

Appeals from separate decisions of the Nevada State Office, Bureau of Land Management, rejecting a request for extensions of time to make final proof and cancelling desert land entries. N-22427 and N-22428.

Affirmed.

1. Desert Land Entry: Extension of Time--Desert Land Entry: Final Proof

BLM properly denies a request for an extension of time to make final proof for a desert land entry, pursuant to sec. 3 of the Act of Mar. 28, 1908, 43 U.S.C. § 333 (1988), based on the entryperson's inability to construct the necessary irrigation works absent evidence that this inability arose due to circumstances not reasonably foreseeable at the time of the allowance of the entry.

APPEARANCES: Robert B. and Mildred E. Arnold, pro sese.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Robert B. and Mildred E. Arnold have appealed from separate decisions of the Nevada State Office, Bureau of Land Management (BLM), dated June 6, 1989, rejecting a request for extensions of time to make final proof and cancelling their desert land entries (DLE's), N-22427 and N-22428.

On March 27, 1979, the Arnolds each filed a DLE application for 320 acres of land 1/ situated in Elko County, Nevada, pursuant to section 1 of the Desert Land Act, as amended, 43 U.S.C. § 321 (1988), proposing to obtain water from wells and to irrigate the land by means of a sprinkler system for the purpose of growing alfalfa hay. 2/ Thereafter, by decision

1/ On Feb. 21, 1985, the Arnolds filed amended applications, conforming the land descriptions to those adopted by BLM. As amended, the applications together encompass 607.88 acres of land. BLM approved the amendments on Mar. 8 and 11, 1985. The subject land is situated in secs. 35 and 36, T. 38 N., R. 62 E., Mount Diablo Meridian, Elko County, Nevada.

2/ On Feb. 25, 1980, subsequent to filing their DLE applications, the Arnolds, along with several of their relatives who had also applied for

dated March 22, 1985, the Elko District Manager classified the subject land as suitable for entry under the Desert Land Act, and, on June 4, 1985, BLM allowed the entries.

In allowing their entries, BLM required that appellants, prior to commencing cultivation of the subject land, drill and flow test the wells which would be used in irrigating the land in order to prove that they had sufficient water for that purpose. By letters dated June 4, 1985, BLM further explained the requirements for filing final proof, stating that such proof must demonstrate development of a permanent source of water sufficient to irrigate and an irrigating system capable of irrigating all of the acreage in the entries as well as cultivation of at least one-eighth of the land in each of the entries. On August 14, 1986, the Arnolds filed annual proofs, indicating the expenditure of \$2,000 for the surveying of water rights and the acquisition of State water permits. ^{3/}

On April 5, 1989, prior to the June 4, 1989, expiration date for filing final proof, the Arnolds filed a request for 3-year extensions of time to make such proof in connection with their DLE's. Noting that, at the time of allowance of their entries in 1985, the farm economy was "in an all time low," they explained that they did not have and could not obtain financing to drill the necessary wells and put in an irrigating system at that time. They argued, however, that due to improvements in the farm economy in 1988 they now had sufficient resources to proceed with drilling the well and intended to do so immediately upon notification that their extensions were approved.

In its June 1989 decisions rejecting the requested extensions, BLM noted that, in order to show entitlement to an extension under section 3 of the Act of March 28, 1908, 43 U.S.C. § 333 (1988), an entryperson must demonstrate that the failure to reclaim and cultivate the entered land was "due to no fault on the part of the entryperson but to some unavoidable delay in the construction of the irrigation works for which he was not responsible and could not have readily foreseen," citing 43 CFR 2522.3. BLM concluded that the lack of financing occasioned by the poor farming economy did not constitute sufficient justification for failing to develop the entries during the 4-year period allowed since these circumstances could have been foreseen when the entries were allowed and, accordingly,

fn. 2 (continued)

DLE's, proposed to operate all of their entries as a "cooperative project" for the production and sale of alfalfa hay. The relatives were identified as Willis Arnold (N-22337), Bruce Westberg (N-22744), and Dennis Remington (N-22426).

^{3/} The record indicates that, on June 28, 1985, the State Engineer of Nevada approved amended applications (Nos. 48719, and 48720 through 48722) by the Arnolds allowing a change in the point of diversion and/or place

of use of water obtained from wells drilled in the vicinity of the subject land for the purpose of irrigating that land. Such water had already been appropriated under State permit Nos. 31951 through 31953, and 34541.

denied the requested extensions. Additionally, noting that the 4-year statutory life of the entries had run and that the record established that the Arnolds had neither drilled a well nor reclaimed the land, BLM cancelled the entries.

In their statement of reasons (SOR) for appeal, appellants reiterate their contention that the failure to develop the subject land for agricultural use during the 4-year period after allowance of their entries in 1985 was due to the "bad" farm economy, especially the low prices for alfalfa hay, which had finally turned around in the early part of 1989 (SOR at 1). They assert that they were then fully prepared to commence developing the land. Thus, they note that, having acquired the necessary water rights, purchased all the necessary equipment and made arrangements for labor, they were set to start drilling the first well in March 1989 and to continue developing the land throughout that spring so that they would have a "full hay crop" in 1989, but were advised to await approval of an extension request which, they were further assured, "was almost certain." *Id.* Appellants state that their development of the subject land would not only be a fulfillment of their own dream, but also a boon to the local area, supplying needed hay to local ranches.

Section 1 of the Desert Land Act authorizes the Secretary of the Interior to patent up to 320 acres of desert land per entry upon the submission of "satisfactory proof * * * of the reclamation" of the land, including the cultivation of one-eighth of the land, and payment of the required fee. 43 U.S.C. § 321 (1988); see also 43 U.S.C. § 328 (1988). The final "proof" entitling the entryperson to a patent is required to be filed within 4 years after allowance of the entry. See 43 U.S.C. § 329 (1988); 43 CFR 2521.6(a); Wright v. Guiffre, 68 IBLA 279, 280 n.3 (1982), aff'd, No. 83-1148 (D. Idaho June 18, 1984).

As originally adopted in 1877, the Desert Land Act made no provision for extending the time in which to submit the required final proofs. Experience under the Act, however, showed that in many cases the practical difficulties attendant to the development of an adequate source of water made it impossible to prove up within the 4-year statutory life of the entry. Thus, in numerous instances, the original plan to irrigate an entry by means of water from wells was shown, upon the drilling of such wells, to be infeasible and it became necessary to alter the original plan of irrigation in order to provide adequate water. In other cases, entrymen would band together to construct irrigation works from nearby rivers only to discover that 4 years was an inadequate period of time in which to complete the project. In neither of these circumstances, however, despite the obvious good faith attempts by the entrymen to overcome unforeseen difficulties, was any extension permissible. ^{4/} In order to provide some

^{4/} The actual practice of the Department, however, was not to reject final proof where the construction of irrigation works and the irrigation of the land occurred after the running of the statutory period in the absence of an adverse claim or a showing that the final proof submitted was false or

relief for entrymen in such situations, Congress adopted section 3 of the Act of March 28, 1908, 35 Stat. 196, 43 U.S.C. § 333 (1988).

This section provides for an initial extension of time that may be granted. It authorizes the Secretary to extend for up to 3 years the period to make final proof upon a satisfactory showing that, despite good faith compliance with the requirements of the Desert Land Act, "because of some unavoidable delay in the construction of the irrigating works intended to convey water to the [entered] lands, [the entryman] is, without fault on his part, unable to make proof of the reclamation and cultivation of said land." 43 U.S.C. § 333 (1988); see also 43 CFR 2522.3. Further extensions were subsequently authorized upon similar showings. See 43 U.S.C. §§ 334, 336 (1988).

[1] As noted above, appellants essentially argue that their failure to drill the required well or otherwise reclaim the entered lands was directly related to their personal financial situation and their inability to obtain outside financing due to the depressed state of the farm economy during the greater part of their 4-year entry period. Insofar as an individual's personal financial situation is concerned, the Department has long held that the inability of an entryman to personally finance the needed development is an inadequate basis upon which to predicate the grant of an extension of time since the need for obtaining such financing should have been readily apparent prior to the allowance of the entry. See, e.g., Thomas D. Hickey, 34 IBLA 86, 93 (1978); Pamela M. Brower, 26 IBLA 366 (1976); Paul I. Kochis, A-30427 (Oct. 26, 1965). This has been true even where the financial difficulties arose subsequent to allowance of the entry and were occasioned by illness and the consequent medical expenses and attendant loss of income (see Virgil H. Belisle, A-29954 (Mar. 4, 1964)) or by theft of an existing irrigation system (see Charles T. McCormack, A-30717 (June 30, 1967)).

Similarly, the inability of an entryman to obtain financing from other sources does not warrant the grant of an extension. In our recent decision in Roseanne M. Bell, 120 IBLA 153 (1991), we expressly noted that

[w]here, in the normal course of events, it is impossible to obtain such financing, owing either to the vicissitudes of the normal business cycle or because of the creditworthiness of the individual, such inability does not justify an extension because this possibility should have been apparent and anticipated at the commencement of the 4-year period. [Emphasis in original.]

Id. at 160.

fn. 4 (continued)

fraudulent. See, e.g., David Gilchrist, 8 L.D. 48, 50 (1889); Alexander Toponce, 4 L.D. 261 (1885). Since, however, the filing of a private contest would constitute an adverse claim, eventual completion of irrigation works beyond the statutory time limit would be unavailing in the face of such a contest.

Admittedly, appellants allege that it was a generalized business turnaround rather than conditions personal to them which made drilling the well an impossibility. While the economic difficulties facing the farming sector during this period may have been severe, however, there is no indication that these occurrences were out of the ordinary business cycle. And, even if such a showing could be made, it would be unavailing.

Thus, during the Great Depression, Congress enacted a number of laws to grant entrymen under both the Desert Land Act and the General Homestead Act extensions of time in which to file final proof where the entryman could show that "it [was] a hardship upon himself to meet the requirements incident to annual or final proof upon the date required by existing law, due to adverse weather or economic conditions." See Act of May 13, 1932, 47 Stat. 153, as amended, 43 U.S.C. § 256a (1976) (repealed by section 702 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2788). The authority to grant an extension on the basis of economic concerns, however, was expressly limited to entries for which final proof was required to be made on or before December 31, 1936. More critically, the fact that special legislation was necessary to authorize the granting of extensions on the basis of general economic conditions underlines the Department's lack of authority to do so under the general extension statutes. ^{5/} Accordingly, we must conclude that, in the absence of any special legislation authorizing the granting of an extension for economic considerations, the asserted economic difficulties attendant to the period in question cannot serve as a basis for the grant of an extension of time to file final proof since such a contingency was a sufficiently foreseeable possibility that appellants should have taken into consideration in making their entries. ^{6/}

^{5/} Further support for this conclusion is provided by the Act of July 30, 1956, 70 Stat. 715, 43 U.S.C. § 336a (1988), which, inter alia, granted a 3-year suspension in the cultivation requirements of the Desert Land Act to entries subsisting on Mar. 1, 1956, or for which applications to enter land were on file as of that date. As noted by Congress, this legislation was, in significant part, generated by difficulties which many entrymen were experiencing in obtaining financing for irrigation projects. See H.R. Rep. No. 2737, 84th Cong., 2d Sess., reprinted in 1956 U.S. Code Cong. & Admin. News 3666. In supporting the legislation, however, the Department expressly noted that it would only apply to entrymen with entries allowed as of Mar. 1, 1956, or applications on file as of that date, and noted that "[w]e agree with this in principle for we believe that these privileges should not be extended to persons applying for entries after the enactment of the bill. Any other approach could lead to speculation." Id. at 3669.

^{6/} In contrast, we note that in Roseanne M. Bell, supra, we held that the issuance of a preliminary injunction barring the Government from issuance of patents for proved-up entries, which in turn inhibited banks from loaning money for the development of these entries, was not a reasonably foreseeable possibility when the entry was allowed and, upon the showing of substantial efforts by the entryman (albeit unsuccessful) to obtain financing, could serve as a basis for the grant of an extension of time under section 3 of the Act of Mar. 28, 1908, 43 U.S.C. § 333 (1988).

Appellants also allege that, prior to requesting extensions to make final proof, they were advised by David Vandenberg, the Elko District Realty Specialist, in early February 1989, to defer development of their entries until an extension had been granted and were assured that "it was almost certain we would get the extension" (SOR at 1). The record, however, contains an earlier October 21, 1988, memorandum to the file, apparently made by Vandenberg, which reports a conversation with Robert Arnold on that date. After noting that Arnold would likely request an extension of time to make final proof "based on the unavailability of a well driller and inability to get financing," the memorandum states: "I could not assure him he could get approval based on those reasons but we would see if his reasons fit within any of the authorities we have for granting extensions."

In any case, even if made, the purported statements by Vandenberg did not guarantee that appellants would receive extensions, but only that they were "almost certain," thus clearly raising the contingency that it might be denied. Thus, appellants could not, by deferring their attempts to reclaim the land until the expected approval of the extension request, have justifiably relied on these statements, in total confidence that the requested extensions would be granted.

Moreover, at the time that the purported assurances by Vandenberg were given, even using the earlier October 1988 date, it seems clear that it was already too late for appellants to show timely compliance with the irrigation and cultivation requirements of the Desert Land Act. Only slightly more than 7 months remained in the life of the entries, which were set to expire on June 4, 1989. Even if appellants had been able to successfully drill the needed well and irrigate their entries prior to June 4, 1989, they would have been unable to establish that at least one-eighth of the acreage was cultivated within the meaning of the Desert Land Act prior to the running of the 4-year statutory life of the entries. See generally Charles Edmund Bemis, 48 L.D. 605, 607 (1922), holding that "it is incumbent upon the entryman to show that some sort of a crop was raised by irrigation or that a bona fide effort was made with that end in view. The mere planting of a crop does not fulfill the requirement."

Since the record attests that the area was freeze-free only 70 to 100 days annually, it is apparent that, by the time the purported advice was tendered, it was already too late for appellants to show timely compliance with the requirements of the Act and, thus, the effect of the advice which appellants received to await approval of the extensions before committing additional resources may well have been to save them from useless expenditures. We can, in short, find no basis upon which to estop the Government from denying the requested extensions. See Ptarmigan Co., 91 IBLA 113, 117 (1986), aff'd sub nom. Bolt v. United States, 944 F.2d 603 (9th Cir. 1991).

For the foregoing reasons, we must conclude that the decisions denying the requested extensions of time in which to submit final proof were clearly in accord with the applicable law. However, we must also note that the decision below not only denied the requested extensions but also cancelled the entries. It is, therefore, appropriate for this Board to

consider the effect of 43 CFR 2521.6(j)(1) on this action. That regulation provides that: "Where final proof is not made within the period of 4 years, or within the period for which an extension of time has been granted, the claimant will be allowed 90 days in which to submit final proof. (44 L.D. 364.)" ^{7/} In our recent decision in Carol Carlton, 117 IBLA 13 (1990), we set aside a decision denying an extension of time and cancelling a desert land entry and directed BLM to afford appellant therein the 90 days granted by the statute in which to submit final proof and also to consider an argument, first made on appeal of that part of the decision below which denied an extension of time, that access problems relating to a railroad right-of-way grant prevented the entrywoman from timely complying with the irrigation requirements of the Desert Land Act. We do not, however, believe a similar course of action is appropriate in the instant appeals.

Thus, in the instant cases, appellants' arguments supporting an extension were fully considered by BLM and, for reasons which we have set forth above, we have affirmed BLM's actions in denying the requests. Thus, the factual predicates which led the Board to reverse the decision in Carlton are not replicated in the instant appeals. Of equal importance, the regulations also make it clear that "[t]he 90 days provided for in this section must not be construed as an extension of time." 43 CFR 2521.6(j)(2). The 90-day period afforded by 43 CFR 2521.6(j) merely provides an entryperson the opportunity to show that the land was timely reclaimed even though the actual proofs of this action were not submitted within the required time period. In the present case, however, appellants admit that they have not yet drilled the required well. It is, therefore, clear that they cannot make the showings required by the statute. Remanding these cases under such circumstances would be a futile and useless act and would afford appellants no benefits whatsoever. We decline to do so.

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 affirmed.

James L. Burski
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

^{7/} The citation to 44 L.D. 364, while longstanding, is in error. The language of the regulation is actually derived from Rule 28 of Circular No. 474, which appears at 45 L.D. 345, 363 (1916).