

Editor's note: Appealed -- aff'd, Civ.No. A 3-73 (D.Alaska Dec. 21, 1973), 363 F.Supp. 692, reversed and remanded, No. 74-1842 (9th Cir. Jan. 14, 1976), 529 F.2d 164; Vacated on remand -- See U.S. v. Nelson, 28 IBLA 314 (Jan. 14, 1977).

UNITED STATES
v.
LEONARD F. NELSON

IBLA 71-57

Decided December 6, 1972

Appeal from decision of Assistant Chief Hearing Examiner Dent W. Dalby, holding that patent is to issue.

Reversed; entry canceled.

Contests and Protests: Generally -- Homesteads (Ordinary): Generally --

Homesteads
(Ordinary):
Cancellation of
Entry --
Homesteads
(Ordinary):
Final Proof --
Homesteads
(Ordinary):
Habitable
House

Where a contest record clearly establishes that the house on a homestead entry is not habitable at the time of final proof, the entry must be canceled.

Administrative Procedure: Adjudication -- Rules of Practice: Evidence --

Secretary of the
Interior

The Board, as the delegate of the Secretary of the Interior, is obliged to consider everything contained in the record in determining all matters relevant to the issues in the matter.

Words and Phrases

"Habitable house." The term "habitable house", as used in 43 U.S.C. § 164 (1970), does not include a structure in Alaska with a leaky roof, torn insulation, and devoid of electric power and heating facilities.

APPEARANCES: James R. Mothershead, Esq., Assistant Regional Solicitor, Department of the Interior, Anchorage, Alaska, for appellant; Eugene F. Wiles, Esq., of Delaney, Wiles, Moore, Hayes and Reitman, Inc., Anchorage, Alaska, for appellee.

OPINION BY MR. FISHMAN

The Regional Solicitor of the Department of the Interior, on behalf of contestant, has appealed from the September 30, 1970,

decision of the Assistant Chief Hearing Examiner 1/ of Salt Lake City, Utah. The Judge held that contestee, Leonard F. Nelson, had satisfied the requirements of the homestead law and that patent is to issue to Nelson for his homestead, located in the Chugach Mountains east of Anchorage, Alaska.

On January 3, 1968, the United States filed a complaint, asserting several grounds for the invalidation of the entry. Among the charges made (Sec. 5(e) of the complaint) was:

e. The homestead laws and regulations issued thereunder, specifically 2211.2-1, 2211.9-1(f) and 2211.9-5(c), Title 43 Code of Federal Regulations, require the claimant to have a habitable house upon the lands entered under his homestead claim at the time of submitting final proof, and other improvements of such character and amount as are sufficient to show good faith. At the time of submitting his final proof on November 25, 1966, Contestee failed to have a habitable house upon his homestead claim, and other improvements thereon of such character and amount as to be sufficient to show the good faith required by section 2211.2-1, Title 43, Code of Federal Regulations.

The Judge's decision found that the contestee had met the residence and cultivation requirements of the homestead laws and had exercised good faith. The Judge made no specific finding that there was a habitable house on the entry at the time of final proof.

Assuming, without deciding, that the Judge's specific holdings are correct, the issue needs to be resolved whether there was a habitable house on the entry at the time of final proof. The entry must be canceled if compliance with requirement of habitability is not established. 43 U.S.C. § 164 (1970); 43 CFR 2511.4-1 (1972). See United States v. Russell G. Wells, 2 IBLA 247 78 I.D. 163 (1971); Mrs. Harril Berry, A-31108 (April 1, 1970).

The record establishes that at the time of final proof, November 25, 1966, the residence had deteriorated, with a leaky roof, torn insulation, no electric power, no heating units, and no electric meter and meter board. The appellant had given the heating and electric equipment to a friend around June 1965. (Tr. 601, 693).

In view of the obvious rigors of the winter climate in Alaska,

1/ The title "Hearing Examiner" was changed to "Administrative Law Judge" by order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972) Hereinafter the term "Judge" will be used.

the house on the entry cannot be considered to be a "habitable" house within the ambit of the law and regulations.

Appellee argues that appellant "has conceded that the allegations * * relating to a habitable house on the claim should be dismissed because the Government in its brief has not mentioned or argued this issue." We do not agree. In any event, this Board stated in United States v. William Leonard Grediagin, 7 IBLA 1, 4 (1972):

* * *

[T]his Board is free, and is obliged, to consider everything contained in the record in determining all matters relevant thereto within the jurisdiction of the Department. 5 U.S.C. § 557(b) (1970); Knight v. U.S. Land Association, 142 U.S. 161, 177-178 (1891); United States v. T. C. Middleswart et al., 67 I.D. 232, 235 (1960). Cf. United States v. Ideal Cement Co., Inc., 5 IBLA 235, 244, 245 (1972).

We find that the preponderance of the evidence clearly establishes that appellee did not have a habitable house on the entry at the time of final proof. Therefore, the entry must be canceled. The Alaska State Director of the Bureau of Land Management is requested to advise appellee of any laws as may be available to permit appellee to gain title to such portion of the entry as contains substantial and permanent improvements.

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 reversed and the entry is canceled.

Frederick Fishman, Member

We concur:

Martin Ritvo, Member

Douglas E. Henriques, Member.

