

THOMAS D. NIGHSWONGER

IBLA 71-52

Decided July 13, 1972

Appeal from decision (W 24199) of Cheyenne land office, granting priority to an earlier filed completed desert land application.

Affirmed.

Desert Land Entry: Generally -- Desert Land Entry: Applications

An application for desert land entry which does not conform to mandatory regulatory requirements earns no priority as against a subsequent application, which subsequent application is perfected before the earlier application is remedied.

A desert land application for land unclassified therefor, which application is not accompanied by a petition for classification, gains no priority until that deficiency is cured.

APPEARANCES: Thomas D. Nighswonger, pro se.

OPINION BY MR. FISHMAN

Thomas D. Nighswonger has appealed from a decision of the Cheyenne land office, dated August 31, 1970, holding that his desert land application (W 24199) was deficient in meeting regulatory requirements and that desert land application (W 24198) of Leroy E. Grapes was entitled to priority.

The appellant's original application was filed on May 8, 1970. On June 19, 1970, 1/ the land office informed the appellant that his application contained several deficiencies, particularly the absence of petition for classification. The letter from the land office noted "your application cannot be considered as officially filed until it is accompanied by a petition for classification."

This land office letter was supplemented on August 31, 1970, by the decision appealed from, notifying the appellant that he had not filed his petition for classification and that his application would

1/ On the same date Grapes was informed of the deficiencies in his application.

be rejected automatically if not corrected within 60 days. The decision also informed him of the desert land application filed by Leroy Grapes, perfected on June 24, 1970. The decision ^{2/} informed the appellant that the Grapes' application was entitled to priority of consideration. The appellant's petition for classification was received by the land office on September 17, 1970.

The appellant asserts that his deficient application was filed earlier than the deficient application of Grapes and that the appellant's incomplete application should have been returned to him earlier than the Grapes application was returned to Grapes, in lieu of the virtually simultaneous return of the applications which, in the appellant's mind, afforded Grapes an opportunity to gain priority. This argument suggests that an applicant is entitled to priority of consideration by virtue of having filed an unacceptable application. There is no warrant for this argument. A deficient application gains no priority until such time as the deficiencies have been cured. Cf. William B. Collins, 4 IBLA 8 (October 26, 1971).

It is clear that at the time the appellant filed his original application May 8, 1970, the applicable regulation 43 CFR 2226.1-1(a) (1970), now 43 CFR 2521.2(a)(1) (1972) recited in part as follows:

A person who desires to enter public lands under the desert land laws must file an application together with a petition [for classification] on forms approved by the Director, properly executed. However, if the lands described in the application have already been classified and opened for disposition under the desert land laws, no petition [for classification] is required.

The land in issue had not been so classified when the deficient and completed applications were filed.

^{2/} It might appear, at first blush, that the decision inviting appellant to complete his application in essence suggested that the appellant engage in a vain effort, in the light of Grapes' established priority. However, if Grapes, for whatever reason, withdrew his application, and the appellant perfected his application prior to the filing of any subsequent proper application, the appellant would enjoy priority of consideration.

We find no basis to disturb the decision appealed from and 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), that decision is affirmed.

Frederick Fishman, Member

We concur:

Edward W. Stuebing, Member

Anne Poindexter Lewis, Member

