GARY LEE SLAY

IBLA 75-147 Decided January 14, 1975

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting homestead location notice F-21199.

Affirmed.

1. Alaska: Generally -- Alaska: Possessory Rights -- Alaska: Homesteads --Withdrawals and Reservations: Generally

Settlement on a homestead claim in Alaska two days prior to a withdrawal of the land does not except the land from the withdrawal where the claimant failed to file his notice of location within 90 days after settlement as required by the Act of April 29, 1950, 64 Stat. 94, 43 U.S.C. §§ 270, 270-5, 270-6 (1970), and his notice is properly held to be unacceptable for recordation.

APPEARANCES: Gary Lee Slay, pro se.

DECISION BY ADMINISTRATIVE JUDGE THOMPSON

Appellant's notice of homestead location was offered for recordation on June 25, 1974, the 91st day after settlement was made. The notice indicated settlement began on March 26, 1974, and there were no improvements on the claim. The Alaska State Office, Bureau of Land Management, by a decision of July 30, 1974, held the notice was not suitable for recordation because it was not filed within the 90-day period required by the Act of April 29, 1950, 64 Stat. 94, 43 U.S.C. §§ 270, 270-5, 270-6 (1970), during which period the lands were withdrawn from appropriation by Public Land Order 5418 on March 28, 1974.

Appellant's statement of reasons, in effect, is a petition for an extension in which to record his location notice. The statement describes no error in the decision below.

The statute is explicit -- the homesteader "shall not be given credit for such residence and cultivation as may have taken place prior to the filing of (a) a notice of the claim in the proper district land office * * *." 43 U.S.C. § 270-6 (1970). Appellant's stated settlement on the homestead claim two days prior to the withdrawal cannot serve to except the claim from the effect of the withdrawal as there could be no valid existing right in the settler without compliance with the Act of April 29, 1950. See Ralph Edmund Marshall, 14 IBLA 233 (1974); Kennecott Copper Corp., 8 IBLA 21, 79 I.D. 636 (1972). In the circumstances of this case, there is no authority by which the Secretary of the Interior may waive or modify the statutory requirement. Therefore, appellant's request must be denied. As no error has been shown in the decision below, it is affirmed.

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 Bureau is affirmed.

Joan B. Thompson
Administrative Judge

I concur:

Edward W. Stuebing
Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN CONCURRING

I concur in the result reached in the decision based on the particular facts involved.

Appellant filed his notice of location on June 25, 1974, and asserted therein settlement on the land on March 26, 1974, 91 days prior to such filing. Appellant stated in his location notice that there were no improvements on the land. He asserted in his appeal, however, that he had invested more than $1000 in plane fares and in having goods barged to the mouth of a river, presumably in furtherance of his desire to homestead. He asserted that being busy as a carpenter inhibited his prompt filing.

Public Land Order 5418 (39 F.R. 11547) withdrew "[a]ll public lands in Alaska, or those which may become unreserved * * *" for classification and protection of the public interest. That order, dated March 25, 1974, was filed with the Division of the Federal Register at 8:45 a.m. on March 28, 1974.

What concerns me is the absolute and unqualified holding that failure to file a notice of location within the 90-day period prescribed by 43 U.S.C. §§ 270, 270-5, 270-6, (1970), necessarily vitiates any claim based on prior occupancy of the land.

Assume arguendo, that (1) appellant had erected some $ 50,000 worth of improvements within the 90-day period; (2) thereafter, but prior to the expiration of the 90-day period, he was rendered unconscious for a period of two months or so and (3) he recovered his ability to function and filed his location notice on the 91st day.

I cannot conceive that Congress in enacting the Act of April 29, 1950, 43 U.S.C. §§ 270, 270-5, 270-6 (1970), prescribing the need for filing the notice, envisaged that the law would be applied so mechanistically as to deprive such a claimant of his investment and interest in the land. This is particularly true in a situation where the delay is de minimis, i.e., one day. Concededly, my hypothetical situation is an extreme one, but it demonstrates my concern that there may be cases in which the application of equitable principles may be appropriate. Admittedly, such cases will be rare, but I want to leave the door open for possible favorable consideration of them. This is consistent with Williams v. United States, 138 U.S. 514, 524 (1891), in which the Supreme Court of the United States said:

> It is obvious, it is common knowledge that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are

therefore not provided for by express statute, may sometimes arise, and therefore the Secretary of the Interior is given that superintending and supervisory power which will enable him, in the face of these unexpected contingencies, to do justice.

Frederick Fishman
Administrative Judge