

DOCK W. JONES, JR.

IBLA 72-313

Decided April 26, 1973

Appeal from decision of the Alaska State Office, Bureau of Land Management, conditionally rejecting homestead final proof and canceling homestead entry A-062290.

Set aside and remanded.

Alaska: Homestead -- Homesteads (Ordinary): Cultivation -- Homestead (Ordinary): Final Proof

Where a homestead entry final proof on its face showed insufficient cultivated acreage in the fourth calendar year of the entry, and the entry is conditionally rejected for that reason by the Bureau of Land Management but facts are alleged on appeal that the requisite acreage was actually cultivated during the fourth entry year, rather than the fourth calendar year, the decision will be set aside and the case remanded to the Bureau to permit appellant's amendment to clarify the final proof.

APPEARANCES: Dock W. Jones, Jr., pro se.

OPINION BY MRS. THOMPSON

Dock W. Jones has appealed from a decision (A-062290) of the Alaska State Office, Bureau of Land Management, of February 4, 1972, finding his homestead entry final proof prima facie defective. It held the proof for rejection and the claim for cancellation, unless the entryman relinquished 80 acres, one-half of his 160-acre entry, so that the acreage under cultivation in his fourth entry year equaled one-eighth of the area claimed.

The only issue raised by this appeal concerns the entryman's compliance with the cultivation requirements of the Homestead Act. As pertinent here, the Homestead Act, 43 U.S.C. § 164 (1970), requires that:

* * * the entryman shall, in order to comply with the requirements of cultivation herein provided for, cultivate not less than one-sixteenth of the area of his entry, beginning with the second year of the entry, and not less than one-eighth, beginning with the third

year of the entry and until final proof * * *, but the Secretary of the Interior may upon a satisfactory showing under rules and regulations prescribed by him, reduce the required area of cultivation. * * *

The original entry of 160 acres was made March 26, 1965. The appellant's final proof of March 17, 1970, contains the following information regarding "Actual Agricultural Use of the Land":

Less Cultivated	Kind of Crop Harvested	Reason for Cultivation	No. of Acres Required By Law	of Crop	Acreage Than	Quantity Calendar Year	vating Planted
1966	None	None	---	Lack of funds	1967	None	2 Garden
Lack of funds	1968	None	10	Garden	Lack of funds	1969	Oats,
Brome, Timothy	30	Very poor					

The State Office, on April 14, 1970, issued a notice to appellant to show cause why his final proof should not be rejected and homestead entry canceled. In this "notice" it tabulated the required cultivation acreage and what it assumed to be the acreage shown by appellant's final proof:

Cultivation	Cultivation	Entry Year	Required	Shown
March 26, 1965 to March 25, 1966	None	None		
March 26, 1966 to March 25, 1967	10 acres	None		
March 26, 1967 to March 25, 1968	20 acres	2 acres		
March 26, 1968 to March 25, 1969	20 acres	10 acres		
March 26, 1969 to March 25, 1970	20 acres	30 acres		

It assumed that the four calendar years, 1966 through 1969, shown on appellant's final proof corresponded to his second through fifth entry years.

The assumption was reasonable because agricultural seasons in the years 1966 through 1969 corresponded with appellant's second through fifth "entry years." In addition, because any one "non-calendar" year may fall in major part within one of two calendar years, the calendar year into which the first eight months of an entry year fall may reasonably be assumed to correspond to that year.

In response to the notice to show cause, the appellant submitted a sworn affidavit. In it he stated that he had relied on a Bureau of Land Management employee's advice regarding the cultivation requirements, and that a family emergency during the summer of 1966 and resulting destitution prevented cultivation during 1966 and 1967.

The Bureau's State Office on May 7, 1970, informed him that mistaken information given by a land office employee cannot substitute for the homestead cultivation requirements, citing Gerald C. Chisum, A-28295 (June 7, 1960), but advised him that he might apply for a one-year leave of absence, August 1966 to August 1967, and for a reduction in cultivation from August 1967 to August 1968. It also informed the appellant that "your cultivation during the fourth entry year (10 acres) would entitle you to patent for only 80 acres of the 160-acre homestead." It concluded by requiring appellant to file an application to reduce or excuse the cultivation requirements and "a partial relinquishment of your claim (so that the ten acres cultivated during the fourth entry year will equal one-eighth of the area of the claim)." We may infer that it meant calendar year 1968, as shown on appellant's final proof, due to its assumption, in the decision of April 14, 1970, that the cultivation shown for calendar year 1968 referred to appellant's fourth entry year.

By letter of May 20, 1970, the appellant's attorney requested the State Office to consider the affidavit as the application, and went on to state that, "You may consider this letter as a conditional relinquishment of the East one-half of the entry of Mr. Jones, the conditions being the success of his application for the balance of his entry." He also requested equitable adjudication relief.

Upon consideration of appellant's application for leave of absence, reduction in cultivation, and his final proof and findings and recommendations in a report of a field examination of the entry by a Bureau Realty Specialist, the Bureau's Office made the decision appealed here. It granted a leave of absence for appellant's second entry year and a cultivation reduction for his third entry year. However, it found the appellant's final proof to be prima facie defective respecting his fourth entry year, as showing 10 acres cultivated -- one-sixteenth of the entry, rather than the one-eighth required. It further required the entryman, himself, to relinquish 80 of the 160 acres in his entry as a condition to receiving patent for the balance of the land included in the claim.

Relinquishment would be proportionate to the amount of land cultivated in the fourth entry year, and once made, would entitle appellant to receive patent to the remainder. Unless the entryman

also applied for a reduction of the cultivation requirement for the fourth entry year and showed reasons justifying such reduction for that year as well as the third entry year, relinquishment of a portion of the entry would be required for patent to issue if the required acreage cultivated is not shown.

By his appeal the entryman raises a question about the correlation by the State Office of his second through fifth entry years with the four calendar years he indicated on his final proof. He states his final proof meant as follows:

In 1966 (*i.e.*, March 26, 1965 to March 25, 1966) there were 0 acres cultivated. In 1967 (*i.e.*, from March 26, 1966 to March 25, 1967), it is stated that 2 acres of garden were cultivated. In 1968, (*i.e.*, from March 26, 1967 to March 25, 1968) there were 10 acres of garden cultivated. In 1969 (*i.e.*, from March 26, 1968 to March 25, 1969) which was the fourth Entry Year, it is stated that 30 (thirty) acres were cultivated and planted with oats, brome, and timothy.

To support these allegations, he has submitted several affidavits of contemporary residents, photographs taken in the fall and winter of 1968 and 1969, and an air photo of July 26, 1969. These purport to show that thirty acres were "under cultivation" by March 25, 1969.

Appellant thus is attempting to change the statements as to cultivation in the final proof from the calendar year therein shown to correspond with the entry years and by so doing shift the cultivation back one year from that which the final proof otherwise would be interpreted as showing. Although this change shows the requisite cultivation for the fourth entry year, it omits any showing of cultivation for the fifth entry year, *i.e.*, from March 26, 1969, until March of 1970 when his final proof was filed. The Homestead Act, as quoted, *supra*, requires cultivation of one-eighth of the entered acreage until final proof is filed, and, therefore, the showing as to the fifth entry year would be required.

There appears to be some confusion on the part of the appellant throughout this proceeding as to the cultivation requirements. If, in fact, as he now asserts, cultivation of one-eighth of the entire entry was made during the fourth entry year, and if he also cultivated that amount during the fifth entry year, he should be allowed an opportunity to amend his final proof to make these showings. It is appropriate to allow an entryman to clarify and amend

final proof where on appeal he asserts facts indicating that actual compliance may have been made. William F. Musgrove, A-30115 (November 23, 1964); George R. Murphy, A-30448 (July 22, 1966).

If an amended final proof prima facie shows compliance with the cultivation requirements, and on the basis of a field report by a Bureau investigator those facts are challenged, the appropriate procedure for the Bureau is to institute a contest. Cf. Don E. Jonz, 5 IBLA 204, 207 (1972); Calvin L. Howard, 6 IBLA 285 (1972); Claude E. Crumb, 62 I.D. 99, 100 (1955).

The Bureau, therefore, should allow appellant to file an amended final proof when this case is returned to the Alaska Office. There should also be clarification of the showing as to crop planted to support a showing of cultivation. Before final action is taken in this case, the Bureau should also consider a request made earlier by appellant for relief under the equitable adjudication authority (43 CFR 1871.1-1), and any other equitable relief that may be available, if full compliance with the law is not shown.

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 set aside and the case is remanded to the Bureau of Land Management for appropriate action in accordance with this decision.

Joan B. Thompson, Member

We concur:

Douglas E. Henriques, Member

Edward W. Steubing, Member.

