

DONALD E. WHITE

IBLA 73-309

Decided May 17, 1974

Appeal from decision of Alaska State Office, Bureau of Land Management, closing homestead settlement claim Contest No. 1817 (Anchorage).

Affirmed as modified.

Contests and Protests: Preference Right of Contestant--Alaska:

Homesteads--Homesteads (Ordinary): Contests--Homesteads (Ordinary):

Settlement--Rules of Practice: Private Contests--Homesteads (Ordinary):

Preference Rights

The recordation of a notice of location of a homestead settlement claim on unsurveyed lands in Alaska without the locator actually occupying or improving the land is a mere filing of a notice of intention to settle thereon, and one who contests such a filing has no preferred right of entry, as conferred by the Act of May 14, 1880, in the event such filing is subsequently canceled.

APPEARANCES: Donald E. White, pro se.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Donald E. White has appealed from a decision of the Alaska State Office, Bureau of Land Management, dated March 7, 1973, which denied White a preference right of entry. The decision also closed his private contest No. 1817 (Anchorage), initiated against the homestead settlement claim of Herbert Ned Kramp, Anchorage 063614, because the land involved was not at the time his contest complaint was filed, and is not now, subject to entry.

On September 22, 1965, Herbert Ned Kramp filed a notice of location of a settlement claim under the homestead laws, 43 U.S.C. § 161 et seq. (1970). He stated therein that September 19, 1965,

was the date settlement or occupancy was made by him. He described his improvements as "staking out" and "started clearing." The notice covered certain lands, then unsurveyed, in T. 13 N., R. 1 W., Seward Meridian, Alaska. The filing was assigned serial number Anchorage 063614. In a letter received in the Land Office on February 21, 1966, Kramp stated he established residence on his homestead claim as of February 12, 1966.

On March 22, 1966, Donald E. White filed a contest complaint against the homestead settlement claim of Kramp seeking a preference right of entry under the Act of May 14, 1880, 43 U.S.C. 185 (1970). The complaint alleged that Kramp (1) did not establish residence within the time required, (2) "made no evidence of clearing land or erecting buildings," (3) "recently (within 30 days) moved from the state," and (4) "has shown no intention of proving up on this homestead or establishing residence thereon." The witness to the truth of the statements in the complaint, who identified himself as a friend of Kramp's and as having an adjoining homestead, deposed that he observed from September 22, 1965, through March 21, 1966, a total absence of any activity on the property involved and that Kramp during that period maintained a residence elsewhere until he moved to Florida to accept employment.

By decision of August 11, 1966, the Alaska State Office canceled Kramp's homestead settlement claim by reason of his failure to file an answer to the contest complaint and, therefore, the charges of the complaint were taken as admitted. By decision dated October 3, 1966, the State Office denied White a preference right of entry on the ground that the lands were not available for entry because on November 16, 1965, the State of Alaska filed a selection application for all lands in T. 13 N., R. 1 W., S.M.

On appeal to the Director, Bureau of Land Management, by White, the Office of Appeals and Hearings, Bureau of Land Management, acting for the Bureau Director, questioned the service of the contest complaint on Kramp, set aside the decision canceling the homestead settlement claim, and remanded the case to the State Office for further consideration. Subsequently, in an affidavit Kramp stated he had received in March 1966 a notice of contest of his homestead settlement claim by Donald White and admitted he did not file an answer to the contest complaint. The Alaska State Office in a decision of December 11, 1967, found the contest complaint was validly served on Kramp, found his failure to answer the complaint was a confession of the charges, and canceled homestead settlement claim Anchorage 063614 under the authority of 43 CFR 1852.1-7(a), now 43 CFR 4.450-7(a) (1973). White was informed of the decision and advised that normally he would be given notice of a 30-day preference right of entry upon the expiration of the appeal period

afforded Kramp, but the Native village of Eklutna on December 9, 1966, had filed a protest against homesteads in the area of the village.

The Alaska State Office by its decision of March 7, 1973, now on appeal to this Board, as previously stated, denied Appellant White a preference right of entry. We agree with the result but on different grounds which are hereinafter discussed. 1/

Appellant contends in essence, since it was upon the basis of the contest proceedings which he initiated that Kramp's homestead settlement claim was canceled, he believes that he is entitled to a preference right of entry.

The homestead laws were extended to Alaska by the Act of May 14, 1898, 30 Stat. 409, 43 U.S.C. § 270 (1970), as amended by various acts. See 43 CFR 2567.0-3. Regulation 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 * * *." 2/ In Alaska a person making settlement on or after April 29, 1950, on surveyed or unsurveyed land, in order to protect his rights, must file a notice of settlement for recordation in the proper office for the district in which the land is situated, and post a copy thereof on the land, within 90 days after settlement. Unless a notice of location of the claim is filed within the time prescribed, no credit shall be given for residence and cultivation prior to the filing of notice. 43 U.S.C. 270 (1970); 43 CFR 2567.2(b).

1/ We, nevertheless, hasten to correct several erroneous findings and statements in the decision below lest silence be construed as consent, by stating briefly, as follows: There is no provision in law or regulation that a person seeking a preference right of entry is required to settle upon the land prior to initiating contest proceedings. The fact that land in Alaska in a homestead settlement claim is unsurveyed does not make a homestead claim on which there has been acts of settlement immune from attack in private contest proceedings initiated by one seeking to acquire a preference right of entry. If successful, the exercise of the preference right would merely be postponed pending survey of the land. Public Land Order 4582, during the period it was effective, did not preclude a successful contestant of a homestead entry from exercising the preference right earned upon the cancellation of the contested entry even though it had not been actually awarded prior to the withdrawal order. Louis J. Hobbs, 77 I.D. 5 (1970). The lands involved were not among the lands circumscribed and withdrawn by Section 11(a) of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. §§ 1601-1624, Supp. II (1972), for selection by the Native village of Eklutna.

2/ Also see 43 CFR 2511.2(a)(1).

In the case of a homestead claim, "[s]ettlement is initiated through the personal act of the settler placing improvements upon the land or establishing residence thereon * * *." In Anne V. Hestnes, A-27096 (June 27, 1955), the Department held:

The statutory provisions for the filing of a notice of settlement are intended to provide information needed for the administration of the public lands. Senate Report No. 1354, 81st Congress, 2d Session. They do not provide for an alternate method of acquiring rights to unsurveyed lands by the mere filing of a notice of intention to settle thereon prior to making actual settlement.

Thus, in order for one who files a notice of location of a homestead settlement claim to acquire any rights in the land, he must go on the land and perform some act or acts of possession such as placing improvements thereon within the six months from the date of filing the notice. Recitals of settlement standing alone earn the locator no rights in the land. A notice of location of a homestead settlement claim without the locator actually occupying and improving the land is a mere "filing."

In Field v. Black, 2 L.D. 581 (1883), the syllabus states:

A contest against a pre-emption filing is not recognized, and no preferred right is conferred by the act of May 14, 1880, for procuring the cancellation of the filing.

The Department pointed out in that decision that, since the contestant did not contest an "entry," but a mere "filing" of a declaratory statement, the case does not come within the letter of the statute.

In Thomas v. Spence, 12 L.D. 639, 641 (1891), it was stated:

The rule is well settled by numerous decisions of the Department that a pre-emption filing is not ordinarily subject to contest prior to the offering of final proof, and an application to contest a mere filing does not confer any right or equity to the land after such filing has been canceled. (Citations omitted.)

In the instant case, the Alaska State Office properly held that because Kramp failed to file an answer to the contest complaint, the allegations of the complaint are taken as admitted. The allegations

of the complaint, buttressed by its accompanying affidavit of a witness, strongly support a finding that Kramp did not perform any acts of a settler at any time from the date he filed his notice of location of a homestead settlement claim or during the six months following, and we so find. As a consequence, Kramp's notice of location of the homestead claim is a mere filing of a notice of intention to settle thereon and Kramp did not acquire any rights in the land. In this circumstance, the filing of the contest complaint by White did not confer in him any right or equity to the land after Kramp's filing of notice of location of the homestead settlement claim was canceled.

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 affirmed as modified.

Anne Poindexter Lewis
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Douglas E. Henriques
Administrative Judge

