the contract was prematurely and improperly terminated by the Government in its notice to the contractor dated November 15, 1958.

Conclusion

The appeal is sustained. The contract is considered to have been terminated for the convenience of the Government. In the absence of a clause providing that the contract may be terminated for the convenience of the Government, settlement of the contractor's claims should be in the nature of an equitable adjustment.[8] The appeal file is remanded to the contracting officer for appropriate action, including an accounting and settlement in accordance herewith and the payment of amounts retained, such as liquidated damages.

THOMAS M. DURSTON, *Deputy Chairman.*

I CONCUR:

DEAN F. RATZMAN, *Chairman.*

I CONCUR:

WILLIAM F. MCGRAW, *Member.*

HAROLD N. ALDRICH

A-30469 *Decided February 28, 1966*

Alaska: Homesteads

When land within a homestead settlement claim is subsequent to the initiation of the claim reserved by a classification order issued pursuant to the Recreation and Public Purposes Act, and the claim is then relinquished, and on the same day a new settlement claim on the land is filed, the new claim can initiate no rights since the reservation of the land pursuant to the classification makes it unavailable for further appropriation.

Rules of Practice: Appeals: Dismissal—Rules of Practice: Appeals: Standing to Appeal

When an appeal to the Director is dismissed for failure to file a timely statement of reasons, and that decision is not appealed, the party has no standing to revivify subsequently in an appeal on another matter to the Secretary the substantive issue involved in the other case and the decisions below are final.

Alaska: Homesteads—Homesteads (Ordinary): Second Entry—Homesteads (Ordinary): Settlements

A homestead settler who files a relinquishment of his location notice of settlement can make a second entry only if he is eligible to do so under the statute regulating second entries.

[8] *Foster Wheeler Corporation,* IBCA-61 (January 26, 1960), 67 I.D. 22, 60-1 BCA par. 2481. *Cf. Cannon Construction Co., Inc.* v. *United States,* 162 Ct. Cl. 94 (1963); Comp. Gen. Dec. B-155936 (February 5, 1965); 15 Comp. Gen. Dec. 439.

Alaska: Homesteads—Homesteads (Ordinary): Second Entry—Homesteads (Ordinary): Settlements

A homestead settler who relinquishes his first location notice of settlement and is otherwise eligible to make a second entry can establish no rights under his second settlement until he files his relinquishment if he has maintained his rights under his first settlement up to the moment of relinquishment.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Harold N. Aldrich has appealed to the Secretary of the Interior from a decision of the Office of Appeals and Hearings, Bureau of Land Management, dated March 25, 1965, which affirmed a decision of the Anchorage, Alaska, land office, dated January 27, 1965, rejecting his homestead application, Anchorage 059754, because the lands applied for [1] had been segregated from all forms of appropriation prior to the filing of his homestead application, and were therefore not available for acquisition at that time.

The records show that on May 18, 1959, Aldrich filed a notice of location of settlement or occupancy claim on 160 acres of unsurveyed lands,[2] pursuant to the act of April 29, 1950, 64 Stat. 94, 48 U.S.C. §§ 371–371c, 461a (1958). In the location notice, identified as Anchorage 048913, Aldrich stated that his settlement or occupancy began May 15, 1959. On April 16, 1963, he filed a request for leave of absence for one year, covering the fourth year of his settlement claim, i.e., May 15, 1962, to May 14, 1963. The request was denied by a decision of the Anchorage land office dated July 29, 1963.

Subsequently, Aldrich filed a relinquishment of his settlement claim on August 13, 1963, and, on the same day, filed a new notice of location of settlement or occupancy claim describing the same lands that were included in his previous location notice and stating that his occupancy began May 15, 1959. The new location notice is identified as Anchorage 059754.[3]

Pursuant to a request of the land office, Aldrich, on November 14, 1963, filed a corrected notice of location describing the lands involved by metes and bounds as they were still unsurveyed at that time.

In a notice received by him on April 29, 1964, Aldrich was informed that the plat of survey covering the lands in his location had been officially filed on March 2, 1964, that he should adjust his claim to the

[1] The lands are the N½NE¼, NE¼NW¼ sec. 8, and the NW¼NW¼ sec. 9, T. 11 N., R. 2 W., S.M., Alaska.

[2] The location notice described the lands by legal subdivisions although they were unsurveyed at that time.

[3] The notice described the land claimed incorrectly as the "NE¼, NW¼, N½, NE¼, sect. 8 NW¼, NW¼ sect. 9." On November 4, 1963, Aldrich filed a "corrected description" describing the land as "NE¼NW¼,N½NE¼, sect. 8 NW¼NW¼, sect. 9. Total 160 acres section 8 and 9."

survey and that to protect his preference right to enter the lands he should file an application for a homestead entry within 3 months of that date.

When Aldrich failed to make the adjustment, the land office did it for him and notified him of its action on July 1, 1964, as required by the pertinent regulation, 43 CFR 2211.0–8(b).

On September 2, 1964, the land office again reminded Aldrich of the desirability of making entry and sent him an application to enter.

By letter of September 23, 1964, the land office informed Aldrich that since his notice of location, filed November 4, 1963, had not been filed within 90 days from May 15, 1959, the date he set out in it as the date of settlement, or occupancy of the lands, no credit could be given for residence and cultivation prior to November 4, 1963, as provided in 43 CFR 2211.9–1(c)(4). The letter also informed him that a review of the status records revealed that on August 12, 1963, the lands involved were reserved by Amendment No. 1 to Classification Order No. 160, issued pursuant to the Recreation and Public Purposes Act, 44 Stat. 741 (1926), as amended, 43 U.S.C. 869 (1964), and were thus segregated from all forms of appropriation; therefore, the lands were not available for settlement pursuant to a claim with priority after August 12, 1963. For this reason, the letter concluded, his notice of location was found to be unacceptable for recordation and had been removed from the records.

Aldrich, apparently, made no response to this letter but on December 28, 1964, he filed application for homestead entry on the same lands described in his previous location notices. This application was rejected by the land office decision of January 27, 1965, from which Aldrich has appealed to the Director and now to the Secretary. The application was rejected for the same reason as was his second notice of location.

The appellant has filed a lengthy statement of reasons, in which he discusses the whole history of his settlement and life in Alaska and the hardships and inequities that he has assertedly endured.[4] As far as the homestead aspects of this case are concerned, the appellant's discussion of the history of his settlement and life in Alaska, although informative, is almost completely irrelevant to the matter at issue. The only relevant matter that the appellant discusses is a repetition of his statement made below that he did not have the money to complete

[4] As part of it he relates his attempts to acquire a trade manufacturing site, involving the other land, against which the Government brought a successful contest. Aldrich's appeals was dismissed by the Office of Appeals and Hearings, Bureau of Land Management, September 24, 1964, for failure by the appellant to file a statement of reasons in support of his notice of appeal filed April 27, 1964, the time for filing the statement having expired (43 CFR 1842.5–1). The appeal to the Office of Appeals and Hearings have been correctly dismissed on the grounds stated and no appeal ever having timely been made from that dismissal, the decisions below are final as to the trade and manufacturing site.

the required plowing and planting of 20 acres of his claim because claim jumpers destroyed his lodge (on other land), wiping out his savings, and that he discussed this matter with land office personnel in 1963; that they suggested he relinquish the claim and refile, both of which he did on August 13, 1963, or, as it happened, one day after the lands were classified for recreational purposes.

While this appeal arises from the rejection of Aldrich's application for a homestead entry, it is not clear whether Aldrich regarded his application as an attempt to convert his settlement claim into an entry or as a new and independent action. If it is the latter, then it came long after the land had been withdrawn from entry by the Classification Order of August 12, 1963, and was properly rejected. *Joseph A. Pittman*, A–30347 (January 25, 1965). If, however, it is the former, then our conclusion remains the same, but for somewhat different reasons. The issue then to be decided would be whether the lands sought by the appellant were available for settlement on the date he filed his second notice of location on August 13, 1963.

Regulation 43 CFR 1825.1(a) provides:

> Upon the filing in the proper land office of the relinquishment of a homestead claim, the land, *if otherwise available*, will at once become subject to further application or other appropriation in accordance with the applicable public land laws. A provision to this effect is contained in section 1 of the act of May 14, 1880 (21 Stat. 140; 43 U.S.C. 202). (Italics added.)

The relinquishment by the appellant of his first notice of location of settlement or occupancy claim, Anchorage 048913, became effective immediately upon the date his relinquishment was filed, namely August 13, 1963. *Frederick J. Zillig* v. *Vernon M. Milburn*, 67 I.D. 136 (1960).

The question, then, is whether the classification notice cut off any interest that Aldrich might have in the land covered by his notice. The decisions below held that his rights under his first notice continued up to the moment he filed his relinquishment and that his rights under the second notice arose at the moment he filed it. The classification notice, they held, having been filed before the relinquishment, became effective immediately on its filing and segregated the land from any later claims.

These decisions assumed, and rightly so as is discussed more fully below, that a classification notice can be filed for land which at the time of filing is subject to prior rights that the classification notice cannot affect, but that it will begin to operate upon the termination of the prior rights.

Does, however, Aldrich have any rights in his claim which predated the filing of the classification notice? The most obvious of such possible rights are, of course, those which his first acts of settlement and

notice of settlement established. These if followed by the requisite residence and cultivation would have kept the classification notice at bay.

When Aldrich filed a relinquishment of his first settlement, he removed that as a possible protection to his rights. Having given up whatever rights he had gained by his first notice he could no longer rely upon it to exclude others from establishing competing claims to the land.

Thus, whatever rights he asserts thereafter, either on the basis of his second notice of settlement or of his later application for homestead entry, if these be different, must exist independently of his rights under his first notice. Since Aldrich claims that he has rights in the land predating the classification notice, we must examine his right to make a second settlement or homestead entry, and, if he may, determine the date on which he could first establish any new rights in the land.

The regulation in effect now and when Aldrich filed his first notice plainly states that if an applicant for a homestead entry has filed a location notice of settlement and failed to perfect title he must, in connection with another application to make homestead entry, demonstrate his eligibility for a second entry under the act of September 5, 1914, 38 Stat. 712, 43 U.S.C. 182 (1964). 43 CFR 2211.9–4(b), formerly 43 CFR, 1954 rev., 65.12.

A settler who attempts to establish a second settlement must be eligible to make a second entry or he gains no rights by his second settlement. *Heiskell* v. *McDowell*, 23 L.D. 63 (1896).

As has been said:

> * * * one who, at the time he performed an act of settlement relied upon to sustain his prior right of entry, was disqualified as an entryman by having an entry, not actually and wholly abandoned, then of record, was equally disqualified to make a valid settlement and gained nothing thereby as against the valid adverse right of another, asserted prior to the removal of such disqualification. *Short* v. *Bowman*, 35 L.D. 70, 76 (1905).[5]

While in several cases the Department has recognized rights founded upon a second settlement before the settler's eligibility for a second entry was established (*Heiskell* v. *McDowell*, *supra*; *Hall* v. *Mitchell*, 24 L.D. 584 (1897)), these have been instances in which the fact that the claimant had abandoned his first entry was unquestioned or in which it was evident that he was clearly entitled to have his entry of record canceled or other disqualifications, merely technical, removed. *Short* v. *Bowman*, *supra*, 73; *William H. Archer*, 41 L.D. 336 (1912); *Arouni* v. *Vance*, 48 L.D. 543 (1922).

[5] Cf. *United States* v. *John C. Brown*, 57 I.D. 169 (1940), motion for rehearing, *id.* 173, 176–177.

Whether or not an abandoned first entry must be canceled of record before settlement for a second claim can be made, the fact is that here Aldrich has never admitted that he abandoned his first claim or indeed that it was in any way invalid. He asserts that he maintained his interest in the claim at all times and only relinquished it because he had not been able to cultivate the requisite 20 acres in the fourth entry year.

Accordingly, we conclude that Aldrich could not make a second settlement until he had filed a relinquishment of his first notice of settlement. Furthermore, his second settlement would give him an interest in the land only if he could show to the satisfaction of the Secretary (or his delegate), among other things, that the prior entry was lost, forfeited, or abandoned because of matters beyond his control. 43 CFR 2211.5–1 (a) through (d).

Since his second claim could arise no sooner than the relinquishment of his first, precisely the moment that the classification order impinged upon the land, at best Aldrich's second claim could only be simultaneous with the classification notice. Yet the classification notice was in existence prior to Aldrich's attempted second filing and covered the land subject only to Aldrich's first settlement. Upon the termination of the first settlement, the classification order took effect *eo instante* and, so long as it exists, it takes precedence over any rights junior to it.

Here Aldrich attempts to tie his second settlement to May 15, 1959, the date of his first. To do so is self-defeating. If that date is held to be controlling, it being more than 90 days before Aldrich filed his second notice of settlement on August 13, 1963, he would then lose all credit for residence (and cultivation) completed before August 13, 1963. Act of April 29, 1950, *supra*. Since the late filing of a notice of settlement does not extend the 5-year period within which a settler must demonstrate compliance with the requirements of the homestead law, Aldrich would have had left only to May 18, 1964, to complete his obligations. The recording act does not purport to extend the life of a homestead settlement claim or to waive the regular obligations. A settler who files late loses credit for his residence and cultivation but is not excused from doing the requisite cultivation and residence. That is, if he files in the third year after settlement, he can get no credit for the second year's cultivation, yet he cannot obtain a patent without having performed it. It would seem, therefore, that any settler who postpones the filing of his notice for a considerable time may find that he not only has lost credit for prior cultivation and residence but that he has also made it impossible for him to satisfy the requirements of the homestead law. So here Aldrich, having let the fourth entry year, ending on May 18, 1963, lapse without filing a notice of settlement,

could not possibly prove cultivation in the fourth year. Thus his second settlement, if otherwise valid, would properly be subject to cancellation for this reason alone.

Furthermore, as we have seen, Aldrich could not establish any claim to the land in conflict until he had relinquished his first entry. He would then have to settle on the land again and prove his eligibility for a second entry. Even if his second settlement would be deemed to be simultaneous with his relinquishment, it could not take precedence over the classification notice, indeed must yield to it. The classification notice overcomes the claim of the settler. Cf. *Orin D. Pool*, 44 L.D. 137 (1915); *Walter R. Freitag*, 52 L.D. 199 (1927); *James C. Forsling*, 56 I.D. 281 (1938).[6]

Therefore the land at issue was not open to settlement or entry after the filing of the relinquishment and Aldrich's application for homestead entry was properly rejected.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a); 24 F.R. 1348), the decision of the Office of Appeals and Hearings, Bureau of Land Management, is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

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[6] In the *Pool* case, land in section 2, a school section, which was in a national forest on the date of the New Mexico enabling act was later restored to the public domain. After the date of the act and prior to restoration of the land, Pool made a settlement, followed by the allowance of his application for a homestead entry. The Department held that the inchoate claim of the State prevented the initiation of a settlement or homestead claim initiated after the date of the act and that the act, granting the school sections to the State operated to reserve and withdraw section 2 upon its restoration to the public domain. It concluded that the rights of the State were paramount to those of the homesteader.

In *Freitag*, it was held that one who relinquishes a homestead entry then covered by an application for an oil and gas prospecting permit which was thus subject to the entry in certain aspects and then applies for a second entry for the same land has merely the status of a homestead applicant for land covered by a prior permit application notwithstanding that the relinquishment and the second entry application were filed simultaneously. In other words, the pending prospecting permit application inserted itself between the first and second homestead claims despite the theoretical absence of a time gap between them.

In *Forsling*, it was held that a relinquishment becomes effective immediately on filing, restores the land to the reservoir of vacant, unappropriated public land without further action.

"But as a result of its reversion to the public domain the land immediately becomes subject to and affected by such relevant lawful burdens, claims, or rights arising during the life of the entry as the life of the entry may have prevented from attaching and a change in its status thus occurring may operate to restrict, render contingent or wholly bar the right sought in an application made subsequently to the filing of a relinquishment or even simultaneously therewith." (P. 286.)