

RICHARD T. POPE

IBLA 76-666

Decided September 20, 1976

Appeal from a decision of the Anchorage State Office, Bureau of Land Management, which held for cancellation a 50-acre portion of appellant's allowed homestead entry.

Reversed.

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 an application for an allowed homestead entry of land which is open and available to such entry at the time of filing will operate to segregate the land from subsequent appropriation and invest the applicant with sufficient interest therein to preserve the land from the effect of a subsequent withdrawal which is made subject to valid existing rights.

APPEARANCES: M. Ashley Dickerson, Esq., Anchorage, Alaska, for the appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On December 1, 1972, Richard T. Pope filed a homestead entry application for 160 acres of specifically described surveyed land in T. 20 N., R. 9 E., Seward Meridian, Alaska. At that time 50 acres of the land applied for were apparently open and available to entry, while the remaining 110 acres were embraced within homestead entry AA-3265 held by one Bertha Fast. However, Pope had previously initiated a private contest of the Fast entry, alleging that Fast had failed to establish residence on the entry as required by law.

Although Pope's contest complaint was filed on November 3, 1972, and served at the last known address of record of Fast, and she filed no answer within the prescribed 30 days, it was not until October 8, 1974, that the Fast entry was canceled by the decision of the Alaska State Office of the Bureau of Land Management. Thirty days thereafter, no appeal having been filed by Fast, that decision became final and Pope had earned a preferred right to enter the 110 acres previously claimed by Fast. 43 U.S.C. § 185 (1970).

The Bureau conducted a field examination of the entire 160 acres described in Pope's application. The examination of the land was accomplished on September 15, 1974, but the report of the examiners was not rendered until March 11, 1975. The report was approved by the Acting District Manager on March 12, 1975. At the request of the State Office Pope executed an acknowledgement that the entry would be subject to a reservation to the United States as to all land described in the application. This was done April 18, 1975.

On May 13, 1975, the State Office issued a decision formally allowing the entire entry of 160 acres, subject to the reservation of oil and gas and to "established easements which may cross it." The decision specifically described all of the 110 acres of preference-right land and all 50 acres of additional land. It was signed by the Chief, Lands and Minerals Operations, Alaska State Office, Bureau of Land Management.

Pope then entered the land and began making improvements. By a letter dated November 12, 1975, he advised the Bureau that he and his family had moved onto the homestead as of November 6, 1975, and supplied his new address for the record.

On May 18, 1976, a year and 5 days after the entry was formally allowed, the Alaska State Office issued a decision holding for cancellation the 50-acre portion which was not part of Pope's preference right. This decision held, in essence, that this portion of the entry had been allowed erroneously because on March 28, 1974, while Pope's application was pending, all unreserved public lands in Alaska had been withdrawn from the operation of the public land laws, subject to valid existing rights, "for classification and protection of the public interest" by Public Land Order No. 5418. The decision impliedly recognized Pope's preference right to the 110 acres as a "valid existing right" but held that entry of the 50 acres of additional land must be canceled unless Pope can demonstrate that prior to the date of the withdrawal he had already established rights to the land by acts of settlement and appropriation, and show continuing acts of appropriation pursuant to such settlement under the homestead laws thereafter.

In his statement of reasons for appeal Pope asserts under oath that from the outset he had desired to immediately move on the land,

but that he had been warned time after time by various BLM personnel that if he entered the land even to cut one tree without an entry permit he would be guilty of trespass and criminally prosecuted. He therefore heeded their admonitions, but continually entreated the Bureau to allow the entry so that he could get started. He states that he and his wife are living on the entry in a habitable house, with a well and road work completed. He had initiated clearing for cultivation and has cleared 3 acres on the parcel now threatened with cancellation and 3-1/2 acres on the undisputed portion of the entry. He says that he has serious intentions of farming this land, and that the 50 acres which is being challenged contain the flat land which he sorely needs to complete the agricultural purpose which was his main reason for attempting to homestead.

These statements are substantiated to some extent by the record. It is not possible to confirm or refute what Pope was allegedly told orally by the various BLM employees he identifies as having warned him not to initiate settlement until the entry was allowed. There may have been some misunderstanding by Pope of the reasons such warnings were given. ^{1/} However, the file does reflect that Pope was ready and anxious to begin his settlement of the land and repeatedly requested permission to enter, and that he was warned that if he entered the land applied for before the entry was allowed it would be at this own risk, and that trespass charges against him might result.

There are two alternative methods by which a prospective homesteader in Alaska can endeavor to acquire homestead land, as explained in 43 CFR 2511.2(a)(1):

(a) Ways in which claims may be initiated; area enterable. (1) Claims in Alaska under homestead laws may be initiated by settlement on either surveyed or unsurveyed lands of the kind mentioned in the foregoing section. Claims may also be initiated on surveyed lands of that kind by the presentation of an application to enter.

^{1/} The Pope application was a top-filing the Fast allowed homestead entry, and, as such, created no right in Pope while the Fast entry remained of record. The warnings given by BLM personnel against occupying the land may have referred to a possible action by Fast against Pope, rather than to a Government trespass action. Pope's application actually was premature and subject to rejection and re-filing. Louis J. Hobbs, 77 I.D. 5 (1970). However, the subsequent allowance of the entry to Pope after cancellation of the Fast entry operated, in these circumstances, to cure this discrepancy.

The first method involves simply going upon the land and appropriating it to the claimant's use and filing a notice of location and settlement of the claim within 90 days thereafter with the requisite filing fee. This method of acquiring what is generally referred to in the BLM vernacular as a "homestead settlement claim" is attended by considerable risk that the land may be withdrawn, or classified for some public use, or subject to the prior claim of another, or have been the subject of a prior selection by the State of Alaska or by entitled Alaska Natives. However, it affords the homesteader the advantage of immediate possession.

The alternative and, at least ostensibly, the more prudent practice, is to apply to the BLM's Alaska State Office to be allowed to make homestead entry of the particular land described in the application, and then wait until the application has been thoroughly reviewed and formally approved and permission to enter has been officially given. This is called an "allowed homestead entry." While this procedure is time-consuming, its supposed virtue lies in the presumption that when and if the Bureau does at last allow the entry, the homesteader will have the assurance that his entry onto the land has the official sanction of the federal government.

The Alaska State Office takes the position that the mere filing of an application to make entry does not segregate the land from further appropriation, or withdrawal.

[1] However, this Board has just decided the appeal of Albert A. Howe, 26 IBLA 386 (1976), which involved circumstances which are similar in all material aspects. In that case Howe filed a homestead entry application in May 1973 for land in Alaska which was then open and available to entry. The entry was formally allowed in October 1975, at which time Howe had not entered the land and taken possession. In May 1976 the Alaska State Office held the entry for cancellation on the basis that while Howe's application was pending, on March 28, 1974, the land had been withdrawn by P.L.O. 5418 (the same withdrawal which gave rise to Pope's appeal). In the Howe case this Board held that in Alaska the filing by a qualified applicant of an application for an allowed homestead entry for land which is open and available to such entry at the time of filing will operate to segregate the land from subsequent appropriation and invest the applicant with a sufficient interest therein to preserve the land from the effect of a subsequent withdrawal which is subject to valid existing rights.

The instant case is not distinguishable from Howe in any material aspect, and the rule in that case is applicable here. Therefore it will not be necessary for us to consider whether estoppel against the Government could properly be invoked in this instance. See United States v. Wharton, 514 F.2d 406 (9th Cir. 1975).

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.

Edward W. Stuebing
Administrative Judge

We concur:

Martin Ritvo
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

