCSA section 14(h)(5), she certified that she lived on the site on August 31, 1971, prior to any of the withdrawal orders cited by BLM. Johnson asserts that Congress' purpose in providing a 2-year period to submit an application for primary place of residence was to allow Natives time in which to "perfect title to those prior existing rights [in existence on August 31, 1971] for permanent places of residence." (SOR at 5.) Johnson thus asserts that her residence in 1971 is an inchoate right which predated the relevant public land orders. She asserts that the relevant public land orders were themselves subject to valid existing rights.

In answer, BLM states that the right to a primary place of residence is not "perfected" until the date the application is filed. BLM admits its "clerical" error in the description of the correct parcels, described above. (Answer at 2 n.2.) BLM also avers that the decision "inadvertently omitted from its analysis that Parcel A was continuously withdrawn and unavailable for selection" since before 1972 because, on January 17, 1969, PLO 4582 withdrew all Alaska lands from selection until the passage of ANCSA. (Answer at 4.) Thus, according to BLM, the land in question was withdrawn from 1969 until the passage of ANCSA, and was again withdrawn from 1972 forward. Because Johnson did not, and could not by the terms of ANCSA's statutory moratorium in section 17(d)(1), submit her application during the period between ANCSA's passage and the issuance of the March 9, 1972, PLO 5180, BLM

^{5/} BLM's 1998 decision issued to Johnson is consistent with its 1988 decision denying Bering Straits' section 14(h)(1) application covering portions of the same land. (Nov. 3, 1988, BLM decision denying AA-10695.)

states that she had no opportunity to apply for land that was not encumbered by a withdrawal. In effect, BLM contends that no period of time existed during which Johnson could have applied for a primary place of residence on the location in question.

Johnson responds that BLM's construction of the various land orders in question and ANCSA would effectively nullify the right established in section 14(h)(5) of a Native Alaskan to obtain a primary place of residence. She points out that section 14(h)(5) establishes a statutory criterion that the applicant be permitted 2 years to submit an application for a primary place of residence which he or she occupied on August 31, 1971. 43 U.S.C. § 1613(h)(5) (2000). As Johnson reads it, BLM effectively argues because of the broad withdrawal effected by PLO 4582 from 1969 until the passage of ANCSA that a Native Alaskan's occupancy on August 31, 1971, has no meaning that would permit the Native to apply for the land within the period established by statute, a construction that eviscerates the very terms of ANCSA. (Johnson Response at 3-15.)^{6/}

ANALYSIS

The decision, by BLM's admission, relies on erroneous facts in its description of the parcels, and an "inadvertently omitted" but central legal justification. In such circumstances, the Board might reverse and remand for correction of fact and law. Nonetheless, given the date of the original application and the fact that the record contains sufficient information to do so, we proceed to resolve the appeal on the merits.

[1] The parties appear to agree that the land was withdrawn continuously from 1969 to the present under PLOs and statutory provisions identified above. In brief, on January 17, 1969, PLO 4582, as amended by PLOs 4962 and 5081 in 1971, withdrew all lands within Alaska from appropriation under the public land laws. ANCSA revoked PLO 4582, but imposed a statutory withdrawal for an additional 90 days following December 18, 1971, to allow the Secretary of the Interior to review all public lands in Alaska and determine if any should be withdrawn pursuant to existing laws in order to "insure that the public interest" in those lands was protected. 43 U.S.C. § 1616(d)(1) (2000). During the 90-day moratorium, on March 9, 1972, PLO 5180 withdrew the lands on which Parcel A is located "for study and classification." 37 FR 5583 (Mar. 9, 1972). On September 12, 1972, within the 9-month period allowed by section 17(d)(2)(A) and (B), the Secretary issued PLO 5250 which withdrew the land on which Parcel A is located under section 17(d)(2) of ANCSA for a further period of 2 years, subject to study and recommendation to Congress for the creation of National Parks, Forests, Wildlife

^{6/} Both parties raise a number of more detailed arguments which will be addressed where necessary below.

Refuges, or Wild and Scenic River Systems. 37 FR 18730 (Sept. 15, 1972). This second withdrawal means that Parcel A was not “unreserved and unappropriated” in October 1973 when Johnson filed her application.

The land in question was included in the Secretary’s recommendations to Congress on December 18, 1973, which, pursuant to of section 17(d)(2)(D), extended the withdrawal for a period of up to 5 years, or through December 1978.^{7/} 43 U.S.C. §1616(d)(2)(D) (2000). In November 1978, the land was withdrawn by PLOs 5653 and 5654 “for the public purpose of preserving, protecting, and maintaining the resource value of such lands.” 43 FR 59756 (Dec. 21, 1978). Section 603(A)(50) of ANILCA added the Unalakleet River to the Wild and Scenic Rivers System pursuant to the Wild and Scenic Rivers Act. 16 U.S.C. § 1274(a)(50) (2000). Thus BLM traces the withdrawal of the critical land from 1969 through its inclusion in ANILCA in 1980.

Johnson argues that this does not answer the question, however, because all of the PLOs and statutory provisions in question withdrew land subject to “valid existing rights” at the time the land was withdrawn. Thus, the issue that forms the heart of this dispute is whether Johnson’s rights in Parcel A vested pursuant to ANCSA section 14(h)(5) as of August 31, 1971.

In its Answer, BLM argues that Johnson’s land was not unreserved or unappropriated on August 31, 1971, because it was withdrawn by PLO 4582 on January 17, 1969, and remained so at the time of Johnson’s application so that she could not apply for a primary place of residence. BLM’s argument is off track in that it does not account for whether such residence might have begun prior to PLO 4582. If the mere fact that lands were closed to appropriation under PLO 4582 on August 31, 1971, invalidates an application for a primary place of residence, as BLM suggests, then no primary place of residence application could have ever been approved because PLO 4582 had withdrawn all unreserved public lands within the State as of that date. Thus, BLM’s reading would render section 14(h)(5) a nullity, essentially invalidated by the very PLO 4582 that ANCSA revoked under section 17(d). We cannot find that Congress, having had that knowledge, would have enacted a statute that could never have been effectuated. It is an accepted doctrine of statutory construction that “effect must be given, if possible, to every word, clause, and sentence of a statute.” California Portland Cement Corp., 83 IBLA 11, 16 (1984).

^{7/} In Asamera Oil, Inc., 77 IBLA 181, 185-86 (1983), the Board stated that withdrawals issued under the authority granted the Secretary in ANCSA section 17(d)(1) did not expire, while withdrawals under section 17(d)(2) expired in 1978, under the terms of subsection (D). 43 U.S.C. § 1616(d)(2) (2000).

Moreover, BLM's reading is in conflict with section 14(h)(5). That provision authorizes the Secretary to "withdraw and convey 2 million acres of unreserved and unappropriated public lands located outside the areas withdrawn by sections 1610 and 1615 of [ANCSA]." 43 U.S.C. § 1613(h) (2000). Because PLO 4582 was revoked on the date of passage of ANCSA and all lands were appropriated as of August 31, 1971, it follows that the critical date for determination of whether lands were "unreserved and unappropriated public lands" for purposes of section 14(h) cannot be August 31, 1971, as BLM suggests. The critical date for that finding is the date the application is filed.^{8/} Any other reading would potentially nullify any conveyances under section 14(h). BLM's argument for purposes of this case would thus unnecessarily and dangerously undermine the validity of other conveyances under that section, including primary places of residence which have been patented by BLM and considered by this Board. We, therefore, reject BLM's invitation to revisit such issues.

We turn to the crux of the disagreement between BLM and Johnson. There is no dispute that Johnson was using at least some portion of land within Parcel A as a tent camp on August 31, 1971, and that she timely applied pursuant to section 14(h)(5) for this parcel as a primary place of residence on October 23, 1973.

It is Johnson's contention that section 14(h)(5) gave her a statutory valid existing right, by virtue of her use of the parcel as of August 31, 1971. Thus, under her theory, this inchoate right to Parcel A "ripened" on August 31, 1971, and was unaffected by the 1972 PLOs 5180 and 5250 which postdated her use while predating her application. Alternatively, Johnson argues that she gained a vested interest in Parcel A upon passage of ANCSA in December 1971, by virtue of this inchoate right.

We cannot endorse these contentions. Section 14(h)(5) allows the Secretary to convey land that was occupied by a Native Alaskan on August 31, 1971, as a primary place of residence "upon application within two years from December 18, 1971." 43 U.S.C. § 1613(h)(5) (2000). Having repealed the Act of May 17, 1906, Congress thus provided a final opportunity to Native Alaskans to apply for land on which they had located a primary place of residence as of August 31, 1971, subject to statutory requirements. No right vested on August 31 of that year, under section 14(h)(5); rather, it was a statutory condition that the land had to be occupied by the applicant as a primary place of residence on that date.

^{8/} The critical date, likewise, could not be Dec. 18, 1971, the date on which ANCSA was enacted, because section 17(d) continued in effect the prior withdrawal of PLO 4582, by implementing, eo instante, a statutory withdrawal for 90 days.

Further, 43 CFR 2653.2(d) states that “[t]he filing of an application under the regulations of this section will constitute a request for withdrawal of the lands, and will segregate the lands from all other forms of appropriations under the public land laws * * *. The segregative effect of such an application will terminate if the application is rejected.” Considering this rule in the context of other applications under section 14, the Board has concluded that “it is clear that it is the filing of a Native corporation’s selection application which segregates the land, at least where application is filed ‘under the regulations of this section.’” Donald H. Hale, 96 IBLA 368, 371 (1987). While that case dealt with a Native corporation’s selection of land pursuant to section 14(h)(8), 43 CFR 2653.2(d) applies equally to individual selection applications pursuant to section 14(h)(5). Thus, Johnson could not obtain any rights to the land pursuant to ANCSA until she filed her application and we reject her argument that her right to the land vested on the passage of ANCSA. All that was established by ANCSA on December 18, 1971, was the right to apply for a primary place of residence.

Moreover, we reject Johnson’s assertion that she had some sort of inchoate right on August 31, 1971, that was preserved by ANCSA. On December 18, 1971, the date of enactment of ANCSA, any aboriginal title, or title based on use or occupancy which Johnson may have possessed was expressly extinguished. “All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy * * * are hereby extinguished.” 43 U.S.C. § 1603(b) (2000) (emphasis added). Thus, Johnson cannot rely on any rights established by her “use and occupancy” of the land prior to December 18, 1971, since ANCSA abolished any such rights she may have had prior to its passage. ANCSA’s creation of the right to apply for a primary place of residence is merely that -- a right to apply subject to conditions established therein. It cannot be construed to have created a pre-existing right that vested prior to the enactment of the statute, and survived the statute, when ANCSA expressly abolished all prior claims based on use or occupancy or aboriginal right, statutory or otherwise.^{2/}

The fact that Johnson’s alleged inchoate right derives from the very statute, ANCSA, which abolished any such rights pre-dating its passage distinguishes this case from the precedent Johnson cites. In Aleknagik Native Ltd. v. United States, 806 F.2d

^{2/} It is for this reason that Johnson’s citations to rights established under the Act of May 17, 1906, do not support her claim. (SOR at 10-11, citing Becharof Corp., 147 IBLA 117, 132 (1998), Golden Valley Electric Ass’n (On Reconsideration), 98 IBLA 203, 207 (1987), affirmed after remand, Golden Valley Electric Ass’n, 110 IBLA 224 (1998), aff’d State of Alaska v. Babbitt, 38 F.3d 1068, 1071 (9th Cir. 1984). Those cases addressed whether “use and occupancy” was so open and notorious as to defeat a subsequently granted right-of-way. ANCSA expressly extinguished any claim, but for those preserved by existing Native allotment applications, on its date of enactment. 43 U.S.C. § 1603 (2000).

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924, 926-27 (9th Cir. 1986), the court addressed valid existing rights which derived from authority predating ANCSA and not abolished by it. With regard to section 11, 43 U.S.C. § 1610 (2000), which allowed withdrawals of land surrounding native villages subject to valid existing rights, the court concluded that rights established under the Alaska Native Township Act of 1926, 43 U.S.C. §§ 733-36 (repealed 1976), were valid existing rights in that the repealer provision preserved existing claims. 806 F.2d at 927. By analogy, it is not disputed that a Native allotment application pending on December 18, 1971, would be a valid existing right until the Native's entitlement to the allotment was finally determined. Similarly, in Seldovia Native Ass'n, Inc. v. Lujan, 904 F.2d 1335 (9th Cir. 1990), the association had obtained land purchase options from the State of Alaska prior to the passage of ANCSA; these constituted valid existing rights. It does not follow, however, that a right to apply for a primary place of residence under section 14(h)(5) would be preserved as a "valid existing right" under the statute creating the application process.

Johnson's situation does not square with those addressed by the courts in Seldovia or Aleknagik. In those cases, the parties obtained valid existing rights by virtue of prior statutory grants. By contrast, the only "expectation" that Johnson could have identified prior to ANCSA's passage would have derived from an application filed pursuant to the Act of May 17, 1906. She never submitted a Native allotment application under that statute. The passage of ANCSA repealed that statute and thus ended any opportunity she may have had to apply for a Native allotment.

Johnson disagrees, stating that section 14(h)(5) "is not the creation of a new right. It is merely a procedure to perfect a prior existing right." (SOR at 12 (emphasis in original).) Johnson confuses the statute's intent to protect valid existing rights under, inter alia, the Act of May 17, 1906, with a newly created option allowing individuals to secure land by application that was entirely a creation of section 14(h)(5) of ANCSA. The method for securing land by a Native Alaskan under section 14(h)(5) was unique to ANCSA, and at the time became the only way for a Native to apply for title to land he or she had not timely applied for under the Act of May 17, 1906.

Johnson similarly misunderstands ANCSA when she asserts that she "elected" to apply for a primary place of residence patent under section 14(h)(5) rather than pursue her rights under the Alaska Native Allotment Act of 1906, 43 U.S.C. §§ 270-1 to 270-3. Section 18(a) allowed those Natives with patent applications pending before the Department of the Interior to choose to pursue those rights under the Act of May 17, 1906, or instead to pursue a primary place of residence under the newly created ANCSA section 14(h)(5). 43 U.S.C. § 1617(a) (2000). ANCSA repealed the Act of May 17, 1906, as to all other persons who did not have pending allotment claims on December 18, 1971. Id. Johnson had no such pending application and thus had no option to "[elect] to apply under ANCSA § 14(h)(5) for a patent, thus

foregoing her rights to obtain a patent under the 1906 Act.” (SOR at 7.) Even assuming she had the requisite use or occupancy to justify a Native allotment application, a matter not resolved on facts in this record, Johnson had foregone any right to pursue a claim under the Act of May 17, 1906, when she did not apply for an allotment under its terms. ANCSA abolished the right of any person to so apply; she had no election to make.

It is true that the Secretary’s decisions with respect to withdrawals as a result of ANCSA’s authorizations and directives ultimately prevented Johnson from filing for a primary place of residence for the land in question. However, we find this result to have been effectuated intentionally by ANCSA. Thus, even in section 14(h) itself, Congress established that the 2 million acres that the Secretary could convey were “outside the areas withdrawn by” sections 11 and 16 of ANCSA. 43 U.S.C. § 1616(h) (2000). Even while establishing the ability to apply for a primary place of residence in section 14(h)(5), Congress expressly ensured that those identified withdrawals for Native villages and corporations trumped any withdrawal and conveyance under section 14(h).

In a similar vein, sections 17(d)(1) and (2) obligated the Secretary to withdraw public lands in Alaska for purposes established therein. 43 U.S.C. §§ 1616(d)(1) and (2) (2000). To accomplish this, Congress ensured that for the first 90 days after ANCSA’s passage, the land would remain withdrawn so that the Secretary could make such determinations. The Secretary was thus to make determinations with respect to the public lands under section 17(d). The land on which Parcel A was located was withdrawn by the Secretary during the 90 days after the passage of ANCSA, and thereafter withdrawn timely and continuously under the provisions of section 17(d). That these withdrawals prevented Johnson from applying for a primary place of residence for such lands is unfortunate, but it occurred through a Congressionally mandated process.

Johnson argues that such a construction nullifies ANCSA section 14(h)(5). To the contrary, unlike BLM’s argument rejected above, we find that this construction is necessary in order to give effect to all provisions of the statute. Congress clearly intended to provide an opportunity for individuals who had not submitted Native allotment applications to apply for a primary place of residence, subject to selections made by Native villages and corporations, and to the Secretary’s authority to choose lands within the State for particular uses. In a letter dated January 11, 1972, addressed to Secretary of the Interior Rogers C. B. Morton, Congressmen John P. Saylor and Morris K. Udall, two sponsors of section 17(d), stated in reference to section 17(d)(1):

In order to maximize your control and full range of options you will want to make very broad and extensive withdrawals during this period

[the 90 day freeze following the passage of ANCSA]. Indeed, you may find it most desirable to withdraw all public lands in Alaska, reinstating a total land freeze in order that you have full authority to begin lifting that freeze, for particular tracts and to particular purposes or forms of entry, on the basis of careful prior planning.

(Congressmen Saylor and Udall to Secretary Morton, A Legislative History of the Alaska Natives Claims Act, P.L. 203, 85 Stat. 688 Part II, Department of the Interior.)

Johnson's remaining arguments do not support her claim. She argues that BLM misreads its regulation at 43 CFR 2653.3(c). That regulation states:

A withdrawal made pursuant to section 17(d)(1) of the Act which is not part of the Secretary's recommendation to Congress of December 18, 1973, on the four national systems shall not preclude a withdrawal pursuant to section 14(h) of the Act.

Johnson contends that this regulation clarifies section 17(d)(2)(C) that "withdrawn land not recommended, as well as withdrawn land, remains subject to valid existing rights under § 14(h)." (SOR at 19.) The underscored language above makes clear that if the Secretary withdrew lands under section 17(d)(1) within the 90-day statutory moratorium of ANCSA, and did not proceed to make recommendations to Congress regarding its use under, inter alia, the Wild and Scenic Rivers System, an application under section 14(h)(5) would not have been precluded. It does not follow that the same is true where the Secretary made such recommendations under section 17(d)(2)(C), as he did here.^{10/}

It is appropriate to address a few additional points raised by Johnson in her response to BLM's Answer. Johnson asserts that it is undisputed that the 80-acre parcel was her primary place of residence. She argues that BLM's "presumption" that she entered the property in 1969 is unjustified. While, as noted above, the BIA field examination report supports the notion that Johnson established a tent camp in the

^{10/} In Appeal of William Thomas Woolard, 2 ANCAB 150, 84 I.D. 891 (1977), the then-existing Alaska Native Claims Appeal Board (ANCAB) directed BLM to adjudicate an application for a primary place of residence which had been filed timely, but at a time when the lands were part of the statutory withdrawal effectuated for Native villages in section 11(a) of ANCSA, 43 U.S.C. § 1610(a) (2000), and subject to a statutory termination date in section 22(h)(1), 43 U.S.C. § 1621(h)(1) (2000). The withdrawal was, in fact, terminated by law in 1975. We do not find this precedent controlling here where the Secretary issued PLOs to withdraw lands and Congress permanently included those lands in the Wild and Scenic Rivers System.

summer of 1969, and that her uncle used the property to camp and fish before that date, Johnson argues that this report is not part of the record and asks the Board to confine its review to other documents.

Johnson misconstrues the record and the Board's review. The Board decides cases fully and finally for the Secretary. The administrative record is the record of documents before the Board. The parties are free to submit documents to the Board, and BLM submitted a case file that included the field examination. We would not refuse to consider it where relevant and Johnson does not suggest it is irrelevant to the issues in this case. Rather, it is only from BIA's certification as a result of this report that she can proffer the assertion that her residency on the parcel is "undisputed."

Moreover, nothing in the record supports Johnson's latest assertion that "there is no reason to believe that Ms. Johnson's occupation did not commence prior to 1969." (Response at 4.) Rather, the field examination report states she established a tent site in 1969, and she does not dispute that finding.

As Johnson notes, the Board in United States Forest Service, 98 IBLA 157 (1987), remanded a section 14(h)(5) application to BLM for determination of whether the applicant had satisfied the requirements of section 14(h)(5). In that case, we stated:

[T]here 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." * * * 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).

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. * *

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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.

98 IBLA at 162-63 (emphasis added, footnote omitted).

No such application of the regulatory requirements has been made here. We cannot endorse Johnson's contention that, but for the legal conclusions herein, the 80-acre tract that is Parcel A would necessarily be hers under application of relevant statutory and regulatory provisions. BLM did not make any such finding, and at best, were we to hold that the lands applied for had not been withdrawn, we would order a hearing to determine whether Johnson had met the terms of BLM regulations governing applications for primary places of residence.^{11/}

Johnson is justifiably frustrated at BLM's astonishing delay in rendering a decision on her application. However, when Johnson originally submitted her application, it appears that she was hoping to file for a Native allotment under the repealed Act of May 17, 1906. She never specifically identified which of the two tracts for which she applied was actually a "primary" place of residence or anything more than one of a couple of camp sites. The regulations applicable since 1976 ensured that only her use area would justify a patent, and that a dwelling would be required for BLM to find a use area. By 1987, this Board had rendered the decision in United States Forest Service, 98 IBLA 157; see also Rose Perley Miller, 93 IBLA 147; Donald Watson, 2 ANCAB 258, 84 I.D. 1015 (1977) (ANCAB holds that occupancy of a dwelling in the vicinity or adjacent to the land sought is not sufficient to meet primary place of residence requirements). While Johnson asked BLM whether she could build a cabin on the parcel, BLM never responded in the affirmative. A fair reading of BLM regulations and Board precedent would not have justified her choosing to build a cabin on a "new site" on a parcel not yet patented to her.^{12/}

^{11/} The answer is not definitely provided in the BIA field examination report. To the contrary, BIA did not address the parameters of the regulations or whether Johnson had shown an entitlement to each aliquot portion of the parcel. Rather, the report suggests that Johnson chose to build a cabin on a "new site" unrelated to her "old camp" use area.

^{12/} To the extent that Johnson means to argue that she relied on BLM's actions in building her cabin, we note that her reliance, if any, could only be placed on

(continued...)

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the BLM is affirmed as modified to correct the decision to reject Parcel A.

Lisa Hemmer
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

^{12/} (...continued)

generally optimistic comments of Bering Straits. (Sept. 23, 1985, Letter from Bering Straits to BLM; June 26, 1997, Letter from Johnson to BIA.) Bering Straits is not an arm of the Department of the Interior, or the Federal government. Bering Straits' comments favorable to Johnson's application predated the Department's 1988 decisions denying Bering Straits' section 14(h)(1) applications covering portions of the same land. (Nov. 3, 1988, BLM decision denying AA-10695; see also Feb. 4, 1998, Township Summary (noting rejection of AA-11789 on Dec. 29, 1988).) Notably, the record contains no suggestion that Bering Straits continued to support Johnson's section 14(h) application after its own section 14(h) applications were rejected on the basis of the relevant section 17(d) withdrawals cited above.