FLONIE THOMAS

IBLA 74-281 Decided November 7, 1974

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting corrected final proof and canceling homestead entry AA-3048.

Affirmed.

1. Alaska: Homesteads -- Applications and Entries: Amendments -- Homesteads (Ordinary): Amendment -- Surveys of Public Lands: Generally

   The amendment of the land description in a homestead entry, three years into the entry, to comport with the newly-filed survey plat for the township does not constitute the filing of a new entry running from the date of the amendment.

2. Alaska: Homesteads -- Applications and Entries: Filing -- Homesteads (Ordinary): Applications -- Withdrawals and Reservations: Effect of

   No matter what an entryman intended when he filed an amended land description after erroneously residing and working on other lands, such filing could not have been considered a new filing since the lands described were withdrawn from entry between the time of the original filing and the time of the filing of the amended description.

3. Alaska: Homesteads -- Homesteads (Ordinary): Final Proof

The Department of the Interior has no authority to extend the statutory life of a homestead entry; the grant of an extension of time was a grant of time for filing proof, not time to allow appellant to cultivate or otherwise meet the requirements of the law.

4. Alaska: Homesteads -- Homesteads (Ordinary): Cultivation -- Homesteads (Ordinary): Final Proof

Cultivation and residence by an entryman on land not in his entry that he mistakenly occupied during the life of the entry cannot be considered in determining the adequacy of final proof filed for the entry.

5. Alaska: Homesteads -- Equitable Adjudication: Substantial Compliance -- Homesteads (Ordinary): Final Proof

Homestead final proof which does not on its face assert establishment of residence within the required time, sufficient length of residence, and sufficient cultivation, fails to show substantial compliance with the homestead law; a request for equitable adjudication based on such proof will be denied.

6. Alaska: Homesteads -- Homesteads (Ordinary): Commutation

A request to file commuted proof will be rejected where the final proof fails to show sufficient cultivation to meet the requirements for commuted proof.

APPEARANCES: M. Ashley Dickerson, Esq., of Dickerson & DeVries, P.C., Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

On July 22, 1968, Flonie Thomas (appellant) filed a

notice of location of homestead entry AA-3048 for unsurveyed land in protracted sections 23 and 24, T. 1 S., R. 1 E., Copper River Meridian, Alaska. He asserted settlement on July 18, 1968.

The Alaska State Office, Bureau of Land Management (BLM), issued a notice on June 4, 1971, that the survey plat for T. 1 S., R. 1 E., C.R.M., had been filed, and that unless appellant notified the State Office, his entry would stand as described by subdivisions in the notice as an approximately 150-acre unit 1/ in sections 23 and 24 of the township. 2/ Within the prescribed period appellant filed a homestead application with a corrected description reciting that the lands were in section 25 of the same township. On September 14, 1971, the State Office rejected the homestead application for section 25 for two reasons: (1) if the filing was treated as an amended location, it was defective under 43 CFR 2511.3-5, which prohibits amendment of a location not describing "at least one legal subdivision of the lands originally entered;" and (2) if the filing was a new or original location, it was for lands segregated from homestead entry by 43 CFR 2440.3(a) due to multiple use classification AA-2779 and withdrawn from disposal under the public land laws by Public Land Order (P.L.O.) 5081, 36 FR 12017 (1971).

Mr. Thomas then filed an amended application describing the lands as the subdivisions in sections 23 and 24 recited in the State Office's notice of June 4, 1971, requiring conformity of the entry description with the newly-filed survey plat. In response to this filing, the State Office vacated its decision of September 14, 1971, and accepted Mr. Thomas' amended entry. The details of these amended filings for different lands are

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1/ The State Office excluded about 10 acres of the original entry by letter decision of December 3, 1968, for conflict with previously-filed Native allotment application A-053876.

2/ The section lines established by the 1971 survey appear to correspond to the protracted survey lines shown on the township plat when appellant originally filed his application. This is not a case where the survey describes the same land as being in a different section than the protracted survey.

set out here because of their relevance to the inadequacy of the entryman's final proof and his contentions on appeal.

After notification by the State Office that the five-year statutory life of his entry had nearly run, appellant filed final proof. The State Office by decision dated January 14, 1974, held the final proof for rejection and the claim for cancellation on the ground that the claimant and his two witnesses all failed to assert cultivation for three of the four years envisaged by 43 CFR 2567.5(b). In this filing, Mr. Thomas asserted cultivation of 30 acres in 1969-70, and his two witnesses both affirmed cultivation of 20 acres in 1970-71. No other cultivation was asserted.

Appellant then filed a request for an extension of time to file corrected final proof, stating that the first proof contained information related to his erroneous occupation of lands in section 25, and his failure to show cultivation in 1971-72 and 1972-73 was due only to his "failure to properly apportion the years of cultivation" between the two different locations, that in section 25 and that in sections 23 and 24.

By decision of April 1, 1974, the State Office granted the extension and accepted the filing, but again rejected the final proof and held the claim for cancellation. The proof was rejected as insufficient to prove compliance with the homestead law on its face on the grounds: (1) the final proof described 210 acres rather than 150 acres by reciting "N 1/2 NW 1/4" section 24, rather than the N 1/2 NW 1/4 SW 1/4 section 24, as allowed in the entry; (2) the amended final proof indicated initial residence on the lands on October 13, 1971, much later than six months (or one year in appropriate circumstances) after July 19, 1968, as required by 43 CFR 2567.5(a)(1); (3) Mr. Thomas did not show three years of residence on the entry; and (4) no cultivation was asserted for 1969-70 and 1970-71.

In his appeal, Mr. Thomas argues against each holding in the State Office decision. However, the premise of the appeal is that the State Office was wrong to treat 1968 as the original entry date in determining whether sufficient cultivation and residence were shown, and whether residence was initiated within six months of the entry. Appellant asserts that the life of his entry began with the approval of the amended land description in 1971, when he physically entered the described land.

He says that three years have not elapsed since the entry began, so that the State Office should have regarded his filing as a commuted final proof, or he should be given more time before having to file his final proof.

[1] Appellant's assumption is erroneous; his entry began with the date of settlement alleged on his first filing, July 19, 1968, and the five-year life of the entry expired July 18, 1973. The letter from the State Office that the survey plat had been filed did not, and could not, extend the 1968 entry in any way. It only requested that the metes and bounds description on the 1968 application be amended to describe the entry according to the new survey.

Appellant's request for an extension of time to file final proof asserted that he originally settled on and cultivated lands in section 25. On appeal he argues that "[t]he life of the homestead Entry could only start with the entry on the proper land and when the amendment was allowed this was the intent." The material in the record discussed below belies the assertion that anyone considered the 1971 filings a new entry. The record also demonstrates that even if appellant mistakenly, and in the face of the BLM's notice and letter decisions, assumed the 1971 filings to be a new entry, such an entry could not have been accepted.

Most definitely it was not the "intent" of the State Office to allow a new entry starting in 1971. The State Office had no reason to know until the request for an extension of time to file final proof in February 1974 that the entryman had settled on and cleared lands not in his entry and that he had good reason to want the 1971 amendments to constitute a new entry. The record does not explain how appellant settled this land in 1968 after filing an application for lands in sections 23 and 24. However it occurred, the State Office's 1971 decision rejecting the amended description, which embraced sections 25 lands, made it clear that such land was doubly withdrawn from homestead entry and that appellant had to relate his description to the 1968 entry in order not to have his application rejected. Cf. Vera Potter, 13 IBLA 131 (1973).

The amended filing in 1971 describing the lands as being in sections 23 and 24 related only to the original 1968 entry. This is evident from appellant's amended

application filed September 22, 1971, which asserts that "the original description [of sections 23 and 24 lands] was correct." It is also evident in the State Office letter decision accepting the sections 23 and 24 description, and vacating the earlier decision dealing with appellant's failure to conform his survey description with the 1968 metes and bounds description, that all these transactions were addressed to the 1968 entry.

[2] Not only do these transactions deal on their face with conforming the 1968 entry to the 1971 survey rather than acceptance of a new entry, but the 1971 application could not have been accepted for recordation as a new 1971 entry for the reason stated infra. P.L.O. 5081, 36 FR 12017 (1971), withdrew 3/ the lands in sections 23 and 24 in appellant's September 22, 1971, filing from location and entry under the public land laws just as it withdrew the section 25 lands for which the State Office rejected his filing. An application filed for lands while they are withdrawn from entry under the public land laws must be rejected. Eugene M. Witt, 15 IBLA 378, 380 (1974); Kennecott Copper Corp., 8 IBLA 21, 79 I.D. 636 (1972).

[3] Because the entry was not and could not have been treated as having been made in 1971, appellant's request to be permitted to file final proof on the basis of commencement of an entry in 1971 cannot be granted. The Department has no authority to extend the life of an entry beyond its statutory time limit. Robert J. Crawford, 6 IBLA 154 (1972). Similarly, appellant's request to file commuted proof based on the asserted commencement of the entry in 1971 cannot be granted.

Appellant contends that the extension granted by the State Office would be of "no benefit whatsoever" unless the entry was deemed to begin in 1971. The extension granted by the State Office April 1, 1974, was an extension of time for filing proof of cultivation and residence prior to the expiration of the entry, not an extension of time to allow appellant to cultivate or otherwise meet the requirements of the homestead law. See Jack H. Carlisle, 13 IBLA 95 (1973); Robert J. Crawford, supra.

3/ More accurately, P.L.O. 5081 extended the withdrawal initiated by P.L.O. 4582, 34 FR 1025 (1969), as extended by P.L.O. 4962, 35 FR 18874 (1970).

An examination of the amended final proof shows, as the State Office found, that appellant did not comply with the requirements of the homestead law on three grounds. Regulation 43 CFR 2567.5(a)(1) requires the entryman to the establish residence on the claim within six months of the entry date, or in the event of a satisfactory showing therefor, within one year from the entry date; appellant did not move onto the land until October 13, 1971, more than three years after the July 1968 entry. Regulation 43 CFR 2567.5(a)(2) requires that residence be maintained for three years; the entry expired less than three years after he established residence on the land. 4/ Regulation 43 CFR 2567.5(b) requires cultivation in the second year of one-sixteenth of the entry and one-eighth every year thereafter; appellants final proof asserts only one-eighth cultivation in the fourth and fifth years of the entry. 5/

[4] Only if the original final proof filed July 12, 1973, of cultivation and residence on the section 25 lands could be applied toward meeting the requirements on this entry would the proof approach sufficiency. However, the statute and regulations explicitly require the residence and cultivation to be on the entered lands. 43 U.S.C. § 164 (1970); 43 CFR 2567.5. Appellant has asserted nothing that would call into play the narrow exceptions to these mandatory requirements. United States v. Wells, 2 IBLA 247, 252, 78 I.D. 163, 166 (1971) (concurring opinion) (house 1/4 mile from entry may preclude favorable consideration); Signar J. Jacobson, A-21064 (January 10, 1938) (residence near entry where entry subject to periodic flooding meets requirements); Gregory Schoen, 42 L.D. 540 (1913); Kendrick v. Doyle, 12 L.D. 67 (1891) (residence near boundary sufficient where entry cultivated and surveyors could not agree on location of

4/ This fact moots a remand to adjudicate the possibility appellant has rights under the homesite provisions of the Act of May 26, 1934, 43 U.S.C. § 687a (1970). See Lon Philpott, 13 IBLA 332, 335-36 (1973), reconsidered on other grounds, 16 IBLA 285 (1974).

5/ These holdings are based on appellant's assertion that the cultivation and residence during the first three entry years in the final proof he first submitted pertained in fact to his residence and work on land in section 25.

line). None of the extenuating circumstances in the cases above is present here; the entry and the erroneously occupied section 25 land do not overlap or abut, nor was the section 25 land mistaken for the entered lands because of survey problems or the like.

[5] On appeal, the entryman argues that since he has done all within his power since the entry was allowed it would be inequitable to reject his proof now. We take this as a request for equitable adjudication under 43 CFR 1871.1. This Board has held that equitable adjudication is unavailable to an entryman who has failed to meet a number of the mandatory requirements of the homestead law. 6/ E.g., Rune E. S. Safve, 13 IBLA 212, 220 (1973). This is especially the case when the failure is not due to misfortune or circumstances beyond the control of the entryman. See Bobby L. Cox, 7 IBLA 277 (1972); Juanita J. Anderson, 4 IBLA 170 (1971). There is no indication in the appeal or in the request for an extension of time to file final proof that the settlement and cultivation of section 25 land was in any way excusable or due to circumstances beyond the entryman's control, and thus within the provisions of 43 CFR 2567.5(b) and 43 CFR 2511.4-3(b). Appellant's failure to comply with the homestead requirements on the entered land from 1968 to 1971 precludes a finding of substantial compliance with the law, and thus precludes the application of equitable adjudication. See Rune E. S. Safve, supra; Lois A. Mayer, 7 IBLA 127, 129 (1972); United States v. Wells, supra.

[6] Appellant's request to be allowed to file commuted proof was apparently based on the erroneous assumption that 1971 marked the commencement of the entry. The request on this basis was rejected above; we add that a request for commutation based on the 1968 entry would also be rejected. While appellant's final proof filed March 6, 1974, shows the 14 months residence required for commuted proof, it does not show the cultivation required, which is by itself fatal. 43 CFR 2567.5(d).

6/ If the erroneous description of the quarter quarter section were the only flaw in the final proof, the request might be sympathetically received. Bobby L. Cox, 7 IBLA 277 (1972); Juanita J. Anderson, 4 IBLA 170 (1971). The text infra moots consideration of this flaw.

An entryman filing commuted proof is held to strict compliance, because he is "representing to the Government that he has achieved full compliance with all of the prerequisites * * *." Rune E. S. Safve, supra at 220. Appellant's work on the section 25 lands does not constitute such a showing.

As the entry did not and could not have begun in 1971, the homestead requirements must have been satisfied over the period 1968-1973. Appellant has not shown either a factual or legal basis for concluding that his efforts on the section 25 land can be applied to meet what the decision below properly found to be the deficiencies in his final proof on the sections 23 and 24 land.

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.

Frederick Fishman
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge