Editor's note: Reconsideration denied by order dated Sept. 24, 1973

H. L. BIGLER ET AL.

IBLA 72-426 Decided June 28, 1973

Appeal from a decision by the Chief, Branch of Land Operations, Bureau of Land Management, Denver, Colorado, rejecting appellants' application for amendment of a patent issued for homestead entry (Durango 08505).

Affirmed.

Patents of Public Lands: Amendments

An application for amendment of a homestead patent filed pursuant to Rev. Stat. § 2372, as amended, 43 U.S.C. § 697 (1970), which seeks to substitute national forest land for land covered by the patent is properly rejected where the forest land has been reserved from entry.

Patents of Public Lands: Amendments

A request for an amendment to a homestead patent is properly rejected where the applicants fail to provide any persuasive evidence that the original patentee entered land other than that described in the patent.

Rules of Practice: Hearings

A request for a hearing will be denied where no offer of proof is presented which, if established, would entitle appellants to the relief sought.

APPEARANCES: Guy B. Dyer, Jr., Esq., of Parga, Dyer and Buck, Cortez, Colorado, for appellants.

OPINION BY MR. GOSS

Appellants have appealed from a decision of the Chief, Branch of Land Operations, Bureau of Land Management, Denver, Colorado, dated April 21, 1972, rejecting their application to amend homestead

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patent no. 956845. The patent was issued to Albert F. Garbareno on April 1, 1925, for a 50-acre tract of land described as follows:

New Mexico Principal Meridian, Colorado
T. 39 N., R. 14 W.
Sec. 36: W 1/2 NE 1/4 NW 1/4, E 1/2 SE 1/4 NW 1/4 NW 1/4, E 1/2 NE 1/4 SW 1/4 NW 1/4, W 1/2 NW 1/4 SE 1/4 NW 1/4, SE 1/4 SW 1/4 NW 1/4, W 1/2 SW 1/4 SE 1/4 NW 1/4.

The above described land was subsequently sold by Albert Garbareno to his brother, V. E. Garbareno. Beginning in 1944, V. E. Garbareno sold a number of parcels of land to various individuals. Such parcels were described by metes and bounds descriptions. Subsequently, some of the parcels were found by survey to be located outside the original boundaries of the patent.

On August 14, 1964, an application for amendment of patent no. 956845 was filed by H. L. Bigler and others, all of whom had purchased one or more of the metes and bounds tracts sold by V. E. Garbareno. The application was later amended on August 26, 1965, and on August 7, 1969. On April 27, 1971, the application was rejected because the applicants failed to present substantial evidence that Albert Garbareno entered on land other than that described in the patent. The applicants appealed to this Board. They later withdrew their appeal and the appeal was dismissed. H. L. Bigler, 3 IBLA 437 (1971).

On December 16, 1971, appellants filed the application herein considered, pursuant to Rev. Stat. § 2372, as amended, 43 U.S.C. § 697 (1970), and the applicable regulation, 43 CFR 1821.6. They contended that the original patentee, Albert Garbareno, entered land different from that described in patent no. 956845. They requested that the patent be amended to describe the land as set forth in their application. The decision appealed from rejected their application, finding no evidence that Albert Garbareno settled on land other than that described in his patent.

Rev. Stat. § 2372, authorizes the Secretary of the Interior or his delegate to change an entry, selection, or location made of a tract of land not intended to be entered, to such land as was intended to be entered "if the same has not been disposed of and is subject to entry." This provision applies to homestead entries even after patent has issued. Le Marchal v. Tegarden, 175 F. 682 (8th Cir. 1909); Harris Miller, 51 L.D. 281 (1925).

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Pursuant to the Forest Homestead Act of June 11, 1906, 34 Stat. 233, (repealed 1962), the Secretary of Agriculture by letter dated November 21, 1914, informed the Secretary of Interior that a certain 50-acre tract of land, described therein, in the Montezuma National Forest was chiefly valuable for agricultural purposes. The Secretary of Agriculture requested that such land be opened to settlement and entry. Albert Garbareno subsequently made homestead entry and received patent no. 956845, such patent describing the land exactly as in the November 21, 1914, letter.

The land sought by appellants to be included in the amended patent is located in the San Juan National Forest, Colorado. This land was originally reserved and set apart by Presidential Proclamation of March 2, 1907. 1/ Such land was never classified as available for entry under the Forest Homestead Act, therefore, it remains withdrawn from entry and it cannot be included in an amended patent under 43 U.S.C. § 697 (1970). This is true even assuming all other requirements of the statute may have been met. For this reason the application must be rejected. Frank H. Stefflre, 3 IBLA 255, 257 (1971); Henry E. Cleek, A-29257 (March 12, 1963).

In any event appellants have failed to provide any persuasive evidence that Albert Garbareno, the original patentee, entered land different from that described in his patent.

Appellants allege that the land so described in the patent was not legally susceptible of entry for agricultural purposes, but that the patentee was bound to follow such description as that land was the only land open for homestead entry. Appellants assert that Exhibits 6, 6 A, 6 B, an aerial photograph and two contour maps, respectively, show that more than one-half of the land within the patent is not useful for agricultural purposes.

1/ The present day San Juan National Forest is a combination of the old San Juan Forest Reserve created by Presidential Proclamation of June 5, 1905 (34 Stat. 3070) and the Montezuma Forest Reserve created by Presidential Proclamation of June 13, 1905 (34 Stat. 3106). The Montezuma Forest Reserve was enlarged by Presidential Proclamation of March 2, 1907 (34 Stat. 3307) to include the subject lands. By Public Land Order No. 400 published in the Federal Register August 30, 1947, 12 F.R. 5849, the Montezuma National Forest was abolished and the lands herein considered were transferred to the San Juan National Forest.

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The fact that the entire 50-acre tract was not useful for agriculture was apparently well known to the patentee, as his final proof statement and those his two witnesses filed in January 1925 bear out:

Albert F. Garbareno, the patentee, stated:

> "This land is in the bottom of West Dolores Creek and is a willow bottom tract of land with about 20 acres of it tillable. The rest lays alaong (sic) the hillside so that it can not be cultivated."

Henry Osterfeld, witness, stated:

> "There are 20 acres of tillable land. No timber except a cottonwood tree or two. It is a river bottom willow flat and cultivated land irrigated."

Jesse J. Armstrong, witness, stated:

> "There is not over 30 or 40 acres of the land tillable. The rest of the land is hillside and rocks, as this land is in the bottom of West Dolores Creek and the tillable land is in the bottom."

Appellants do not contend that the land that they seek to include in the patent would be more valuable for agricultural purposes. In fact the land sought by appellants is primarily located west of the West Dolores River; Exhibits 6, 6 A, and 6 B indicate that the land on the west side of the river is itself rough and not suitable for farming.

Appellants also request that the Department exercise its equitable power and authority according to 43 CFR 1821.6-5 to grant the amendment of the entry because the land embraced within the present legal description is so unfit for or unsusceptible of occupancy, cultivation, or irrigation as to render it impossible to perform the requirements of the law.

Appellants overlook the fact that Albert Garbareno fulfilled the requirements of the law in 1925 when he secured his homestead patent, and the evidence available, presented herein, establishes that his physical entry on the land was in conformity with the legal description as set forth in his patent and in the 1914 letter from the Secretary of Agriculture to the Secretary of the Interior.

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Appellants request a hearing, yet they have presented no offer of proof which, if established, would entitle them to the relief sought. The request for a hearing is, therefore, denied. Frank H. Stefflre, supra at 259.

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 affirmed.

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Joseph W. Goss, Member

We concur:

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Newton Frishberg, Chairman

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Edward W. Stuebing, Member

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