

ROBERT J. PROCTOR, ET UX.

IBLA 89-524, 89-537

Decided December 8, 1992

Appeal from separate decisions of the Elko District Manager, Bureau of Land Management, rejecting desert land entry applications. N-22889 and N-22890.

Affirmed in part; set aside and remanded in part.

1. Desert Land Entry: Cultivation and Reclamation

The raising of Christmas trees on desert land by means of irrigation and tilling the soil does not constitute cultivation as contemplated under the Desert Land Act, as amended, 43 U.S.C. §§ 321-39 (1988).

APPEARANCES: Robert J. Proctor, pro se and for Patricia K. Proctor.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Robert J. Proctor and Patricia K. Proctor have appealed from separate decisions of the Elko District Manager, Bureau of Land Management (BLM), dated May 24, 1989, rejecting their desert land entry (DLE) applications, N-22889 and N-22890. These applications were originally filed on March 29, 1979, each embracing 320 acres of land located, respectively, within secs. 31 and 32, T. 28 N., R. 56 E., Mount Diablo Meridian, Elko County, Nevada. As submitted, the applications proposed to obtain water from a well and to irrigate the land by means of a sprinkler system for the purpose of growing garlic, onions, carrots, and alfalfa or wheat on a rotation basis.

Following the receipt of these applications and those submitted by five other individuals in the general vicinity, BLM prepared an environmental assessment (EA) to determine the environmental consequences of classification of the lands within the various applications as suitable for desert land entry. This EA (EA-NV-010-6-102), dated September 2, 1986, recommended that all of the land within the Proctors' applications be classified as suitable for desert entry, with the exception of 80 acres in Robert Proctor's application which embraced a source of above-ground water and were not, therefore, desert in nature, and further recommended that the applications, with the exception of the specified 80 acres, be allowed. Subsequent thereto, Robert Proctor submitted an amendment to his entry application deleting the identified 80 acres, which amendment was approved by BLM on October 1, 1986.

In accord with the EA, a Proposed Classification decision was issued by the Nevada State Director, BLM, on February 6, 1987, which afforded interested parties 30 days in which to comment on the recommended classification of the subject parcels as suitable for desert land entry. Pro-tests to the proposed reclassification were subsequently filed by Leonard Merkley, the holder of the grazing rights with respect to the Twin Creek East Allotment, which includes the land encompassed by the Proctors' DLE applications, 1/ and by Harvey Barnes, referred to by BLM as a representative of the Elko District Grazing Advisory Board. See 43 CFR 2450.4. After reviewing these protests, the State Director issued an Initial Classification Decision on July 23, 1987. That decision classified the land encompassed by the Proctors' DLE applications as suitable for desert land entry, subject to review by the Secretary. See 43 CFR 2450.5.

Merkley objected to the initial classification decision on August 3, 1987, essentially resubmitting his original protest to the Proposed Classification decision. Relying on various publications of the Nevada Cooperative Extension Service and a March 4, 1987, affidavit of Fred C. Worline, who was farming a 40-acre parcel adjacent to the land sought by the Proctors, Merkley argued that the Proctors would not be able to sustain an economically viable farming operation:

As shown on their applications, the Proctors propose to rotate "truck crops," garlic, onions and carrots, with alfalfa and wheat. The short growing season, soil conditions, and well water depth in the proposed Huntington Valley area and long distances to any market areas militate against any commercial farming of such truck crops. * * * [N]ot one commercial garlic, onion (or carrot) farming operation is operating in Elko or Eureka Counties. * * * Focusing on the production of alfalfa alone, the applicants' chance of economic survival in this farming venture are almost non-existent.

(Attachment to Aug. 3, 1987, Protest at 1-2).

On August 20, 1987, the Acting Deputy Director, BLM, informed the protestant that he was requesting the Nevada State Director to make an analysis of the issues raised by the protest. The State Director, in turn, by memorandum dated June 28, 1988, instructed the District Manager to evaluate Merkley's protest, with particular attention to determining the likelihood that the land sought by the Proctors could "be developed into a profitable operation on a 'permanent' basis."

1/ According to BLM, Merkley stands to lose 180 AUM's (animal unit months) of grazing use as a result of allowance of the Proctors' two desert land entries. This represents almost 28 percent of the total AUM's allocated to him on the Twin Creek East Allotment (646).

In the course of preparing a response to the State Director's request, the Elko District Realty Specialist contacted the applicants. Robert Proctor informed him that they had been rethinking their plans for developing the entries and had tentatively decided to grow alfalfa and then feed it to their livestock. Proctor promised to provide the District Office with their latest development plans in the near future. See Memorandum to File, dated July 27, 1988.

On August 26, 1988, the applicants submitted a revised application form indicating that the designated crop would be Christmas trees. Upon receipt of these documents, the District Office apparently inquired of the State Office as to the allowability of a desert land entry for the purposes of Christmas tree production. By memorandum dated May 9, 1989, the State Director concluded that cultivation of Christmas trees was not the growing of an "agricultural crop" within the meaning of the Desert Land Act and suggested the rejection of the proposed changes. By decision dated May 24, 1989, the District Manager, after reiterating the State Director's determination that coniferous trees were not considered an acceptable crop, rejected the DLE applications. Appellants thereupon appealed to this Board.

We note at the outset that rejection of the DLE applications was clearly improper. By their submission of August 26, 1988, appellants sought to amend their pending applications to indicate that the crop to be grown would be Christmas trees. If, as is obviously the case, the District Office had determined that this was not a proper crop, the correct course of action would have been to simply reject the amendment, not the subsisting application, as was done herein. To that extent, therefore, the decisions below were simply in error.

Be that as it may, appellants in their appeal to the Board, clearly take issue with the determination that the cultivation of coniferous trees for sale as Christmas trees is not the growing of an "agricultural crop" within the meaning of the Desert Land Act. Accordingly, to the extent that the decision below also implicitly rejected the proposed amendment to their applications, that question is ripe for determination.

In their statement of reasons for appeal (SOR), appellants contend that Christmas trees are not expressly excluded as acceptable crops under the Desert Land Act either by the statute, Departmental regulations, or Departmental precedent. Rather, they argue that such trees fall under the definition of a "crop" set forth at 43 CFR 2520.0-5(a)(4), viz., "any agricultural product to which the land under consideration is generally adapted and which would return a fair reward for the expense of producing it." As proof of this, they note that "Christmas tree production and sales is an annual billion dollar U.S. agricultural industry" and that the Nevada Department of Agriculture planted a test plot of Christmas trees 20 years ago and have since irrigated and cultivated it: "Not all varieties of Christmas trees were successful, but several types were. From this study,

marketable Christmas trees were proven to grow on lands similar to the applied for lands" (SOR at 2).

[1] Section 1 of the Desert Land Act, as amended, authorizes the Secretary of the Interior to patent up to 320 acres of desert land 2/ to an entryman where he makes satisfactory proof of "reclamation" of the land by conducting water upon it and pays the requisite fee. 43 U.S.C. § 321 (1988). Such proof must consist of a showing that the entryman has spent at least \$3 per acre "in the necessary irrigation, reclamation, and cultivation of the land" and has also cultivated at least one-eighth of the land. 43 U.S.C. § 328 (1988). Finally, the statute indicates that such endeavors are to be directed to the production of "ordinary agricultural crops." 43 U.S.C. § 327 (1988).

While appellants are correct that there has been no Departmental adjudication explicitly rejecting the cultivation of Christmas trees as the growing of an "agricultural crop" as required by the Desert Land Act, supra, this question has been examined in the context of the Homestead Act, as amended, 43 U.S.C. § 161 (1976) (repealed by section 702 of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2787).

It is true that in Ferdinand J. Clifford, 42 L.D. 535 (1913), the Department held that the planting of fruit trees, even though technically horticulture, did fulfill the statutory requirement under the Homestead Act that an entryman cultivate an agricultural crop. However, in Lauren M. Lucas, Oregon 09887 (Dec. 7, 1960), the Director, BLM, noted that "the courts have held that cultivation is ordinarily understood to mean wheat, corn, potatoes, or other annual crops which are cultivated and harvested during a single growing season. It does not apply to the planting of timber seeds or cuttings." And, in Herman H. Moore, Sacramento 049601 (Feb. 8, 1956), the BLM Director expressly held that "[t]he growing of Christmas trees cannot be considered as cultivation under the homestead law."

The difference between Clifford, on the one hand, and Lucas and Moore, on the other, is that, with respect to fruit trees, the fruit and not the tree is the "crop" being cultivated, whereas with Christmas trees, it is the tree itself which is the object of the cultivation. Thus, while horticulture was accepted as an agricultural use within the meaning of the Homestead Act, silviculture was rejected. 3/

2/ Desert land is defined as "[a]ll lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop." 43 U.S.C. § 322 (1988).

3/ It should be pointed out, however, that, for a short period of time, cultivation of timber could qualify an entryman for a patent under the Homestead Act. This, however, was the result of section 4 of the Timber Culture Act of 1873, 17 Stat. 606, a statute more fully considered subsequently in the text of this decision. That section provided that, where

Admittedly, both Lucas and Moore dealt with interpretation of "cultivation" under the Homestead Act. But, it has long been recognized that the requirement of "cultivation" under the Desert Land Act is identical to that under the Homestead Act. See generally Claude E. Crumb, 62 I.D. 99, 102 (1955); Brandon v. Costley, 34 L.D. 488, 500 (1906). Indeed, as just one example, the analysis in Clifford, which permitted the cultivation of deciduous trees for their fruit under the Homestead Act, was eventually applied to desert land entries in Samuel D. Block, 45 L.D. 481, 484 (1916). Since the ultimate goal of both the Homestead Act and the Desert Land Act were the same, viz., the transformation of heretofore undeveloped land into productive farms, with the primary difference between the two relating to the character of the land involved rather than the use to which it was being put, it makes eminent good sense to apply the same standards with respect to cultivation under one statute as was applied under the other statute. To the extent, therefore, that the Department has rejected attempts to cultivate Christmas trees in fulfillment of the requirements of the Homestead Act, a similar result should obtain under the Desert Land Act.

Moreover, as was noted in the concurring opinion in William S. Archibald, 75 IBLA 236, 240 (1983), there are additional reasons to reject the cultivation of Christmas trees under the Desert Land Act. By its own terms, the Desert Land Act was not applicable to lands mineral in character or to timber lands. See 43 U.S.C. § 322 (1988). Allowance of Christmas tree cultivation under the Desert Land Act would have the anomalous result of permitting the cultivation of trees under the Desert Land Act, whose presence in substantial numbers prior to the allowance of the entry would have barred entry under that Act. See, e.g., Vladimir P. Havlik, 61 I.D. 294 (1954); Riggan v. Riley, 5 L.D. 595 (1887).

Finally, while appellants argue that Christmas tree production is now considered to be an agricultural use and, thus, should be allowed under the Desert Land Act, the proper ambit of that Act is necessarily constricted by consideration of the original intent which animated its adoption. At the time the original Desert Land Act was enacted in 1877, Congress had already provided in the Timber Culture Act of 1873, 17 Stat. 605, a mechanism whereby entry could be made on the public lands with a view towards

fn. 3 (continued)

a homestead entryman had established residency on the entry, patent could issue upon a showing that the entryman had under cultivation, for at least 2 years, 1 acre of timber for each 16 acres of entered land. The Timber Culture Act was repealed by section 1 of the General Revision Act of Mar. 3, 1891, 26 Stat. 1095, largely because of the view that the Timber Culture Act had become the source of large-scale abuse. See generally Gates, History of Public Land Law Development (1968) at 560. Far from undermining the Department's historic treatment of silvicultural endeavors under the Homestead Act, this history actually supports it, since it is clear that absent the special provision of the Timber Culture Act, cultivation of timber would not have been a qualifying use under the Homestead Act.

the cultivation of timber. This latter Act permitted individuals to make entry on a quarter section of land for the purpose of planting and cultivating timber. Unlike the Desert Land Act, which, in its initial form, had no requirement that proof of cultivation be submitted but did require an application for patent to be made within 3 years of the allowance of the entry, the Timber Culture Act, as originally adopted, required that the trees be cultivated for 10 years prior to the issuance of patent. This totally disparate treatment, under almost contemporaneously adopted statutes, buttresses the view that Congress, in adopting the Desert Land Act, did not intend silvicultural endeavors to qualify under that Act. ^{4/} Indeed, even when the Desert Land Act was amended to require proof of cultivation, the time for submission of final proof was extended to 4 years, clearly insufficient time to prove cultivation under the Timber Culture Act.

We have indicated in at least one recent case that "cultivation" under the Desert Land Act could be extended to include crops which might not have been considered to be "agricultural crops" at the time of the adoption of the Desert Land Act. See Wesley A. Painter, 90 IBLA 69 (1987) (cultivation of jojoba for the extraction of oil). Where, however, as in the instant case, the question is whether the term "cultivation" can be extended to embrace purely silvicultural endeavors, expansion of the scope of the Desert Land Act to embrace such activities would not be merely a logical extension of Congressional intent but, on the contrary, would result in a clear contravention of that intent and constitute a determination totally inconsistent with Departmental adjudications stretching over a full century.

In view of the foregoing, we hold that the growing of Christmas trees does not constitute the growing of "ordinary agricultural crops" within the meaning of 43 U.S.C. § 327 (1988), and accordingly affirm the rejection of appellants' amendment. However, to the extent that the decision below rejected the subsisting DLE applications, it must be set aside for the reasons discussed above.

^{4/} Moreover, it is clear that the Timber Culture Act, as interpreted by the Department, actually applied to desert lands since the Department consistently held that if irrigation was necessary to foster the cultivation of timber, an entryman under the Timber Culture Act was required to so irrigate. See, e.g., Cummings v. Rudy, 16 L.D. 115 (1893); Sampson v. Lawrence, 8 L.D. 511 (1889). Since, as noted in the text, the original Desert Land Act had no requirement that proof of cultivation be submitted (that requirement being added by section 2 of the General Revision Act of 1891, 26 Stat. 1097), it would have been totally illogical to require irrigation under the Timber Culture Act if entries could be made under the Desert Land Act for the purpose of growing timber, particularly since only a quarter section of land could be entered under the Timber Culture Act, whereas a full section could be entered under the original Desert Land Act.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the determination that Christmas tree production is not permissible under the Desert Land Act is affirmed, but the decisions rejecting the applications are set aside and the case files are remanded for further action consistent with the foregoing.

James L. Burski
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge