Editor's note: 80 I.D. 268

DAVIS L. DANN

IBLA 72-187 Decided April 4, 1973

Appeal from decision (AA 2956) by the Alaska State Office, Bureau of Land Management, rejecting notice of location of settlement claim for an additional entry under the homestead laws.

Reversed and remanded.

Alaska: Homesteads -- Additional Homesteads -- Settlements on Public Lands

A homestead settlement claim for an additional homestead entry under the Act of April 28, 1904 (33 Stat. 527), 43 U.S.C. § 213, may be made for unsurveyed lands in Alaska by a person otherwise qualified who has filed an application for homestead entry on a form approved by the Director, Bureau of Land Management, and made acceptable final proof on his original homestead settlement claim, where the combined area of the two claims does not exceed 160 acres.

APPEARANCES: Davis L. Dann, pro se.

OPINION BY MRS. LEWIS

Davis L. Dann has appealed from a decision by the Alaska State Office, Bureau of Land Management, dated October 27, 1971, which declared unacceptable for recordation his notice of location of settlement claim filed pursuant to the Act of April 29, 1950 (64 Stat. 94; 43 U.S.C. §§ 270, 270-5, 270-6, and 270-7 (1970)), for an additional homestead entry under the Act of April 28, 1904, as amended, 43 U.S.C. § 213 (1970), and vacated its notice of August 19, 1969, entitled "Claim Recorded."

Dann had filed on June 13, 1968, the notice of location of settlement claim for an additional homestead entry under the 1904 Act, Serial No. AA 2956. The notice described a tract of land by metes and bounds in unsurveyed sections 16 and 17, T. 4 S., R. 7 E., Copper River Meridian, containing approximately 120 acres and lying contiguous to a tract, containing approximately 40 acres, on which he had previously filed a notice of location of settlement claim for occupancy under the homestead laws, Serial No. AA 801. On May 6, 1969, the Alaska State Office informed Dann that the land description was incorrect and that the filing would be closed if the defect was not corrected within 30 days from receipt of the notice. Dann filed a new location notice with a corrected description on June 25, 1969, whereupon the State Office issued its notice of August 19, 1969, accepting the claim for recordation.

The decision below pointed out that the regulations under the Act of April 28, 1904, supra, authorize a person who has not theretofore entered 160 acres but has entered less than that amount to enter other and additional land lying contiguous to the original entry which, with the land first entered and occupied, will not in the aggregate exceed 160 acres (43 CFR 2512.2(a)); that 43 CFR 2512.2(b) states that a person who desires to make an additional entry under the 1904 Act must comply with the provisions of 43 CFR 2511.3-1, which regulation provides that applications for public lands in Alaska subject to entry must be filed on a form approved by the Director, and that homestead entry may be made on unappropriated surveyed public lands (43 CFR 2511.0-8).

The decision then held that the lands covered by Dann's notice of location are not open to or subject to entry because they are not surveyed, as unsurveyed lands cannot be entered and the 1904 Act deals specifically with additional entries; also, that Dann is not qualified to make an additional entry because his prior filing AA 801 is not an entry but a homestead location claim on unsurveyed land, and there is no provision in the law or the regulations to allow a homesteader to file an additional homestead settlement claim; and, therefore, his notice of location serialized as AA 2956 should have been declared unacceptable for recordation at the time it was filed.

In his appeal, Dann contends that (1) at the time of filing his original homestead settlement claim, AA 801, on March 9, 1967, he was assured by the land office that he could file on additional contiguous land at any time during the statutory life of the original claim, and that (2) he has been unofficially informed that patents have been issued on similar filings on unsurveyed lands by the land office.

We disagree with the decision below, which relies on provisions of the general regulations pertaining to homestead entries contained in 43 CFR Part 2510 to the effect that a homestead entry can be made only on surveyed lands and that an application for entry must be filed on a particular form, and on a conclusion that there is no provision in the law or the regulations to allow a homesteader to file an additional homestead settlement claim. It is true that a homestead entry per se cannot be made on unsurveyed lands either in Alaska or the other public land states, and that in either case an application for an entry must be filed on a form approved by the Director. We also concede that there is no specific provision for an additional homestead settlement claim in Alaska. On the other hand, there is no specific prohibition.

The provisions of the regulations cited by the State Office must be read in pari materia with the special regulations pertaining to homestead settlement and entry in Alaska contained in 43 CFR Subpart 2567. The homestead laws were extended to Alaska by the Act of

May 14, 1898 (30 Stat. 409; 48 U.S.C. § 371), as amended by various act. See 43 CFR 2567.0-3. 43 CFR 2567.0-8 states that "[a]ll unappropriated public lands in Alaska adaptable to any agricultural use are subject to homestead settlement, and, when surveyed, to homestead entry. * * *" 1/ A person making settlement on unsurveyed land in Alaska on or after April 29, 1950, in order to protect his rights, must file a notice of settlement for recordation in the land office, and post a copy thereof on the land within 90 days after the settlement. 43 CFR 2567.2(b).

An entryman on surveyed lands or a homestead settlement claimant on unsurveyed lands must file acceptable final proof of his compliance with the residence and cultivation requirements of 43 CFR 2567.5 within five years from the date of the entry or from the date of recording of the notice of the settlement claim, as the case may be. In the case of a settlement claim, the land included therein may be surveyed without expense to the settler, provided he submits, within the said five-year period, an application to enter on a form approved by the Director and acceptable final proof. 43 CFR 2567.6(a). In such case, the entry is then allowed and approved for patenting. If a settler wishes to secure earlier action in the matter of survey, he may have a survey made at his own expense by a deputy surveyor appointed by the authorized officer of the Bureau of Land Management and, after

1/ Also see 43 CFR 2511.2 and 2511.3-1(b).

the special survey has been made, he should file an application to enter as in the case of other settlements on surveyed lands. 43 CFR 2567.6(b) and (c).

The regulations provide that any person otherwise qualified who has made final proof on an entry for less than 160 acres may make an additional homestead entry in Alaska for contiguous land under the Act of April 28, 1904, supra, or for noncontiguous land under the Act of March 2, 1889 (25 Stat. 854; 43 U.S.C. § 214) for such area as when added to the area previously entered will not exceed 160 acres. See 43 CFR 2567.4(c). As the homestead laws are applicable to Alaska, including additional entries, we see no reason why a homestead settlement claim for an additional homestead entry under the Act of April 28, 1904, cannot be made on contiguous unsurveyed lands, even though the regulation pertaining to additional entries in Alaska does not specifically provide for additional homestead settlement claims on unsurveyed lands. Neither does the regulation explicitly prohibit them. Therefore, we hold that additional homestead settlement claims may be made in Alaska under proper circumstances.

We have examined the case file of Dann's original settlement claim AA 801 and find that he has filed final proof and a homestead entry application on approved Bureau of Land Management Form 2211-1 (October 1964). A field report recommended that the land be

surveyed and the claim proceed to patent. The proof has been accepted and instructions have been prepared for U.S. Survey No. 4097 to accommodate the claim. As Dann has filed acceptable final proof on his original claim AA 801, his notice of location for an additional claim, AA 2956, is acceptable and should be recorded in the absence of any other objections appearing. If he files acceptable final proof on it within the statutory period, he will be entitled to make the additional entry.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case record is remanded to the local Bureau of Land Management office for further appropriate action consistent herewith.

Anne Poindexter Lewis, Member

We concur:

Douglas E. Henriques, Member

Martin Ritvo, Member, Concurring specially

Martin Ritvo, concurring.

While I concur in the result reached in the main opinion, I believe a few additional comments may be advisable.

First considering the amount of unsurveyed land in Alaska and number of claims initiated by settlement, we find it unusual that there is no provision in the regulation or any decision pertaining to this situation. Nevertheless, there must have been a practice of either allowing or disallowing additional entries of unsurveyed land. The only reference that our research has uncovered is found in Margaret L. Gilbert v. Bob H. Oliphant, 70 I.D. 128 (1963). The decision states:

> The record shows that Oliphant filed notice of location of his original homestead entry, Anchorage 027911, on unsurveyed land on September 29, 1954, and that his additional entry, Anchorage 028930, was allowed April 22, 1955. * * *

Apparently neither the contestee nor the various offices of the Department through which the contest and appeal passed found anything objectionable in allowing an additional "entry" to be made to a settlement claim for unsurveyed land. We take this instance as a reflection of what was most likely the general understanding.

We also note that a settler is not required to file a notice of initiation of his settlement claim on unsurveyed land. Although the general provision of the pertinent statute, 43 U.S.C. § 270 (1970), says that he "shall" do so, another provision, 43 U.S.C. § 270-6, limits the effect of nonfiling to loss of credit for residence and cultivation prior to filing of the required notice, or a petition for survey, or an application for homestead entry. 1/

Thus, absent recording, a settler could enlarge his claim merely by changing the boundary markers. The practical advantage of recording, however, limits his opportunity to add to his entry so informally, so that a recorded settlement claim becomes much more akin to an allowed entry. This similarity supports the conclusion reached in the main opinion.

1/ As to the possible difficulties that failure to file a timely notice may cause a settler, see Harold N. Aldrich, 73 I.D. 70, 75 (1966):

"* * * 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 filed 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. * * *"

We would, however, add as a final caution the reminder that the filing of a notice of location does not establish any rights in the land. It is not a bar to a later finding that the land was not open to entry and that no rights were established by settlement.

Vernard E. Jones, 76 I.D. 133, 136, 137 (1969), discusses the matter in detail:

> The reasons offered by the Bureau for its action in this matter and the reasons advanced by appellant for his appeal from that action suggest some misapprehension on the part of both parties with respect to the nature of a notice of location or settlement in Alaska and the effect of its filing in a land office. Both parties appear to have viewed appellant's notice of location as the equivalent of an application for land which, in the view of the Bureau, was subject to rejection upon a determination by that agency that the land applied for should not be disposed of in the manner contemplated in the filing of the notice and which, in appellant's view, upon its approval by the land office, authorized his entry upon the land. Such is not the nature of a notice of location.
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> Except in Alaska, appropriation of, or entry upon, the public domain under the nonmineral public land laws is authorized only after application has been filed, the land applied for has been classified as suitable for the desired usage, and entry has been formally allowed. A determination by this Department that a tract of land has a greater value for some use other than that proposed by an applicant constitutes sufficient grounds for rejection of the application. In Alaska, however, such a determination is not a prerequisite to settlement upon the public lands. If land is vacant and unappropriated, that is, if no prior rights have been established and if the land has not been withdrawn or otherwise closed to operation of the public land laws, any person who is qualified to enter under those laws may, without seeking or obtaining permission from the land office, occupy or settle on a tract of land and, through compliance with one of the applicable laws, establish in himself rights

in the land which will ultimately entitle him to receive patent to the land. It is immaterial in such a case that, in the view of the land office, the land may have greater value for some other purpose and that it may be, in fact, wholly unsuited to the type of settlement or occupancy that was made. [Footnote omitted.]

Although prior approval by the land office is not needed in order to settle upon land in Alaska, a settler is required by the act of April 29, 1950, 48 U.S.C. secs. 371, 461a (1958), within 90 days after settling upon land, to file in the appropriate land office a notice of location or settlement. The purpose of such notice is to provide the land office with information needed for the administration of public lands and to allow the settler to receive credit for his occupancy and use of the land, the statute expressly providing that, unless notice is filed in the time and manner prescribed, credit will not be given for occupancy maintained prior to the filing of notice of location or an application to purchase. The filing of a notice of location, however, does not establish any rights in land, the establishment of such rights being entirely dependent upon the acts performed in occupying, possessing and improving land and their relationship to the requirements of the law under which the settler seeks to obtain title. See Anne V. Hestnes, A-27096 (June 27, 1955); Loran John Whittington, Chester H. Cone, A-28823 (August 18, 1961); Albert L. Scepurek, A-28798 (March 27, 1962).

The actual appropriation and occupancy of land generally are accomplished facts at the time a notice of location is filed. Thus, the acceptance of a notice of location for recordation is not the allowance of an application for land but is, in reality, nothing more than the acknowledgement that the initiation of settlement rights as of a particular date has been claimed and a noting of the land office records to reflect the existence of that claim, and the acceptance for recordation of a notice of location is not a bar to a subsequent finding that, in fact, no rights were established in the attempted settlement. See Charles G. Forck et al., A-29108 (October 8, 1962). It is clear, then, that the acceptance of appellant's notice of location for recordation on September 20, 1966 did not preclude a later determination that the land which appellant claimed was not open to entry and that no rights were established by his settlement on the land.