Editor's note: Reconsideration denied by orders dated July 28, 1977, and Dec. 3, 1980

PEKKA K. MERIKALLIO

IBLA 76-620 Decided May 18, 1977

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting amended homestead entry description, denying petition for reconsideration and holding homesite purchase application for rejection.

Affirmed.

1. Alaska: Homesteads ! ! Applications and Entries: Cancellation ! ! Homesteads (Ordinary): Generally ! ! Res Judicata ! ! Rules of Practice: Appeals: Reconsideration

   A request to reconsider a 1968 decision by the Department rejecting final proof for a homestead entry and canceling the entry is properly rejected in the absence of a showing of "extraordinary circumstances." In the absence of compelling legal or equitable reasons for reconsideration, the principle of res judicata, and its counterpart, finality of administrative action, will operate to bar consideration of a new appeal arising from a later proceeding involving the same claim and the same issues.

2. Alaska: Homesteads ! ! Applications and Entries: Amendments ! ! Homesteads (Ordinary): Amendments ! ! Homesteads (Ordinary): Land Subject to ! ! Withdrawals and Reservations: Effect of

   Where a homestead entry has been located on land later included within a withdrawal "subject to valid existing rights," the withdrawal attaches to the land within the homestead upon cancellation of the entry. An

amendment of a homestead entry cannot include lands within a canceled adjoining entry to which a withdrawal has attached.

APPEARANCES: Pekka K. Merikallio, pro se.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Pekka K. Merikallio appeals from the April 2, 1976, decision of the Alaska State Office, Bureau of Land Management (BLM). In its decision, the State Office rejected the amended homestead entry descriptions filed by appellant in 1966 and 1975, denied appellant's petition for reconsideration of the cancellation of his homestead entry, and held for rejection appellant's application to purchase a homesite unless he submitted additional information.

In view of contentions made by appellant, we have reviewed the entire case file. The most salient facts are hereafter set forth.

On July 19, 1960, appellant filed notice of location A-052658 for a 160!acre homestead situated on Yukon Island, Alaska. His final proof of residence and cultivation was due before July 19, 1965. Appellant was reminded that his final proof was due in a notice sent by BLM on February 12, 1965. Following a decision issued by BLM on September 29, 1965, that unless he submitted his final proof within 30 days, his entry would be canceled, appellant filed his final proof on October 26, 1965, approximately 3 months late.

Various sites of archaeological significance had been discovered on Yukon Island. Appellant was notified of this by BLM in 1962 and warned that the antiquities are the property of the United States. In order to protect these sites, the entire island was "withdrawn from all forms of appropriation under the public land laws, * * * subject to valid existing rights," by Public Land Order (P.L.O.) 3275, 28 FR 12821 (December 3, 1963).

Appellant's final proof was rejected by the BLM State Office on June 8, 1966, and the entry canceled, after he failed to provide adequate response to a request for additional information. Appellant appealed this decision to the Office of Appeals and Hearings, BLM, and also amended his entry description to 40 acres, including land not within his original entry (this amendment is referred to in the 1976 BLM decision). When the Office of Appeals and Hearings affirmed the State Office, appellant appealed to the Department. The Assistant Solicitor, Land Appeals, also affirmed the rejection of appellant's final proof and cancellation of the entry in Pekka Merikallio, A-30892 (March 5, 1968).

The appellate decisions affirmed the rejection and cancellation because appellant failed to show any cultivation on his homestead during the fourth and fifth entry years. The decision of the Assistant Solicitor specifically preserved appellant's opportunity "to establish his right to acquire as a homesite up to 5 acres of land pursuant to the Act of May 26, 1934," 43 U.S.C. § 687a (1970). Appellant then filed an application to purchase a 5!acre homesite on May 29, 1968.

While the BLM State Office was processing his homesite purchase application, appellant filed a request on January 2, 1975, that his homesite "be amended back" to a full 160!acre homestead. A considerable portion of this amended description lies outside the boundaries of appellant's original entry. The BLM State Office, in its 1976 decision, rejected this amended description, the 1966 amended description, and denied the petition for reconsideration, because the land outside the boundaries of appellant's original homestead had been withdrawn by P.L.O. 3275 and was therefore unavailable for appropriation. Moreover, a Native allotment application (AA-8149) under 43 U.S.C. §§ 270-1 to 270-3 (1970), alleging use and occupancy since 1949, had been filed for some of the land within the amended descriptions. The decision noted that copies of appellant's protest had been filed in the conflicting Native allotment file and two other Native allotments for lands on Yukon Island, and would be considered when the allotment cases were processed. The State Office also held for rejection appellant's homesite application unless he amended it to include only land embracing improvements within his original homestead entry. 1/

In his statement of reasons for appeal, appellant argues that he amended his homestead description merely to straighten the boundaries of his entry and to include his improvements and established rights!of!way as far as possible within these boundaries. He disputes the finding by BLM that the land outside his original entry became unavailable for appropriation. He has asserted repeatedly that he was unable to cultivate the necessary acreage as a direct result of BLM actions concerning potential archaeological sites. He argues that BLM, by its silence, approved his 1962 suggestions for reduction in cultivation requirements and the use of wild berries as "alternative cultivation."

[1] The 1968 decision by the Assistant Solicitor constituted final departmental action concerning appellant's homestead entry. At that time, appellant chose to proceed with a homesite purchase application rather than pursue the cancellation of his homestead

1/ Appellant has filed an amended homesite application but requested action on it be suspended until a final decision was issued on appeal. We have not considered the amended homesite. When this case is returned to the BLM Alaska State Office, the application should be adjudicated to assure the requirements of the law have been satisfied.

entry in the courts or by requesting reconsideration within the Department. Almost 7 years later, appellant submitted an amended 160!acre homestead description and requested reconsideration of the 1968 decision rejecting his final proof and canceling his entry.

Under the regulations, reconsideration of a departmental decision is permitted "only in extraordinary circumstances." 43 CFR 4.21(c). Moreover, in the absence of legal and equitable reasons for such reconsideration, the principle of res judicata, and its counterpart, finality of administrative action, will operate to bar consideration of a new appeal arising from a later proceeding involving the same claim and the same issues. Ben Cohen, 21 IBLA 330, 331-32 (1975); Elsie Farington, 9 IBLA 191, 194 (1975), aff'd, Farington v. Morton, Civil No. S 2768 (E.D. Cal., December 5, 1973); Gabbs Exploration Co., 67 I.D. 160, 165-66 (1960), aff'd, Gabbs Exploration Co. v. Udall, 315 F.2d 37 (D.C. Cir.), cert. denied, 375 U.S. 822 (1963).

In order to establish a right to his homestead entry, the entryman must show, among other things, a habitable house on the claim, cultivation of one!sixteenth of the area of the claim during the second entry year and one!eighth of the area for every following entry year until submission of final proof. 43 CFR 2567.5(b), (c). For a 160!acre entry, this requires cultivation of 10 acres the second entry year and 20 acres thereafter.

In his 1965 final proof, appellant indicated he had constructed a habitable residence worth approximately $ 1,000, cultivated one!half acre during 1961, and 5 acres during 1962-1963. He was sent a request for additional information, dated February 28, 1966, that specifically asked for clarification of the dates of cultivation and his request for reduction in the area required to be cultivated, and for an explanation of his late submission of final proof. Appellant failed to respond to this request adequately, particularly concerning the cultivation dates.

Appellant has not shown that the original departmental decision erred in affirming the cancellation of his entry and rejection of his final proof as inadequate. It is apparent from the record that he did not meet the cultivation requirements of the law as the prior decisions correctly held. Appellant now argues that the actions of BLM concerning the antiquities are at fault and that BLM never responded to his request for a reduction in the cultivation requirements. We make no excuses for that omission by BLM. However, appellant did not pursue the matter and later communications from BLM were sufficient to apprise him that he must meet the requirements of the law. The fact remains that appellant was not granted relief from the cultivation requirements. He had full opportunity to raise all the issues concerning the cultivation requirements before BLM

and the Department when the rejection of his final proof and cancellation of his entry were on appeal before. It is now too late to request the adjudicative action which he desires as a substitute for full compliance with the law.

Moreover, there are additional reasons which preclude reinstating the entry. Appellant was given adequate notice of the need to file his final proof timely. When he failed to do so, BLM requested that he show reasons why his final proof was filed after the 5 years as required by 43 CFR 2511.3-4(a)(1). In all his discussions concerning the history of this case, appellant has not shown any reason for filing his final proof late. For this reason alone, the final proof was subject to rejection. 43 CFR 2511.3-4(a)(1). We see no justifiable basis for excepting this case from the general principle of administrative finality and conclude that appellant's request for reconsideration of the prior departmental decision and, in effect, to reinstate the canceled entry, must be denied.

[2] Even if appellant's request for reconsideration were granted, his amended description would have to be rejected. Because this issue may bear on appellant's still!pending homesite purchase application, we will discuss why appellant may not include lands outside his original homestead entry.

Appellant argues that P.L.O. 3275 was of no effect because there was no unappropriated land on Yukon Island in 1963. Appellant misinterprets the effect of a withdrawal. When a public land order withdraws land "subject to valid existing rights," prior homestead entries are protected from the withdrawal. However, when a protected entry is canceled, the withdrawal immediately attaches to the land within the canceled entry and renders it unavailable for new entry or appropriation under the public land laws. Jack Z. Boyd (On Reconsideration), 15 IBLA 174, 81 I.D. 150 (1974).

When appellant amended his entry description in 1966 and 1975, he included lands from an adjoining homestead entry, A-052659, which had been canceled in 1965. Since P.L.O. 3275 withdrew all the land on Yukon Island, it attached to the land within A-052659 on the date that entry was canceled. Appellant has not shown any basis for amendment of his original homestead entry. Appellant's assertion that BLM "approved" amending his entry description to include withdrawn land is unsubstantiated in the case file. Furthermore, rights not authorized by law cannot be acquired by reliance on erroneous information given by BLM employees. Wilfred S. Wood, 20 IBLA 284 (1975).

Therefore, apart from other determinative issues, appellant's amended descriptions are properly rejected as embracing lands not

available for entry. The fact that Native allotment applications have been filed for land on Yukon Island does not change this defect in appellant's amended description. The Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 to 270-3 (1970), is a separate statute with rules and requirements somewhat similar to, but not the same as, the rules and requirements of the homestead laws as applied to Alaska by 43 U.S.C. § 270 (1970). Because the withdrawal would prevent any amendment of an entry to embrace new lands outside the area originally intended to be entered, we need not discuss the effect of the conflicting Native allotment application. But see 43 CFR 2091.6-3, 2091.6-5 and 2561.1-1(e).

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. 2/

Joan B. Thompson
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

Frederick Fishman
Administrative Judge

2/ See footnote 1, supra.