

BOBBY L. COX

IBLA 71-121

Decided September 20, 1972

Appeal from decision of the Alaska state office, Bureau of Land Management, canceling homestead entry, rejecting final proof and denying an extension of time.

Set aside and remanded.

Alaska: Homesteads -- Homesteads (Ordinary): Cultivation --
Homesteads (Ordinary): Military Service

When final proof shows that an entryman met the cultivation requirement for the fifth entry year and that such entryman is entitled to two years' credit for military service which he may allocate to the partial satisfaction of his residence and cultivation requirements, leaving a one-year deficiency in cultivation, and where facts are alleged which, if proven, might excuse the entryman's failure to cultivate during that year, the case will be remanded to the land office for a determination of whether the entryman's misfortunes were the cause of his failure to meet the balance of the cultivation requirement.

APPEARANCES: Michael M. Holmes, Esq., for appellant.

OPINION BY MR. STUEBING

Bobby L. Cox has appealed from a decision of the Alaska state office canceling his homestead entry filed pursuant to the Homestead Act, 43 U.S.C. §§ 270, 161 *et seq.* (1970). The state office canceled the entry because the final proof submitted by appellant failed to show that the required cultivation had been performed on the entry within the five-year statutory period and for the further reason that compliance with the residence requirement was deficient. This decision also rejected Cox's final proof 1/ and denied him an extension of time to meet the requirements of the law.

1/ 43 CFR 2511.3-4(a) (1972) requires that the entryman submit final proof within five years showing that there is a habitable house on the entry and that the required residence and cultivation requirements have been met.

The entry, consisting of approximately 160 acres, is unsurveyed and is situated on the east bank of the Chilkoot River. Appellant made settlement on the entry on August 5, 1965, and filed his notice of location the same day. The Bureau of Land Management acknowledged the claim on December 8, 1965.

Cox and his family allegedly resided on the homestead from August 1965 to August 1967, when he left due to his wife's pregnancy, threats of violence, and denial of access. He returned to the homestead on May 23, 1968, and remained until September 30, 1968. Cox departed the entry on September 30, 1968, and had not returned by the time final proof was filed (August 7, 1970) except for weekends and spare time.

On final proof, Cox estimated the value of his improvements, which included a cabin, at \$42,000. In his appeal he stated that he has expended approximately \$4,000 more. Cox states that he cultivated 21 acres of oats in 1970.

On August 7, 1970, Cox filed his final proof which the land office rejected by its decision of November 12, 1970. He filed a timely appeal on December 14, 1970. On appeal, Cox offered the following facts to explain why his cultivation was not completed until 1970.

In 1967, a dispute arose between Cox and some loggers working on another homestead, when Cox refused to allow them to do some logging on his (Cox's) homestead. As a result, the loggers threatened his family and denied them the use of the only practical access road to the valley. A state trooper advised Cox to take his family off the homestead to avoid trouble and, because of his wife's pregnancy, Cox agreed. Before this departure the loggers destroyed a bridge, making the Coxes' exit a dangerous endeavor. Subsequent to these events, flash floods destroyed two more bridges. The following spring, upon returning to the homestead, Cox contracted with one Rosser to clear the site. Pursuant to the contract, Rosser began to clear the land, but progress was interrupted when Rosser was in an accident and was hospitalized for several months. Due to the loss of Rosser's assistance, Cox was unable to proceed with the clearing and complete the cultivation until 1970.

The sole issue for determination by this Board is whether appellant has complied with the residence and cultivation requirements of the homestead laws and the regulations issued pursuant to those laws.

Although the state office's decision rejecting Cox's final proof stated that there were deficiencies in both the residence and cultivation requirements, the rationale of the decision dealt exclusively

with the issue of cultivation and made no further reference to the residence requirement. From the facts submitted by Cox on final proof, it is uncertain whether or not he complied with the residence requirement, particularly in light of his military credit. Further information is necessary before a decision can be rendered on this issue. A homestead entryman must show residence upon his claim for at least three years. 43 CFR 2567.5(a)(2) (1972).

Appellant satisfied the fifth entry year cultivation requirement by cultivating twenty-one acres of oats in 1970; however, his final proof is deficient in that it shows no cultivation in the second, third, and fourth entry years as prescribed by statute.

The law provides appellant with two mutually exclusive possibilities of curing his cultivation deficiency, filing of commutation proof, and credit for military service. 2/ Appellant has attempted to invoke the rules relating to commutation proof.

Filing a commutation proof can be of no assistance to appellant in this case. Since he delayed submitting final proof until the fifth entry year, he comes within the ambit of 43 CFR 2511.1-2(b)(2) (1972), which provides that the entryman cultivate the same acreage required under ordinary homestead law; therefore, his proof is deficient whether it be filed as regular final proof or commutation proof. Pekka Merikallio, A-30892 (March 5, 1968), and cases cited therein.

43 CFR 2096.1-3 (1972) permits the entryman two years' credit for military service toward satisfying his residence and cultivation requirements. 3/ Because of appellant's failure to cultivate in all but the fifth entry year, it is impossible to meet the cultivation requirement solely by the addition of the two years' credit for military service to the actual cultivation performed during the fifth entry year. Regardless of how this two years' credit is allocated, a deficiency for one entry year will exist in satisfying the cultivation requirement.

43 CFR 2511.4-3(b)(2) (1972) provides:

A reduction may be allowed also if the entryman, after making entry and establishing residence, has met with misfortune which renders him reasonably unable to cultivate the prescribed area. In

2/ 43 CFR 2096.1-2(c) (1972) provides that military credit cannot be used in the case of commutation proof.

3/ The file in this case verifies that appellant served in the Army for approximately four years and is therefore entitled to two years' credit.

this class of cases an application for reduction is not to 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; upon satisfactory proof regarding the misfortune at the time of submitting final proof a reduction in area of cultivation during the period of disability following the misfortune may be permitted. (Emphasis added.)

Apparently appellant did not provide the manager with notice within 60 days of the occurrence of the events. However, the underscored portion of the regulation, supra, seems to indicate that this is not necessarily fatal to his prospects for relief if at the time of submitting final proof he makes an appropriate showing of misfortune.

Appellant cites Walter H. Bullwinkle, Joseph E. Vogler, 63 I.D. 172 (1956), in support of the proposition that the Secretary may relieve an entryman of the consequences of his failure to meet the cultivation requirement during one entry year when misfortune prevents his compliance. Appellant argues that, like himself, Bullwinkle had met all requirements except for one year's cultivation by utilizing his credit for military service. The one-year deficiency in cultivation in the Bullwinkle case was attributed to the burning of the entryman's house by vandals, which made it necessary for him to devote his time to rebuilding rather than cultivation during that year. The Deputy Solicitor remanded that case for a determination as to whether Bullwinkle was entitled to a reduction of the cultivation requirement on the basis of the alleged misfortune.

Because of the possible claim to equitable consideration raised by the pleadings in this case and in light of its similarity to Bullwinkle, we remand the case to the state office for resolution of the factual issue of whether Cox's misfortunes are grounds for a reduction of his cultivation requirement. We also direct the land office to determine whether or not Cox has met the residence requirement. Cox will be afforded ample time to submit an amended proof showing as accurately as possible all periods of actual residence and the allocation of his military credit to periods of nonresidence. Prior to filing the amended proof he should consult with officials of the Alaska state office, BLM, to ascertain precisely why they consider his residence inadequate.

In the event Cox's final proof is found to be deficient by the state office, we note that appellant may be eligible to apply for a second entry pursuant to the Act of September 5, 1914, 43 U.S.C. § 182 (1970). Under this Act, the appellant is permitted to file a second entry if he has lost, forfeited, or abandoned his prior entry

through no fault of his own provided he shows to the satisfaction of the Secretary of the Interior that his prior entry was made in good faith, and was lost, forfeited or abandoned because of matters beyond his control. William B. Larkin, Sr., A-30422 (October 26, 1965); see also Jan W. Wawrytko, 2 IBLA 78 (1971); Robert L. Douglass, A-30582 (September 16, 1966). The recitation of facts in appellant's case bears a marked resemblance to those which obtained in Larkin. In the Larkin case the Assistant Solicitor held that Larkin was entitled to make a second entry because he relinquished his original entry due to his inability to gain access to the homestead and this was a matter beyond his control.

Also, we note that there is a homesite application in the file on which no action has been taken. Presumably action on this application has been deferred pending final action on the homestead question.

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 is set aside and the case is remanded for further action consistent herewith.

Edward W. Stuebing
Member

We concur:

Frederick Fishman
Member

Joan B. Thompson
Member

