

**Editor's note: 78 LD. 218**

C. ARDEN GINGERY

MICHIKO SHIOTA (GINGERY)

IBLA 70-6

Decided June 23, 1971

Act of August 11, 1916 – Desert Land Entry: Generally – Reclamation Lands: Acquisition and Disposal

Where an irrigation district acting pursuant to the Smith Act of August 11, 1916, has enforced its lien against public land in an unpatented desert land entry and has sold the land at a tax sale, the rights of the entryman and his successors are terminated and the rights of the purchaser are determined by the Smith Act.

Desert Land Entry: Generally – Reclamation Lands: Inclusion and Exclusion of within Irrigation District – Withdrawals and Reservations: Reclamation Withdrawals

Land within a desert land entry included in an irrigation district does not become subject to a later reclamation withdrawal so long as the entry subsists.

2 IBLA 351

Act of August 11, 1916: Smith Act – Desert Land Entry: Generally – Reclamation Lands: Generally – Words and Phrases:

"Irrigation works" – Words and Phrases: "Water of the district available for such land"

For the purpose of determining whether entered but unpatented land can be disposed of pursuant to section 6 of the Smith Act of August 11, 1916, the "irrigation works" referred to in that section are not those necessary on an individual entry to carry out irrigation but refer to facilities that serve the irrigation district in general, and "water of the district available for such land" means only that the entryman has a legally enforceable claim to available water even though access to it is barred by a Departmental regulation.

Desert Land Entry: Relief Acts

One who has acquired his interest in a desert land entry by purchase in 1949 cannot purchase the entry under the provisions of the act of March 4, 1929, which authorizes purchases only by an assignee under an assignment made prior to March 4, 1929.

Desert Land Entry: Suspensions

Since the suspension of desert land entries under the policy announced in Maggie L. Havens, A-5580 (October 11, 1923), was subject to termination whenever the Secretary found good reason to do so, the Secretary is authorized, when he determines that there is no public purpose to be served by continuing the suspension of entries suspended for almost 50 years, to terminate the suspension without notice or hearing and to restore the entries to the condition they were in on the date of the suspension.

Act of October 17, 1940: Soldiers' and Sailors' Civil Relief Act

One who acquires an interest in a desert land entry by purchase long after he entered military service cannot derive benefits from the Soldiers' and Sailors' Civil Relief Act of 1940 which are restricted to those who acquire their interest before entering military service and who file a notice of such entrance with the land office within six months of such entrance.

Desert Land Entry: Suspensions

Where part of a desert land entry suspended under the policy announced in Maggie L. Havens, A-5580 (October 11, 1923), has been held by the United States under lease for use by the Department of the Navy for purposes which make it impossible for the entryman to reclaim the entry, the termination of the Havens suspension while the land remains under lease should not work to the detriment of the entryman and the entry is to remain suspended until it is determined that the United States' occupation has ceased or is no longer an obstacle to reclamation.

IBLA 70-6	:	LA 038253
C. ARDEN GINGERY	:	Desert land entry
MICHIKO SHIOTA (GINGERY)	:	cancelled in part;
	:	applications to purchase
	:	rejected
	:	
	:	Affirmed in part; reversed
	:	In part and remanded

DECISION

C. Arden Gingery has appealed to the Secretary of the Interior from a decision dated February 27, 1968, Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision of the Riverside district and land office rejecting his application for an extension of time in which to submit final proof on desert land entry LA 038253; for relief under the provisions of section 504 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. § 564 (1964); or for purchase of the land in the entry in its entirety under the act of March 4, 1929, as amended, 43 U.S.C. § 339 (1964), or in part under the act of June 23, 1910, 43 U.S.C. § 441 (1964), or section 6 of the Smith Act of August 11, 1916, 43 U.S.C. § 628 (1964).

Michiko Shiota Gingery <sup>1/</sup> has appealed from the decision to the extent it affirmed the rejection by the land office of her application to purchase part of the entry under section 6 of the Smith Act of August 11, 1916.

The record shows that the desert land entry was allowed to Christopher C. Gingery, the father of appellant Gingery, on June 10, 1907. The entry, as adjusted, covers the S 1/2 SW 1/4 sec. 17, SE 1/4 SE 1/4 sec. 18, E 1/2 NE 1/4 and NE 1/4 SE 1/4 sec. 19, and lots 3 and 4 sec. 20, T. 15 S., R. 12 E., S.B.M., California. By dint of several extensions and suspensions the entry remained viable for over 16 years and then on October 11, 1923, it was suspended under the departmental decision in Maggie L. Havens, A-5580 (October 11, 1923). The Havens case suspended the Havens entry and all others similarly situated until water for the irrigation of the lands covered by an entry became available or until it should be found advisable to revoke the suspension for any good reason arising in the future. See Hazel, Assignee of Patterson, 53 I.D. 644 (1932).

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<sup>1/</sup> The land office concluded that this appellant was married to a man named Gingery and addressed its decision to her to "Michiko Shiota Gingery." Although the mail receipt for the decision is signed "Michiko S. Gingery," the appeals to the Director and to the Secretary are in the guise "Michiko Shiota (Gingery)." The Director described this appellant as the wife of C. Arden Gingery. The appellants neither admitted nor denied the assertion in their appeals to the Secretary.

The record also indicates that on October 19, 1920, the lands in the entry, along with others, were included in a first form reclamation withdrawal pursuant to section 3 of the act of July 17, 1902, 43 U.S.C. § 416 (1964). On February 16, 1921, the Secretary of the Interior approved an application filed on May 6, 1920, by the Imperial Irrigation District to place the lands under the Smith Act of August 11, 1916, supra. This Act permits an irrigation district organized and operated under State law to impose a lien on unentered and entered but unpatented public land within the district boundaries for a proportionate share of charges payable for construction, maintenance, and operation of irrigation works, and authorizes the enforcement of the lien against unpatented entries by sale of the land in the same manner as assessments are enforced against privately-owned lands.

By letter dated April 16, 1964, the irrigation district informed the land office that part of the lands in the entry, the SE 1/4 SE 1/4 sec. 18 and a portion of the S 1/2 SW 1/4 sec. 17, is within the West Mesa unit, that the remainder of the entry is in the Imperial unit, and that water is available from the district to the portion of the entry in the Imperial unit.

A certificate, dated February 16, 1966, by the proper official of the irrigation district states in effect that all of

the entry lying within the Imperial unit was sold to the district in 1936 for failure to pay assessments; that in 1939, the period for redemption having expired, collector's deeds were issued to it in exchange for the certificates of sale; and that on April 2, 1952, the district deeded all its right, title, and interest to C. Arden Gingery.

Gingery has also submitted a copy of a deed from his mother, who acquired the entire interest in the entry on the death of her husband in 1931. The deed, which conveys the entire entry to Gingery, is dated November 30, 1949. It was recorded on December 26, 1961. The appellant's mother died on March 11, 1950, leaving Gingery and two other children as heirs. Gingery has also filed a duplicate original of a document dated February 7, 1966, quitclaiming to him the interest of his brother and sister in the entry and the land it covers.

It also appears that the land in the entry has been used by the Department of the Navy as a target range since 1944. In 1952 Gingery signed a lease with the Navy under which the Navy paid him for past use and agreed to pay him an annual rental of \$72.50, renewable annually through June 30, 1958. Thereafter Gingery granted new

leases to the Navy which continued the Navy's usage through June 30, 1967, at rentals increasing from \$261 per year to \$1,914 per year. 2/

Mrs. Gingery filed an application on February 20, 1966, for the purchase of 99.40 acres described as SE 1/4 SW 1/4, SW 1/4 SW 1/4 sec. 17, lots 3 and 4 sec. 20, T. 15 S., R. 12 E., S.B.M., as the subrogee of Gingery under the tax sale. She alleged that Gingery had failed to pay the proper manager's fees, commissions, and purchase price as required by 43 U.S.C. § 628. 3/

On November 13, 1964, the land office informed Gingery by mail that, by letter dated April 16, 1964, the irrigation district had informed it that water was available and that, as a result, the land office was considering lifting the Havens suspension.

A little over a year later, the Secretary, on December 2, 1965, issued a notice to all entrymen whose entries were suspended

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2/ The record does not show whether the premises were leased after June 30, 1967.

3/ Mrs. S. Gingery's application actually describes 130.15 acres. Apparently she intended to describe only that part of the S 1/2 SW 1/4 sec. 17 which is within the Imperial Irrigation District. This portion covers 40 acres, which with 19.40 acres in lot 3 and 30.75 in lot 4, sec. 20, totals 90.15 acres. Gingery's acknowledgment of payment to him of the price for which the lands were sold at the sale compounds the error by referring to the SE 1/4 SW 1/4 and the SW 1/4 SW 1/4 sec. 20.

under the Havens case stating that the blanket suspension was revoked. It then said that water had been available for entries within the service area of the Imperial Irrigation District or the Coachella Valley County Water District since March 4, 1952, at the latest, when the All American Canal was officially declared completed, and that the life of these entries had begun to run as of that date. The entrymen were allowed 90 days to submit final proof that reclamation had been accomplished within that period. If, however, an entryman could show that he had actually reclaimed the land, he would receive a patent. If he were in the process of actually and diligently reclaiming the entry, he would be allowed 90 days or the life of his entry as of March 4, 1952, whichever was greater, to file final proof. The entrymen were required to give notice within 90 days if they elected to take the greater period. Other entries would have what life was left to them as of the date of the Havens suspension.

The notice also announced that the Department's regulation governing grants of rights-of-way across public lands was amended by adding to it a provision prohibiting the allowance of a right-of-way within Imperial and Riverside counties for the construction of canals and ditches to effect the agricultural reclamation of desert lands unless the appellant could show that the water to be carried would be from some source other than the Colorado River.

On February 14, 1966, Gingery filed a notice electing to take advantage of the longer period for filing final proof.

He then filed the several applications which were disposed of in the earlier decisions.

As we have seen, Gingery offers several sources for his interest in the entry. It may be well to examine this point at the outset in the hope that the elimination of some of his alternate claims may simplify the issues he raises. One of Gingery's sources of title is a quitclaim deed from the Imperial Irrigation District for 210.15 acres, i.e., a part of the S 1/2 SW 1/4 sec. 17, E 1/2 NE 1/4, NE 1/4 SE 1/4 sec. 19, and lots 3 and 4 sec. 20. The lien enforcement proceedings carried out by the irrigation district in accordance with the applicable State law and the Smith Act effectively transferred the rights of the original entryman and his wife or his heirs to the irrigation district and terminated their rights to the portion of the entry within the district. Clytie McPherson et al., A-26440 (October 25, 1954).

Gingery's rights, then, to this portion are only those of a purchaser by a tax deed from the irrigation district. These rights, in turn, depend upon whether the land is or is not subject to the provisions of the Reclamation Act of June 17, 1902, as amended.

43 U.S.C. § 371 et seq. (1964). If it is, as section 2 of the Smith Act, 43 U.S.C. § 626 (1964) provides, his rights are those of an assignee of a homestead entryman (43 U.S.C. § 441 (1964)), and he may receive a patent upon submitting satisfactory proof of the reclamation, the irrigation, and the making of the payments required by the Reclamation Act. If it is not, his rights are controlled by section 6 of the Smith Act, supra, which authorizes the patenting of lands sold by the irrigation district upon payment of \$1.25 per acre, or such other price as may be fixed by law, and other fees and a "satisfactory showing that the irrigation works have been constructed and that water of the district is available for such land."

As the land office pointed out, the entry, having been allowed prior to the reclamation withdrawal, did not then and does not become subject to the reclamation withdrawal so long as the entry subsists. George B. Willoughby, 60 I.D. 363 (1949); Clytie McPherson et al., supra. Consequently, section 6 of the Smith Act governs Gingery's rights.

The land office then held that the applications for purchase under section 6 of the Smith Act could not be allowed because no "irrigation works" had been constructed on the land in the entry. It found that "irrigation works" in the statute refers to works to be constructed on the entry as well as those to be constructed by the irrigation district to serve all the lands

in the district. It also concluded that water was not available to the land because water can be conducted to the entry only over public lands which lie between the facilities of the irrigation district and the entry, and Department regulations preclude the approval of a right-of-way for the irrigation of the entry.

The appellants point out that the effect of the land office decision would be to limit severely the ability of the irrigation district to dispose of public land which it has acquired for nonpayment of water assessments and, consequently, its ability to realize income from its assessments.

There are two aspects to this issue: one, whether the land is eligible for sale; and, two, what its status is if it is not.

Turning first to the question of what "irrigation works" are, we find little help in either the statute or regulations. The term is used three times without definition in section 3 of the Smith Act, 43 U.S.C. §§ 623, 625 (1964), as well as in section 6, 43 U.S.C. § 628 (1964). In section 2, 43 U.S.C. § 622 (1964), however, there are listed all the components of an irrigation project whose cost is to be apportioned among the lands in the district. These, we note, are "[t]he cost of acquiring, purchasing, or maintaining canals, ditches, reservoirs, reservoir sites, water, water right, rights-of-way, or other property incurred in connection with

any irrigation project". While there is no connection made between these items and the term "irrigation works," they do constitute a rather complete category of what would be "irrigation works."

Similarly, the regulation expanding on the statutory requirement that an irrigation district submit a map explaining the plan of irrigation in a district where the irrigation works have not been constructed requires that the map show "reservoirs, canals, ditches, power plants, transmission lines, or other aids to reclamation which are included in the system." 43 CFR 2783.1-4(d), formerly 43 CFR 2253.1-4(d). Here again the reference is to facilities that serve the irrigation district in general and not to structures on an individual entry.

Finally, we observe that section 3 of the Smith Act, 43 U.S.C. § 625 (1964), authorizes the Secretary after a certain period has elapsed to release from the lien authorized by the statute "any unentered land or lands upon which final certificate has not issued, for which irrigation works have not been constructed and water of such district made available for the land." Since it is highly unlikely that any "irrigation works" would be placed on unentered land, the section would offer no protection to an irrigation district if the lien could be released so long as there were no irrigation works on the land itself. Thus the "irrigation

works" must be those, as section 3 says, constructed for unentered land or lands upon which final certificate has not issued, not those on the land itself.

We conclude, then, that the "irrigation works" referred to in section 6 are not those necessary on an individual entry to carry out irrigation, and the absence of water distributing facilities on an entry is not a reason to deny an applicant the opportunity to purchase an entry under section 6.

The land office also held that Gingery had failed to meet the other requirement that section 6 imposes upon an applicant for purchase, that is, that he demonstrate the availability of water. Although it was admitted that water was available for the land from the irrigation district, the land office noted that water could not be conducted to the entry because the Department had issued a regulation precluding the approval of a right-of-way over intervening public lands. 43 CFR 2871.08, formerly 43 CFR 2234.3-1(d)(1).

As we have noted, the Department has held that water was available to entries such as the appellants' no later than March 4, 1952. In fact, it was on the basis of the availability of water within the service area boundaries that the Department found that

the Havens suspension had expired and that the statutory term of the entries had again begun to run. The only change that has occurred since then is that the Department has decided that it will not grant a right-of-way across publicly owned lands if the right-of-way is to be used to transport water originating in the Colorado River for use in irrigation. Does the policy of denying an entryman access to water justify a determination that water is not available to the entry? The policy was adopted to prevent or make more difficult the use of Colorado River water for irrigation. That policy will be as easily enforced by the Department's own action denying a right-of-way whether title to the land in the entry is in the Gingerys or the United States.

The question, then, is whether within the meaning of the Smith Act the water becomes not "available" when the United States decides that it will cut off access from the land to the water or whether an applicant must demonstrate only that he has an enforceable claim to water even though access to it is barred.

All the statute requires is that the "water of the district be available for such land." There is no dispute that he has a right to water. It is our conclusion that the water remains "available" despite the difficulty that the applicant may encounter in utilizing it.

Accordingly, Gingery has met the above statutory requirements and is to be permitted to purchase under section 6 of the Smith Act the land to which he still retains his right, assuming he meets the other qualifications of the act. Similarly, Mrs. Gingery, whether she is an assignee or subrogee, has established her right to purchase the acreage, which she claims in lieu of Gingery, in the entry that is within the same area of the Imperial Irrigation District. <sup>4/</sup>

There remains for disposition the approximately 80 acres in sections 17 and 18 situated outside the service area. Once again we note that the appellant submitted a deed dated November 30, 1949, signed by his mother conveying the entire entry to him. While the deed was ineffective as to the portion of the entry which had passed to the irrigation district by tax sale, it did transfer to Gingery his mother's interest in the other 80 acres. Since it precedes any interest he would have gained through inheritance upon his mother's death, it must be considered as the source of his interest in the entry. Treating the sale as an assignment, as the regulation provides, 43 CFR 2521.3(c)(2),

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<sup>4/</sup> Gingery's application to purchase part of the entry under section 6 of the Smith Act describes lands totalling 160 acres including Lot 4 sec. 20 and that part of the SW 1/4 SW 1/4 sec. 17 lying within the Imperial Unit. Mrs. Gingery's application also lists Lot 4 sec. 20 and the SW 1/4 SW 1/4 sec. 17. To the extent the applications are in conflict, Mrs. Gingery, as the subrogee of Gingery, will prevail.

formerly 43 CFR 2226.1-2(c)(2), and assuming that Gingery is qualified to be an assignee, 43 CFR 2521.3(b), formerly 43 CFR 2226.1-2(b)(c), we may now consider his claim to this land.

First, Gingery's assertion that he may derive benefits from the Soldiers' and Sailors' Civil Relief Act is unfounded. The provisions pertaining particularly to desert land entries, found in section 504, 50 U.S.C. App. § 564 (1964), offer relief only to an entryman who acquired his interest before he entered military service and who filed notice of his entrance into military service with the land office within six months after his entrance. Gingery acquired the interest in the entry by purchase from his mother long after he entered the military service and he never filed the requisite notice. Thus he is not one whom the act benefits.

Furthermore, the obligation to reclaim the portion of the entry outside the Imperial Irrigation District did not begin to run again until the Havens suspension was terminated by the notice of December 2, 1965. On that date the appellant had been separated from the service for over 3 years. His military service, then, did not interfere with his opportunity to reclaim the entry.

Next he asks that he be permitted to purchase this portion of the entry pursuant to the act of March 4, 1929, as amended, 43 U.S.C. § 339 (1964). That act, however, permits an assignee to purchase only if he is a "duly qualified assignee under an assignment made prior to March 4, 1929." Since Gingery purchased the entry from his mother in 1949, he is not an assignee who may take advantage of the act.

What then is the status of this portion of the entry? Under the notice of December 2, 1965, the suspension under which it had lain for over 40 years was lifted and, in the absence of any reason to the contrary, the life of the entry began to run. The term of the entry would then have expired on April 6, 1968.

Gingery raises many objections to the manner in which the suspension was terminated. Without discussing them in detail, it is enough to point out that the entrymen had no right to the original suspension, that it was an act of Secretarial discretion, and that the notice announcing it said that the suspension would be ended anytime for good reason. The Secretary has determined that no useful purpose is to be served by continuing into the indefinite future entries now some 50 years or more old. There is no requirement for the Secretary to hold a hearing and to take other formal procedures before acting. Upon the termination of the suspension, the entry reverted to its status as of the day of the suspension.

The only unusual aspect of the entry is that it has been under lease by the Department of the Navy for use in connection with several naval programs. While the appellant has received substantial compensation for the naval occupation of the entry, it is also true that the Navy's use was exclusive and that Gingery could not have reclaimed his entry while the Navy was in possession. The land office held that Gingery had disabled himself from reclaiming his entry by leasing the entry. The Office of Appeals and Hearings, on appeal, concluded that the lease was a prohibited assignment. In our view neither of these conclusions is correct. The strictures against the assignment of an entry discussed in Idaho Desert Land Entries - Indian Hill Group, 72 I.D. 156 (1965), and United States v. Ollie Mae Shearman et al., 73 I.D. 386 (1966), <sup>5/</sup> cited in the decision appealed from, were designed to prevent unqualified persons from gaining effective control of an entry or to make it illegal for any person to hold more than one entry. They have no pertinency to use of an entry by the United States for purposes of national defense.

The land office view, in turn, ignores the fact that the United States could have taken its leasehold by eminent domain, if

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<sup>5/</sup> Rev'd sub nom. Reed v. Department of the Interior, Civ. No. 1-67-97 (D. Idaho, July 10, 1970), appeal docketed, No. 71-1187, 9th Cir., February 9, 1971.

it had so desired. That the appellant cooperated with the Government by making legal proceedings unnecessary is not to work to his detriment and he is not to be deemed to have incapacitated himself by assenting when resisting would have been meaningless.

While the United States occupies the entry, it is impossible to determine with certainty whether the entryman would be able to reclaim this portion of it by developing his own sources of water. The final disposition of this land can best be made either when the United States has ceased to use it or when its use is no obstacle to Gingery's development of it. Until such time, the only way to avoid the Government's use from being detrimental to the entryman is to place this part of the entry in suspension. Accordingly, that portion of the entry that was not conveyed to Gingery by the irrigation district is suspended as of December 2, 1965, and is to remain suspended until December 31, 1971. At that time, the land office will examine the status of the tract. If the conditions which we have stated as justifying a suspension are unchanged, then the land office will continue the suspension for a year. If, in the land office's opinion, the suspension is no longer justified, it will notify the entryman that the suspension has been terminated and that the life of the entry has again begun to run.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision of the Bureau of Land Management is affirmed insofar as it denied (1) Gingery's application for relief under section 504 of the Soldiers' and Sailors' Civil Relief Act, (2) his application to purchase part of the entry pursuant to the act of March 4, 1929, and (3) his request for equitable adjudication; it is reversed insofar as (1) it denied the appellants' separate applications to purchase part of the entry under section 6 of the Smith Act, and (2) it held that the life of that part of the entry now within the Imperial Unit was to expire on April 6, 1958; and the case is remanded for further proceedings consistent herewith.

Martin Ritvo, Member

We concur.

Joan B. Thompson, Member

Francis E. Mayhue, Member.

