

ROBERT W. BLONDEAU

IBLA 70-32 Decided September 22, 1970

Homesteads (Ordinary): Cultivation: Final Proof: Relinquishment

Homestead final proof showing that less than one-eighth of the entry was cultivated during the fifth entry year is defective on its face and is subject to rejection unless a reduction in the cultivation requirement for that year is warranted, or unless the entryman relinquishes sufficient acreage so that the amount cultivated constitutes one-eighth of the entry.

Homesteads (Ordinary): Cultivation

The cultivation requirements for one year of a homestead entry may be reduced where the entryman suffers some misfortune making him unable to cultivate that year. Unusual weather conditions preventing him from cultivating that year as compared with other years when he did cultivate may be considered a misfortune. An entryman's misunderstanding of the requirements in regulations will not constitute a misfortune.

Homesteads (Ordinary): Cultivation: Final Proof

Action rejecting homestead final proof may be suspended to permit a homestead entryman to make a further showing of a misfortune which may have prevented him from cultivating the required amount of acreage for the fifth year of his homestead entry.

ROBERT W. BLONDEAU : Homestead final proof
rejected, entry cancelled
: Set aside, case remanded

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Robert W. Blondeau has appealed to the Secretary of the Interior from a decision by the Office of Appeals and Hearings, Bureau of Land Management, dated February 5, 1969, which affirmed the Bureau's Alaska State Office's decision of September 17, 1968, rejecting his homestead final proof filed May 28, 1968, and cancelling his homestead entry on the ground that the proof showed that less than one-eighth of the entry was cultivated during the fifth entry year as required. The Office of Appeals and Hearings modified the land office decision to the extent of allowing the entryman 60 days within which to file a relinquishment of all excess acreage of his homestead entry in order to make the final proof acceptable on its face.

Blondeau's appeal raises questions concerning the acceptability of his final proof, the requirement that he relinquish land in his entry and whether or not he might be allowed an adequate opportunity to apply for a reduction in the cultivation requirement.

Appellant's homestead settlement notice was filed on May 27, 1963, showing settlement or occupancy as of April 23, 1963. An amended notice was filed May 1, 1964. The Bureau's decisions were based on the assumption that the entry contains approximately 120 acres as shown on the final proofs submitted and for the purpose of this decision we make the same assumption. ^{1/}

To understand appellant's objections and questions it is necessary to review some of the actions shown in the record.

^{1/} The amended settlement notice described the unsurveyed lands of the entry and gave the acreage as approximately 155 acres. By a letter of June 17, 1964, the entryman was informed that 25 acres were not subject to location and settlement. When the case is returned to the land office the extent of the acreage within the claim may be clarified.

On April 5, 1967, appellant filed a final proof. By decision of May 5, 1967, the Bureau's Alaska State Office gave the entryman 30 days within which to show cause why the proof should not be rejected because the statements of his two witnesses were incomplete. They did not give periods of appellant's residence on the claim or the dates of cultivation of the entry. The decision indicated that the proof must be clarified by testimony under oath by witnesses who knew the facts as to residence, cultivation and improvements. Within the time required, appellant filed supplemental statements made by himself and two other persons, who were not the same witnesses on the initial final proof statements. These notarized statements gave dates of his residence on the land from 1963 to the date of filing and showed that approximately 7 1/2 acres were cultivated in 1964 and 15 acres were cultivated in 1965 and 1966. On June 26, 1967, the Alaska office issued a letter stating that the statements of the two new witnesses could not be considered as completing the statements of the original witnesses and it was necessary for him to get two persons familiar with the facts to complete Form 4-369a before the final proof could be considered as filed, or they could come into the office and give their testimony before the Manager of the land office. No forms were filed.

On October 27, 1967, the land office issued a decision rejecting the final proof on the ground that it was incomplete, and advised appellant that the 5-year statutory life of the claim would not expire until May 26, 1968. The decision stated that he could file a new proof by that date with his testimony and testimony of two witnesses familiar with the facts as to residence, cultivation and improvements, up to and including the date of submission.

On May 28, 1968, appellant filed another final proof with forms completed by two witnesses. The proof of appellant and his two witnesses showed cultivation of 7 1/2 acres in 1964, 15 acres in 1965 and 1966, and 7 1/2 acres in 1967. On June 24, 1968, the Alaska office issued a decision giving appellant 30 days to show cause why his final proof should not again be rejected and the claim cancelled because it showed on its face that only 7 1/2 acres were cultivated during the fifth entry year rather than the required one-eighth or 15 acres for a 120-acre homestead. The decision also advised that a portion of the claim could be relinquished so that the 7 1/2 acres would be equal to one-eighth of the area of his claim. In response by letter, the appellant replied that he felt he was under no obligation to cultivate any land during 1967 because he had already completed the cultivation requirements and submitted final proof. He stated that he had intended to plant 15 or more acres anyway but gave the following as his excuse:

When I planted about half of that amount, it started raining and it continued to stay so cloudy and rainy that the ground never dried out sufficiently before snowfall. Working the soil when it is too wet can seriously damage it and it sometimes takes over a year for the soil to regain its original consistency. Also, I didn't want to get my equipment stuck in the mud.

He also asked for information concerning the relinquishment of land from his entry.

The Alaska office responded by letter explaining how reduction of cultivation requirements by relinquishment of a portion of the entry could make the proof satisfactory. Appellant responded requesting forms for reduction of cultivation requirements and contending that the filing of his initial final proof made it unnecessary to cultivate thereafter. The Alaska office thereupon issued its decision of September 17, 1968, from which the appeals followed, rejecting the final proof for the reason that it showed on its face that one-eighth of the entry was not cultivated during the fifth entry year and cancelling the entry. The decision did not mention the possibilities of relinquishing a portion of the entry or reducing the cultivation requirement.

In affirming the land office decision, the Office of Appeals and Hearings allowed appellant 60 days within which to file a relinquishment of all excess acreage in order to make the final proof acceptable, or failing which the final proof would stand rejected and the entry cancelled without further notice. As appellant has pointed out, no mention was made in that decision concerning the possibility of reduction of cultivation.

In his appeal to the Director, Bureau of Land Management with respect to relinquishing acreage from his entry, appellant stated:

Nearly half of the land included within the homestead boundaries is worthless and unusable and I don't want it. However, if I could relinquish it, the remaining tract would be irregular in shape and would not conform to the shape requirements unless these requirements could be modified.

However, in his present appeal, appellant objects to relinquishing any land from his entry or, at most, not more than one-seventh of the land. His reasoning in this regard is that he cultivated a total of approximately 45 acres of land in 5 years of the entry, with the total amount required being 52 1/2 acres. Therefore, he says he completed all but one-seventh of the total amount required. He says that he met the requirements for patent at the end of three years and now has cultivated more than twice the total amount ordinarily required for a patent after three years and the total amount of residence is far in excess of the requirement.

There are several fallacies in appellant's contentions. First, he did not appeal the land office's denial of his first proof and the supplemental statements filed in support thereof, which were rejected by the Alaska office. Therefore, we can consider only his final proof filed at the expiration of the five-year life of his entry. The Bureau correctly pointed out that the homestead law requires cultivation of one-eighth of the entry until final proof is filed. Because satisfactory final proof was not filed until the end of the fifth year, the requirements of cultivation extended throughout the duration of the five year entry. Thus, only one-half of the required one-eighth was shown by the final proof. The Bureau correctly concluded the final proof was insufficient on its face. It was subject to rejection for that reason and in the absence of acceptable final proof, the entry was subject to cancellation because its life had expired. Nicholas v. Secretary of Department of Interior, 385 F 2d 177 (9th Cir. 1967). The fact that the total cultivation was more than that required for a three-year entry was not significant when the proof is not acceptable.

The second fallacy in appellant's reasoning is the assumption that the cultivation requirement might be apportioned over the life of the entry. The requirements are for one-eighth of the entry to be cultivated for each entry year following the second year, and not for a proportionate amount for the total of the entry years. William F. Musgrove, A-30115 (November 23, 1964). A lesser amount of cultivation for any given entry year is permissible only if a reduction in the cultivation requirement is approved.

Third, appellant complains that the Bureau failed to send forms or respond to his remarks concerning the reduction in the cultivation requirements. The regulations permit a reduction of these requirements in two different circumstances. The first type requires

an application by the entryman and a finding by the Bureau that there was good faith and that a prudent man at the time of entry would not be aware that cultivation was not reasonably practicable. The entryman must show that:

... the land entered is so hilly or rough, the soil so alkaline, compact, sandy, or swampy, or the precipitation of moisture so light as not to make cultivation of the required amounts practicable, or if the land is generally valuable only for grazing. 43 CFR 2211.2-3(b)(1). [Now 43 CFR 2511.4-3(b)(1).]

Although appellant has not filed an application, it is doubtful whether he could fall within the purview of this regulation since he states he did cultivate 15 acres for three of the entry years, thus demonstrating the cultivability of that amount of land. All he needs is a reduction of one-half of the cultivation requirement for the final entry year.

The second circumstance in the regulation, *supra*, provides for a temporary reduction in the cultivation requirement for any given entry year after the entryman has established a residence if he "has met with misfortune which renders him reasonably unable to cultivate the prescribed area." The regulation indicates that under these circumstances an application for reduction need not be filed but notice of the misfortune and of its nature must be submitted to the manager of the land office, within 60 days after its occurrence. However, the Department has held that the 60-day requirement is not mandatory and has permitted an entryman to make a showing after that time and final proof has been filed. See Earl R. Bamard, A-30920 (May 27, 1968).

Appellant attempted to explain his failure to cultivate the additional 7 1/2 acres during the fifth year. One of his reasons was a misunderstanding of the law. We cannot accept this as a "misfortune" within the meaning of the regulation. However, he also said that rainy and wet conditions prevented him from cultivating more land. The Bureau did not consider this statement a "notice" of a "misfortune" and did not rule on whether such was an adequate showing. Unusually heavy rains or other conditions preventing cultivation within a given year could be a "misfortune" within the meaning of the regulation. Ordinarily this provision relates to other more personal types of misfortune and weather conditions usually fall within the first category. However, in this circumstance, if the condition would preclude cultivation for one year and not other entry years, this may be considered within the second provision. In any event, we believe

appellant should corroborate his statements concerning the conditions in 1967 with additional explanations and any proper proof he might be able to obtain, such as information from the Weather Bureau, agricultural extension agents or individuals in the vicinity familiar with the conditions. Such information should be submitted to the Bureau's Alaska State Office within 60 days from the date of this decision or such further time as may be granted by the Alaska office if appellant wishes to have this explanation considered further as a means for justifying the reduction in the cultivation requirement for the fifth year. If the Bureau's Alaska office finds that his supplemental proof sufficiently shows that there was a "misfortune" because of unnatural weather conditions or other circumstances, the requirement of cultivation for the fifth year may be reduced and the final proof be acceptable on its face.

If the Bureau's Alaska office finds that there were not circumstances such as to constitute a "misfortune" within the meaning of the regulations, appellant will be required to relinquish land from his entry to make the final proof satisfactory or suffer rejection of the proof and cancellation of the entry. In this connection, it is suggested that Bureau personnel cooperate with appellant in helping to define the area that could be relinquished in order to preserve the required shape of the homestead entry. In the alternative, as pointed out by the Bureau, the appellant could apply for five acres covered by his improvements as a homestead.

So that appellant may be afforded the opportunity to make a further showing to justify a reduction in the cultivation requirement or relinquish a portion of his entry, action on his final proof will be suspended until the Bureau's Alaska office considers whether the reduction in the cultivation requirement is warranted.

Accordingly, pursuant to the authority delegated to the Office of Hearings and Appeals, Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 33 F. R. 12071), the decision appealed from is set aside and the case remanded for further action consistent with this decision.

Francis E. Mayhue, Member

I concur:

I concur:

Martin Ritvo, Member

Anne P. Lewis, Member

