ALBERT A. HOWE

IBLA 76-676 Decided September 15, 1976

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying a request for an extension of time to establish residence and holding homestead entry AA-8407 for cancellation.

Reversed and remanded.

1. Alaska: Homesteads -- Applications and Entries: Valid Existing Rights -- Segregation: Filing of Application -- Withdrawals and Reservations: Effect of

   The filing by a qualified applicant of a homestead application to enter unappropriated surveyed lands in Alaska segregates the land covered by the application from appropriation. Such an application will be considered to have created a valid existing right which is protected from the effect of a subsequent withdrawal which is subject to valid existing rights.

2. Alaska: Homesteads -- Applications and Entries: Generally -- Homesteads (Ordinary): Residence

   Pursuant to 43 CFR 2567.5(a)(1), a home stead entryman in Alaska must establish residence upon the land within 6 months of the date of allowance of the entry or within a maximum period of 12 months, if a 6-month extension of time was requested and granted. These periods do not commence at the time of the filing of the application.

APPEARANCES: Julian L. Mason, Esq., Mathews, Dunn, and Bailey, P.C., Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Albert A. Howe has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated May 18, 1976, which held his homestead entry, AA-8407, for cancellation and denied his request for an extension of time within which to establish residence.

On May 24, 1973, appellant filed a homestead entry application pursuant to 43 U.S.C. § 161, et seq, as supplemented by 43 U.S.C. § 270 et seq. (1970), for 141.92 acres in section 19, T. 20 N., R. 9 E., S.M., Alaska. By decision dated October 6, 1975, BLM informed appellant that his application for entry had been allowed as of the date of the decision.

On March 1, 1976, appellant filed a request for extension of time in which to establish residency, pursuant to 43 CFR 2567.5(a)(1).

By decision dated May 18, 1976, BLM denied the request for an extension of time and held the entry for cancellation. BLM stated that the October 6, 1975, decision was erroneously issued and that the entry "must be canceled unless the applicant can show that he already established rights to the land by act of settlement and appropriation required by the homestead laws prior to the date of the withdrawal, March 28, 1974."

The withdrawal referred to in the BLM decision was effectuated by P.L.O. 5418, 39 F.R. 11547 (1974), which withdrew subject to valid existing rights "[a]ll unreserved public lands in Alaska * * *" for classification. Therefore, unless appellant possessed a valid existing right on the effective date of the withdrawal, March 28, 1974, his rights under the Alaska homestead laws were cut off.

[1] It has long been the rule in this Department that a homestead application to enter land subject thereto is equivalent to an actual entry so far as the rights of the applicant are concerned and, while pending, reserves the land from other disposition. Rippy v. Snowden, 47 L.D. 321 (1920); Goodale v. Olney, 12 L.D. 324 (1891). See also R. B. Whitaker et al., 63 I.D. 124 (1956). This rule does not hold true, and an application for public lands confers no absolute rights, when the allowance of such a claim is discretionary with the Secretary of the Interior, or when the classification of the land is a prerequisite to the allowance of an entry. Lewis Lafon Gourley, A-28497 (November 6, 1961); Charles H. Simmons, A-26317 (January 8, 1952); Joseph E. Hatch, 55 I.D. 580 (1936). However, the exception does not govern this case. The classification provisions of section 7 of the Taylor Grazing Act, 43 U.S.C. § 315f (1970), are not applicable to lands in Alaska and the allowance of a homestead entry in Alaska is not discretionary with the Secretary. Raymond L. Gunderson, 71 I.D. 477 (1964).

At one time the Department held that a homestead application did not segregate a tract of land from the public domain. John J. Maney, 35 L.D. 250 (1906). However, the Maney rationale was modified by Circular No. 759, 48 L.D. 153 (1921), on the basis of two Supreme Court decisions in Payne v. Central Pacific Ry. Co., 255 U.S. 228 (1921), and Payne v. State of New Mexico, 255 U.S. 367 (1921).

Subsequently, in John F. Silver, 52 L.D. 499, 500 (1928), the Department announced the:

> * * * previously more or less well-settled rule that when a person has done all that the law requires to entitle him to an entry or to obtain a right under the public land laws, he has, in the eye of the law, obtained that right, even though it has not been acknowledged or recognized by the Land Department.

Such rule was expressed in the early departmental case of Gilbert v. Spearing, 4 L.D. 463 (1886), and was thereafter followed in Charles C. Conrad, 39 L.D. 432 (1910).

The above-stated rules, as applied to the case at bar, dictate that when appellant filed his application on May 24, 1973, such filing segregated the lands encompassed by the application. This is true despite the fact that the entry was not allowed by BLM until more than 2-1/2 years later, because at the time the application was filed appellant was qualified, he had done all that was required by law to apply, and the land was subject to appropriation by homestead entry on the date of the filing.

Therefore, the filing of the viable homestead entry application created a valid existing right which survived the withdrawal of March 28, 1974.

[2] Having decided that appellant was possessed of a valid existing right, the question remains of whether BLM properly denied appellant's request for an extension of time within which to establish residence.

The rationale of BLM in denying the request was that the 6-month period within which residence must be established upon the claim, as required in 43 CFR 2567.5(a)(1), was initiated by the filing of the entry in May 1973 and, therefore, the 6-month period expired in November 1973.

Appellant argues that the 6-month period did not commence until his entry was allowed in October 1975 and that his request for an extension of time, pursuant to 43 CFR 2567.5(a)(1), was timely filed in February 1976 and should have been granted. He also asserts that

he was advised on numerous occasions by BLM employees that the filing of his application did not authorize him to settle upon or to improve the land claimed and that as a result of these warnings he minimized his acts of settlement. 1/

The regulation governing the establishment of residence on a homestead in Alaska is 43 CFR 2567.5(a)(1), which states:

> Residence must be established upon the claim within 6 months after the date of the entry or the recording of the location notice, as the case may be; but an extension of not more than 6 months may be allowed upon application duly filed, in which the entryman shows by his own statement, and that of two witnesses, that residence could not be established within the first 6 months, for climatic reasons, or on account of sickness, or other unavoidable cause.

While the actual language of the regulation in reference to the establishment of residence upon the land within 6 months is "after the date of entry," the Department has consistently followed the interpretation that the period within which to establish residence commences on the date of allowance of the entry. See Circular No. 641, 47 L.D. 128 (1919); Oscar Kawagley, Anchorage 067507 (September 25, 1967). In addition, appellant has supplied a copy of a document published by BLM entitled, "Homesteading in Alaska" (450 2567-9 Rev. 8/71), which he alleges he read prior to filing his entry. Such document states on p. 2, under the heading "REQUIREMENTS FOR COMPLIANCE WITH THE LAW AND REGULATIONS":

> 1. Residence
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> A. Residence must be established on the land within six months from the date of settlement or allowance of the entry as the case may be. See 43 CFR 2567.5(a)(1) for details. (Second emphasis added.)

Appellant was also informed by BLM after he filed his entry application that the statutory life of his claim would not begin

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1/ By letter dated July 15, 1974, appellant was advised by BLM as follows:

"The homestead entry application you filed on May 24, 1973, segregates the described lands from appropriation. The statutory life of your claim will not begin to run nor will you be required to take any further action until such time as your entry application is allowed by land office decision."

to run, nor would he be required to take any further action, until his claim was allowed.

It is clear that the 6-month period within which appellant was required to establish residence did not begin until the date the entry was allowed by BLM, October 6, 1975. Having established the starting date for such period, appellant's request for an extension of time, filed March 1, 1976, was timely. The request stated that by the time appellant received notice that his entry had been allowed, winter was upon him and he needed an extension of time covering some warm months within which to undertake construction of improvements.

Appellant's request, having been timely made and for good cause shown, is granted.

Accordingly, 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 remanded for appropriate action consistent herewith.

Frederick Fishman
Administrative Judge

I concur:

Newton Frishberg
Chief Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON CONCURRING:

The reason for the rule that a homestead application may be considered the equivalent of an entry so far as the applicant is concerned rests upon the application of the doctrine of relation back. Thus, when a patent is issued, and also when an entry is allowed, the rights of the applicant to the land are deemed to go back to the date of the original application. White v. Roos, 55 L.D. 605 (1936). The doctrine of relation back is evoked only to protect the rights of the applicant and someone in privity with him -- not strangers -- in order to preclude intervening rights of other claimants. Id. However, I would not conclude that this doctrine may be invoked to prevent a withdrawal by the United States from attaching to land subject only to a homestead application if there is a clear expression in the language of the withdrawal that such an inchoate right is not excepted from the effect of the withdrawal.

In every case, the effect of the withdrawal depends upon the authority for the withdrawal, the language of the withdrawal and the apparent intent reflected by the overall purport of the withdrawal. There is a savings clause in P.L.O. 5814, the withdrawal involved here, making the withdrawal subject to "valid existing rights." A similar phrase in the Taylor Grazing Act withdrawal orders was interpreted as including "prior valid applications for entry, selection, or location, which were substantially complete at the date of the withdrawal." Solicitor's Opinion, approved by the Secretary, 55 I.D. 205, 210 (1935). Those withdrawals, like the one here, were very broad in scope and reserved the land for future classification. The reasons expressed in that opinion for construing the phrase as including an application for entry seem applicable here. Therefore, I base my concurrence with the conclusion reached by Judge Fishman on the effect of the withdrawal upon this homestead application on this interpretation. The phrase "valid existing rights," however, is not a precise phrase of unvarying implication. Thus, this case is not precedent for an interpretation of the same phrase in some other factual context.

While the doctrine of relation back is used to protect the applicant from intervening claimants, it is not to be used as the Alaska State Office apparently did to require the applicant to meet the requirements of the homestead laws beginning with the date of the application rather than the date of allowance of entry. I agree with Judge Fishman that the proper date for determining compliance with the homestead requirements, including residence, is the date of allowance of the entry, rather than the date of the application in this case.

I wish to note that time may be very important in this case as this Department has no authority to extend the time for initiating homestead residence after 12 months from the date of the allowance of entry. It has authority only to grant the one 6-month extension. If residence is not initiated within that time, the entry may be subject to cancellation. Hulse v. Griggs, 67 I.D. 212 (1960); Henry J. Ernst, A-27196 (November 7, 1955); cf. Edwin P. Knapp, 70 I.D. 441 (1963).

Joan B. Thompson
Administrative Judge