ARTHUR LLOYD ZELLWEGER

IBLA 75-142 Decided March 5, 1975

Appeal from a decision of the Fairbanks, Alaska, District Office, Bureau of Land Management, holding Notice of Location of Settlement Claim for a second homestead entry (F-21193) as not proper for recordation.

Affirmed.

1. Alaska: Homesteads -- Homesteads (Ordinary): Second Entry

   An application for a second homestead entry under the Act of September 5, 1914, is properly rejected in the absence of sufficient showing that the applicant lost, forfeited, or abandoned the original entry through no fault of his own or because of matters beyond his control.

2. Homesteads (Ordinary): Cultivation

   A homestead entryman is irretrievably in default on his entry where he failed to meet the cultivation requirements in the second, third, and during the growing season of the fourth year of the entry, when he left the land in September of the fourth year for the avowed purpose of making money to complete his improvements.

APPEARANCES: Arthur Lloyd Zellweger, pro se.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Arthur Lloyd Zellweger has appealed from a decision of the Fairbanks, Alaska, District Office, Bureau of Land Management, dated July 23, 1974, which held his Notice of Location of Settlement Claim for a second homestead entry as not proper for recordation. The

decision is predicated upon the ground that Zellweger is not entitled to a second entry as he has not furnished satisfactory evidence that his original homestead entry was lost because of matters beyond his control.

We adopt the Bureau's decision, which reads as follows:

> On June 21, 1974, Mr. Arthur Lloyd Zellweger filed a Notice of Location of Settlement for a second homestead entry. Mr. Zellweger claims he first occupied the land on March 23, 1974. The records show that Mr. Zellweger filed an application for homestead entry, Serial No. F-017175, on November 27, 1957. Entry was allowed for the land involved in this former application on April 10, 1958. By notice of October 25, 1962, Mr. Zellweger was notified that the five-year statutory life of the entry would expire on April 10, 1963, and that final proof was due on or before that date. There was no response to this notice and final proof was not submitted. The entry was subsequently cancelled and the case closed.
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> 43 CFR 2513.0-7(a) 1/ states:
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> "When a person has made a homestead entry or entries but fails to perfect them, his right to make another homestead entry is governed by the Act of September 5, 1914, (38 Stat. 712; 43 U.S.C. 182) which provides that the applicant must show to the satisfaction of the Secretary of the Interior that the prior entry or entries were made in good faith, were lost, forfeited, or abandoned because of matters beyond his control, and that he has not speculated in his right, nor committed a fraud in connection with such prior entry or entries."
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> In support of a second homestead entry the applicant stated that he had walked and reviewed the previous entry before filing on it. That residence was established on it in July of 1958 and they lived on it continuously until September of 1961, at which time they moved into town to make enough money to finish the improvements.

1/ The correct citation is 43 CFR 2513.1(a).

That approximately 14 acres were cleared, a concrete foundation was poured and a house was framed.

The Department has consistently held that lack of money is not a sufficient reason for not complying with the homestead laws and regulations. An entryman should be aware of the expense involved in developing a homestead and should not undertake trying to do so unless he is financially able. Therefore, this is not a valid reason to show that the original entry was lost due to circumstances beyond the entryman's control.

The applicant further stated that: "The original entry was never abandoned but someone moved onto our land in our absence and contested us." Furthermore, "We believed we still had a summer to finish our requirements when actually our time was up in the spring not the fall. We thought our time for proving up was from the date of allowance rather than our date of filing. No relinquishment was ever filed."

The facts do not support the above contentions. There is no record in the office to show that the original entry was ever contested. Even if it had been the contest would have been unsuccessful if the entryman was complying with the homestead laws. The records do show that a Lawrence R. Cooke filed an application for a homestead entry, Serial No. F-031239, for Mr. Zellweger's original entry on May 3, 1963, nearly a month after the statutory life of the original homestead entry expired. This was Mr. Cooke's legal prerogative.

Mr. Zellweger had every right to know when the statutory life of his original homestead entry expired. He was sent a Notice of Allowance on April 10, 1958, which stated that the entry had been allowed as of that date. Further, a notice was sent on October 25, 1962, which reminded Mr. Zellweger that the five-year statutory life of the entry would expire on April 10, 1963, and final proof was due on or before that date. This notice did not state that the statutory life of the entry would expire in the fall as Mr. Zellweger contends to believe.

> Due to the foregoing, as Mr. Zellweger has not shown satisfactory evidence that his original homestead entry was lost because of matters beyond his control, he is not entitled to a second entry. Accordingly, the subject Notice of Location of Settlement or Occupancy is not proper for recordation.

In his appeal, Zellweger repeated the assertions he made at the time of filing his Notice of Location of Settlement for second entry that he had cleared 14 acres of ground and resided on the original entry from July 1958 to September 1961; and that he thought his time for proving up was from the date of allowance rather than his date of filing, because he thought he still had a summer to finish his requirements when actually the time was up in the spring and not the fall. He added that, because of a confusion of dates on his part, when the October 1962 notice from the Fairbanks Land Office that final proof must be filed prior to the expiration date of April 10, 1963, reached him, he no longer had another summer to do the extra planting.

The showing made by appellant, both with his Notice of Location for Settlement for second entry and in his appeal, actually proves that at the time he left his original homestead in September 1961 and moved into town -- ostensibly to make enough money to finish his improvements -- he was then in default on the performance of necessary requirements of the homestead law, and the entry was already beyond redemption.

[1] The Act of September 5, 1914, 43 U.S.C. § 182 (1970), permits an otherwise qualified person who, through no fault of his own, may have lost, forfeited, or abandoned a homestead entry, to make a second entry as though the first entry had never been made. The right to make a second entry, however, is conditioned upon showing to the satisfaction of the Secretary of the Interior that the prior entry was made in good faith and was lost, forfeited or abandoned because of matters beyond the control of the applicant.

Appellant has not demonstrated that his departure from his original entry in September 1961 for the purpose of making money to complete his improvements was not his own fault or that it was a matter beyond his control. Cf. Thomas G. Simmons, Jr., A-30076 (June 3, 1964); James W. Byrd, A-29772 (November 5, 1963); John E. Schulz, A-29552 (September 25, 1963); Kermit A. Dowse, A-29355 (June 7, 1963).

Furthermore, appellant left the entry without complying with the regulations pertaining to absences from the land. Regulation 43 CFR 2511.4-2(e)(1) provides for absences of up to five months

during each year, beginning with the date of establishment of actual residence. However, in order to be entitled to such absences the entryman "must each time he leaves the land file at the proper office (by mail or otherwise) notice of the time of leaving; and upon his return to the land he must notify said office thereof." (Emphasis added). Regulation 43 CFR 2511.4-2(e)(2) provides in applicable part:

> (i) Leave of absence for 1 year or less may be granted by the authorizing officer of the proper office to entrymen who have established actual residence on the lands in cases where total or partial failure or destruction of crops, sickness, or other unavoidable casualty has prevented the entryman from supporting himself and those dependent on him by cultivation of the land. Application for such leave of absence must be signed by the applicant and corroborated by at least one witness in the land district or county within which the entered lands are located. It must describe the entry and show the date of establishing residence on the land and the extent and character of the improvements and cultivation performed by applicant. It must also set forth fully the facts on which the claimant bases his right to leave of absence, * * *
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> (ii) All applications for leave of absence for one year or less * * * must be accompanied by an application service fee of $5 which will not be returnable. (Emphasis added).

Examination of the case file of his original entry reveals that he did not file a notice of his absence with the Fairbanks Land Office -- a mandatory requirement of the above regulations. Moreover, his absence does not come within the ambit of the regulation for a one-year leave of absence as he has never done any cultivation of the land, and his reason for leaving the entry cannot be deemed an unavoidable casualty. His lack of finances should have been foreseeable.

[2] Appellant was also irretrievably in default in September 1961, when he left the land, because of his failure to comply with the cultivation requirements up to that time. The statute provides that the entryman shall cultivate not less than 1/16 of the area of his entry, beginning with the second year of the entry and not less than 1/8 each year, beginning with the third year of the entry

and until final proof. 43 U.S.C. § 164 (1970). The cultivation requirement of the homestead law is mandatory. Thomas G. Simmons, Jr., supra.

Appellant's entry was allowed on April 10, 1958. Therefore, he failed to meet the cultivation requirements of the statute in 1959, 1960, and during the growing season of 1961, when he left the land in September 1961 in the fourth year of the entry. 2/ See Gene L. Brown, 7 IBLA 71, 74 (1972); Gilbert v. Oliphant, 70 I.D. 128, 130-131 (1963).

The mere clearing of 14 acres, as asserted by appellant, does not satisfy the standard of cultivation of the homestead law. Gene L. Brown, supra at 75; cf. Gilbert v. Oliphant, supra at 132. Even if he had cultivated the 14 acres which he cleared, while it would have been enough to satisfy cultivation of 1/16 of the entry for the second year, it would not satisfy the cultivation requirement of 1/8 of the 160-acre entry for the succeeding years.

We do not know what could have caused the confusion in dates on appellant's part in that he thought he had another summer after the expiration of the entry on April 10, 1963, in which to cultivate the entry. The time for proving up runs from the date of allowance of the entry. The notice of allowance of the entry on April 10, 1958, and the notice sent to him on October 25, 1962, by the Land Office, advising him that the entry would expire on April 10, 1963, and that final proof must be filed prior to this date, were clear and unequivocal. The law places the burden upon the applicant for land to understand and comply with the requirements of the particular law

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2/ We note that, in both his original application for homestead entry and his notice of settlement for second entry, appellant indicated that he served in the military from July 25, 1950, to January 14, 1955, and that the original application contains the notation "Verified M.B." Such being the case, appellant would have been entitled to two years' credit for his military service under 43 U.S.C. § 279 (1970). This act further provides that no patent shall issue to any such person who has not resided upon his homestead and otherwise complied with the provisions of the homestead laws for a period of at least one year: "Provided, that such compliance shall include bona fide cultivation of at least one-eighth of the area entered under the homestead laws."

However, this credit affords the appellant no relief in the instant case. No cultivation was required during 1958, the first entry year. After applying his military service credit to the years 1959 and 1960, he was still required to cultivate one-eighth of the area for at least one year, which he had not done. See Thomas G. Simmons, Jr., supra.

under which he seeks to obtain title to the land; it does not grant this Department authority to extend the life of a homestead beyond the five-year period prescribed by statute. Gene L. Brown, supra at 74.

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.

Anne Poindexter Lewis
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Douglas E. Henriques
Administrative Judge