

UNITED STATES

v.

ALAMEDA P. LAW ET AL.

IBLA 72-2

Decided December 31, 1974

Appeal by the United States from that portion of a decision by Administrative Law Judge Rudolph M. Steiner which dismissed contestant's complaints against four desert land entries (R 07370, etc.); and appeal by one of the contestees from that portion of the Judge's decision in which he refused to rule on the statutory life remaining in her desert land entry (LA 039326).

Reversed.

1. Desert Land Entry: General -- Desert Land Entry: Assignment --  
Desert Land Entry: Cancellation -- Desert Land Entry: Cultivation and  
Reclamation

Where a group of desert land Entrymen have leased their entries for a term of 15 years, with an option to purchase at the end of the

lease, given full control of the entries to the lessees, and deposited in escrow warranty deeds conveying the land in their entries, the agreements violated the provisions of the Desert Land Law against sale of entries prior to patent, assignments for the benefit of a corporation, and holding of more than 320 acres of desert land by one person or association. Accordingly, the entries must be cancelled.

The doctrine of voluntary rescission of an alleged contract to sell a desert land entry after patent is not to be applied in these circumstances, particularly where the rescission comes long after a contest has been brought against the entries, the money paid to entrymen has not been refunded, and the life of entry has run.

2. Desert Land Entry: Generally -- Desert Land Entry: Cultivation and Reclamation -- Contests and Protests: Generally

An applicant whose desert land entry, suspended for many years by the decision in Maggie L. Havens and who was allowed the 19 months provided by the Secretary's notice of December 2, 1965, to submit proof of compliance with the requirements of the Desert Land Act, is not to be given further time when the evidence adduced in a contest against the entry shows that compliance with the cultivation and reclamation requirements of the desert land law was not accomplished within the life of the entry; the existence of a contest against the entry does not suspend the entry while the contest is pending and thus permit compliance with the requirements for perfection of the entry beyond the statutory life of the entry.

APPEARANCES: R. B. Whitelaw, Esq., El Centro, California, for the contestees; George H. Wheatley, Esq., Office of the Solicitor, for the contestant.

## OPINION BY ADMINISTRATIVE JUDGE RITVO

The Bureau of Land Management has appealed from that portion of the May 21, 1971, Decision of the Administrative Law Judge, 1/ which dismissed the allegations in its complaints against four Desert land entries involved in this consolidated contest proceeding. 2/ Contestee Inez Mae Pearson has appealed that portion of the decision in which the Judge refused to express an opinion as to the statutory life remaining in her entry, LA 039326, on which there have been no improvements or cultivation.

The four entries were made in the early 1900's but were suspended as the result of the Department's decision in Maggie L. Havens, A-5580 (October 11, 1923), until water for the irrigation of the lands became available from the Imperial Irrigation district through the anticipated construction of the All-American canal to bring Colorado River water into the Imperial and Coachella

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1/ Change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated by order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

2/ The proceeding dealt with the validity of the following desert land entries located in Imperial County, California:

R 07370 of Alameda P. Law, embracing the NW 1/4 Sec. 11, T. 16 S., R. 11 E., S.B.M.

LA 038793 of Earnest J. Pearson, embracing the NE 1/4 Sec. 11, T. 16 S., R. 11 E., S.B.M.

LA 039023 of Dorothy Nichols Pinkham, et al., embracing the N 1/2 NE 1/4 Sec. 12, T. 16 S., R. 11 E., S.B.M.

LA 039326 of Inez Mae Pearson, embracing the E 1/2 Sec. 35, T. 15 S., R. 11 E., S.B.M.

Valleys in California. The suspension was lifted in 1965. <sup>3/</sup> The Alameda P. Law, Earnest J. Pearson and Dorothy Nichols Pinkham entries have been reclaimed by the construction of adequate irrigation facilities, and the entries have been cultivated.

The Administrative Law Judge has set out the facts as follows:

The Contestees seek acquisition of title to the subject lands pursuant to the Act of March 3, 1887 (19 Stat. 377) as amended by the Act of March 3, 1891 (26 Stat. 1096, 43 U.S.C. 321 et seq.). Final proofs were filed in each entry, except R-039326, in February or March 1966.

The Contestant filed similar Complaints in each proceeding alleging generally that the entrymen, during May or June 1961, had leased the entries, with option to purchase, to E. J. McDermott and Kemper Marley, doing business as Pima Cattle Company, and pursuant thereto executed and delivered warranty deeds into escrow and that the rights and privileges of McDermott and Marley under the lease-option agreements have inured to the benefit of Pima Cattle Company, a California Corporation.

The Complaints further allege as follows:

(a) The aforesaid lease-option agreements and deeds constitute prohibited assignments of the entries to individuals who are ineligible to make a desert land entry in the State of California or to take such an entry by assignment in violation of Section 8, Act of March 3, 1877, as added by Act of March 3, 1891, 26 Stat. 1096, 1097 and as amended by Act of January 26, 1921, 41 Stat. 1086, 43 U.S.C. 325 and Section 2, Act of March 28, 1908, 35 Stat. 52, 43 U.S.C. 324 (1964).

(b) The aforesaid lease-option agreements and deeds constitute prohibited assignments of the entries to or for the benefit of a corporation in violation of Section 2, Act of March 28, 1908 (*supra*).

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<sup>3/</sup> The Havens suspension is more fully discussed infra in connection with the Inez Mae Pearson entry, LA 039326.

(c) The aforesaid lease-option agreements and deeds constitute binding contracts of sale of the land in the entries to be consummated after patents are issued.

(d) The entrymen and their predecessors in interest have failed to expend the amount required by law necessary for the irrigation, reclamation and cultivation of the land in the entries as required by Section 5, Act of March 3, 1877, as added by Act of March 3, 1891 (supra).

(e) E. J. McDermott and Kemper Manley, also known as Kemper Marley, doing business as Pima Cattle Company, and/or Pima Cattle Company, a California corporation, hold in excess of 320 acres of desert land in violation of Section 7, Act of March 3, 1877, as added by Act of March 3, 1891 (supra).

(f) The entrymen have not maintained the entries in good faith with intent to irrigate, reclaim and cultivate the land therein as required by Section 1, Act of March 3, 1877 (supra).

A hearing was held in El Centro, California.

The Contestant introduced in evidence those documents alleged to constitute prohibited assignments of entries [footnote omitted] to ineligible individuals, to benefit a corporation, and to result in a holding in excess of 320 acres by a single corporation.

By instrument dated June 16, 1961 (Exhibit 13), the Estates of Kitty H. Nichols and George W. Nichols, Sr., by Dorothy Nichols Pinkham, as "Administrator with Power of Attorney," leased the lands in the Pinkham entry, LA-039326, to "E. J. McDermott and Kemper Manley, doing business under the name and style of Pima Cattle Company, of 1720 Fifth Avenue, Yuma, Arizona." By instrument dated August 31, 1961, Dorothy Nichols Pinkham again leased the lands in the two entries to the same lessees.

By similar instrument dated May 22, 1961 (Exhibit 9), Earnest J. Pearson and Inez Mae Pearson leased the lands embraced by the other three entries to the same lessees. McDermott and Manley were residents of the State of Arizona at the time the leases were executed.

Each lease runs for a term of 15 years with option to purchase after expiration of the term. Each provides for a "full rental price" of \$100 per acre due in annual installments of \$6 per acre. In the event of the failure of the lessees to make the payments provided for, the leases were to be terminated and all payments theretofore made were to be retained by the lessors as liquidated damages. The lessees were to pay all taxes and assessments levied by the Imperial Irrigation District. The lessees further agreed "to keep records and to be, or furnish, suitable witnesses who will jointly with Lessors, furnish and make said final proof."

The option clause reads, "It is mutually agreed as a part of the consideration for this lease that Lessees shall have and they are hereby given an option at the end of fifteen (15) years provided they have in the meantime kept and fully - performed all the provisions of this Lease) to have Lessors convey and - transfer title to said lands to the Lessees, or to their designated grantees by a duly executed and acknowledged Warranty Deed now being placed in escrow upon the payment to them of the sum of FOUR THOUSAND EIGHT HUNDRED (\$4,800.00) DOLLARS."

The Bank of America, Brawley, California, was designated as the "escrow" or "collection" agent to collect the rental payments, credit the same to the lessor's account and to make delivery of deeds of conveyance to the lessees pursuant to the leases. By warranty deed dated July 24, 1961, and acknowledged August 31, 1961, Dorothy Nichols Pinkham conveyed the lands in the Pinkham entry and LA-038342, to E. J. McDermott and Marion McDermott, his wife, "or their nominees" (Exhibit 8). By grant deed dated February 23, 1962, and acknowledged the same date, Earnest J. Pearson and Inez Mae Pearson conveyed the lands in the Law and Earnest J. Pearson entries to the same grantees. (Exhibit 11). A further grant deed was prepared for execution by Mr. and Mrs. Pearson in February 1962, for conveyance to E. J. McDermott and Kemper Marley, doing business under the name and style of Pima Cattle Company of the land in LA-039326, as well as the lands in R-07370 and LA-038793. (Exhibit 12). Whether said deed was ever signed and acknowledged is not known.

Pima Cattle Company was incorporated under the laws of the State of California in 1962, by E. J. McDermott, Marion E. McDermott, and James L. Campbell, at that time all residents of the State of Arizona. (Exhibit 16) E. J. McDermott and Kemper Marley, doing business under the name and style of Pima Cattle Company, granted, conveyed, sold, assigned, transferred and set over to Pima Cattle Company, a California corporation, their August 31, 1961, lease and option from Dorothy Nichols Pinkham and their May 22, 1961, lease and option from Earnest J. Pearson and Inez Mae Pearson. (Exhibit 8 and Exhibit 7, respectively).

A concrete lined main irrigation ditch has been constructed from the West Side Main Canal of the Imperial Irrigation District across privately-owned land, then along the northern boundary of Desert Land Entries LA-039023, LA-038342, LA-038793 and R-07370, to serve the lands in these entries and privately-owned lands in the area. It was constructed by, and the costs thereof were paid by, either Pima Cattle Company, a partnership, or Pima Cattle Company, a corporation. (TR-96, TR-97 and TR-98). Pima Cattle Company, a corporation, by three instruments dated April 25, 1966, granted to Inez Mae Pearson, Earnest J. Pearson and Alameda P. Law, and by instrument dated April 20, 1966, granted to Louis C. Pinkham and Dorothy Nichols Pinkham, the perpetual right to transport water through said main irrigation ditch and to use other of its facilities to irrigate the lands in their entries. (Exhibit 29, Exhibit 30, Exhibit 31 and Exhibit 32, respectively). By instrument dated June 18, 1965, Pima Cattle Company, a corporation, granted all of its right, title and interest in certain lands, including those covered by the four entries here in question, in trust to Security Title and Trust Company, to secure Kemper Manley in the payment of money advanced or to be advanced by him to the corporation. (Exhibit 34). Also, by instrument of the same date Pima Cattle Company, a corporation, assigned to Kemper Manley "all rents and sums due and owing" to the corporation "under Lease or Rental agreements now existing or hereafter made, for the leasing or rental" of certain lands including the four entries. (Exhibit 33).

The above-mentioned irrigation ditch was constructed so that its capacity would be sufficient to irrigate the land in LA-039326 at such time as the ditch was extended to serve the land in that entry.

(TR-104 and TR-105). There has been no cultivation of, nor have any improvements been placed on, the land in that entry. The reclamation of the lands in the remaining three entries is more than adequate to meet the requirements of the desert land laws. (TR-135).

The Contestees do not deny the existence of the said leases and conveyances. However, they point out that the payments were discontinued on October 11, 1967, after which time the agreements were subject to forfeiture. The documents held for collection by the Bank of America were returned to the entrymen on April 23, 1969. (Exhibit 7).

The Judge found that the lease option agreements were illegal, void, unlawful, and unenforceable in California, but that McDermott and Pima Cattle Company have a lien against the entries to the extent of their expenditures for improvements. He then concluded that the entrymen had acted in good faith and the existence of the lien satisfied the requirement that they expend funds for the reclamation and cultivation of the entries. Finally he concluded that the entrymen having rescinded the agreements, the entries could be processed to patent.

Contestant states in its appeal that the subject contests were filed on the basis of and in reliance upon the views expressed in Solicitor's Opinion Idaho Desert Land Entries -- Indian Hill Group, 72 I.D. 156 (1965), and in Departmental decision United States v. Shearman, 73 I.D. 386 (1966). Shearman was the subject of judicial review in Reed v. Hickel, Civil No. 1-65-86, in the United States

District Court for the District of Idaho. Also, United States v. Hood Corporation , Civil No. 1-67-97, (hereafter Hoodco) was brought in the same Court seeking to cancel patents issued to desert land entrymen on the grounds of fraud against the United States arising from the same transactions as those in Shearman. The two actions were consolidated for trial, and by preliminary decision of March 13, 1970, the District Court reversed the Departmental decision and dismissed the complaint in Hood Corporation .

The Court of Appeals issued its decision in the two cases on June 4, 1973, as amended on Denial of Rehearing on July 27, 1973, sub nom. Reed v. Morton, United States v. Hood Corporation , 480 F.2d 634 (1973), reversing the District Court and upholding the Department.

The facts in Shearman are set out in great detail in the Court and Departmental decisions and need not be restated here. Suffice it to say that it involved a plan to develop a large group of desert land entries through the use of entrymen who, having despaired of reclaiming the land on their own, entered into agreements with a corporation which had the exclusive right to possess each entry and to grow and harvest crops on it for a term of 20 years. The entrymen also signed nonrecourse notes secured by first and second mortgages on the entry. Although they did not execute written agreements

to sell the entries before or after patent, each reached an agreement with the individual who organized the plan that the entrymen would sell after patent for \$10 per acre. The arrangements between the entrymen, the individual organizer, and the corporation were not revealed to the Bureau of Land Management.

The Department held that the agreement between the entrymen and the corporation was an assignment for the benefit of a corporation within the meaning of the prohibition of section 2 of the Desert Land Act, supra; that the combined agreements constituted a holding by the corporation of more than 320 acres of desert land within the meaning of the prohibition of section 7 of the Desert Land Act; that the signing of a nonrecourse note secured only by a mortgage on the entry does not constitute a personal liability for the money expended; and that an entryman must have the intention of reclaiming his entry in accordance with the provisions of the law at the time the entry is made.

The Court of Appeals cancelled the patented entries and affirmed the Department's decision cancelling the unpatented entries. It found that the entrymen had given up any interest in the land after they had agreed to transfer their interests to the developers. It also held that, while assignments were permitted under the Desert Land law, secret assignments of entries could not be used to avoid either the

proscription against a contract to convey an unpatented entry or against a person or association holding by assignment or otherwise 320 acres and that a corporation could not hold a desert land entry.

[1] We agree with the Administrative Law Judge's conclusion that the agreements were illegal, void, unlawful and unenforceable. As defined in the Department's decision in United States v. Shearman, supra, they fall within the scope of prohibited assignments for the benefit of a corporation, of illegal contracts to sell the land in the entries after patents are issued, and of the prohibition against a holding in excess of 320 acres of desert land.

[2] While recognizing the illegality of the agreements and conveyances, the Administrative Law Judge held that the entries could nonetheless pass to patent because the entrymen had acted in good faith and had voluntarily rescinded the agreements, citing Lois L. Pollard, A-30226 (May 4, 1965).

There the desert land entrywoman had entered into an executory agreement to sell the land in her entry after she obtained patent. Prior to filing final proof she had refunded the purchase price, and reacquired possession of the entry. She then performed the necessary reclamation and cultivation of the entry. After pointing out that the regulations (then 43 CFR 1964 rev., § 232(17)(b), now 43 CFR

§ 2521.3(c)(3)), stated that the provisions of law permitting assignments did not furnish authority for a claimant to make an executory contract to convey land after entry and to proceed with the submission of final proof in furtherance of the contract, the Department held that voluntary rescission of an illegal agreement may correct the defect where the entryman executed the agreement in good faith, but that the application of the rule depends on the circumstances of each case.

We hold that the circumstances of this case do not justify a similar application of the doctrine of voluntary rescission.

The Judge points out that the facts in Hoodco demonstrate from the very beginning of the entries a much plainer intent to violate the desert land law than can be found here. He stresses the long time the entries were held by the appellants or their predecessors, the discussion of the plan with land office officials, the entrymen's unawareness that the plan was illegal. He then concludes that the entrymen acted in good faith and should benefit from the Department's policy permitting voluntary rescissions.

He also emphasizes that the entrymen could have financed the development of their entries by mortgages as permitted by the desert land regulation.

While the scenario of Hoodco presents, in some ways, a more drastic example of violations of law than the facts herein, a scheme not as outrageous as Hoodco may still be not only plainly illegal, as this one was, but may also present circumstances not justifying the application of the doctrine of voluntary rescission. We also note that in Hoodco the entrymen had only an understanding that they would sell the land to the Hood Corporation and that by paying of the note they could have reclaimed possession of the land. Here the entrymen had specifically agreed to convey the land and could not regain possession before 15 years.

What are the circumstances that militate against granting relief here? First, the life of these entries has run. If rescission is accepted, the entries presumably are ready for patent. There is nothing more to be done. In Pollard, to the contrary, the rescission was made during the life of the entry, the money was returned, and Mrs. Pollard proceeded to reclaim the land in accordance with the law. Here there will be no opportunity for the entrymen to demonstrate the sincerity of their repentance by complying themselves with the requirement of the law. The entries will pass to patent subject to a huge lien held by Pima who in all likelihood will again have control of these entries. We also note that there is no allegation that they returned any of the money they received from Pima.

Furthermore, one strong element in the rescission cases is whether rescission was made before a contest was brought against the entry. Blanchard v. Butler, 37 I.D. 677, 680 (1909). Here there was no attempt at rescission until long after the life of the entry had expired, and after the contest was brought. The rescission, if such there has been, has not been accomplished by any formal document, but only by the return of the instruments to the contestees some 18 months after the contest was instituted.

The concept underlying the doctrine of voluntary rescission is that it permits an innocent person first to undo an illegal act and then to proceed to comply with the requirements of the law. To award patents upon the basis of rescission, alone, coming long after the life of each of the entries has expired, will simply be ratification of the illegal arrangements. The Judge finds that Pima holds a lien on the entries in some undisclosed but substantial amount. While we do not believe that a lien can arise until after patent -- at least not one the United States must recognize while the title to the land is in the United States -- one presumably would be enforceable after patent. We would then be permitting the parties to accomplish by indirection what they could not have achieved directly.

There are other aspects of this case deserving of comment. First, the thought that the entrymen and Pima could have arrived at the same

result through the use of mortgages seems to have been accepted by the Judge without question. While a mortgage between one entryman and a lender is sanctioned by the regulation, mortgages by one lender to one or a group of entrymen under which the mortgagee operates and controls the entry for a long period of time, may be "assignments" in violation of section 2 of the Act of March 28, 1908, 43 U.S.C. § 324 (1970), prohibiting assignment to corporations, as well as of section 7 of the Act of March 3, 1891, 43 U.S.C. § 329 (1970), prohibiting holdings in excess of 320 acres. United States v. Shearman, *supra*, 390, 426-428. Pima's rights to and control of the entry are practically identical with those in Shearman, *supra* at 426. Therefore, the substitution of mortgages for lease-options would not have been a magic bullet curing the ills of these arrangements. Pima held 5 desert land entries totalling 880 acres while Section 7 permits an individual to hold only 320 acres. Thus Pima still might have been in violation of one or both of the above sections even if mortgages had been used instead of the lease-option.

Again, much is made of the fact that the irrigation system was developed in such a way that each entry could be individually farmed. Water to serve the entries and some privately owned land was transported from the West Side Main Canal of the Imperial Irrigation District through a concrete lined main irrigation ditch. The concrete

ditch was constructed and paid for by Pima. It crossed privately owned lands and then ran along the northern boundary of these entries.

The water must be lifted and transported to the entries by way of the ditch and two pumping plants. Pima owned the pumping equipment. Without the right to use the ditch and pumping equipment there was no way to bring to these entries the water essential to their irrigation. After final proof was filed, the Riverside District and Land Office called these circumstances to the entrymen's attention and required them to submit proof that each had a permanent and legal right to use these facilities.

The entrymen, thereupon, filed evidence showing that by instruments dated April 25, 1966, or April 20, 1966, Pima Corporation granted to them the perpetual right to transport water through the main irrigation ditch and to use its other facilities to irrigate the land in their entries.

Up to this point, then, Pima had a stranglehold on all the entries. Simply by refusing an entryman permission to use the ditch or pumping facilities, it could have made it impossible for him to irrigate his entry. how could an entryman assume any financial responsibility for the cost of the ditch, as we are urged to believe each one did, when he had no assurance that the ditch would

be of any value to him? On the other hand, if Pima not only acquired control of the entries at the outset of the arrangement but intended to keep control at all times, then one and the same person had control of the entries, the ditch and the pumping facilities. So long as all these interests were in Pima it did not have to grant a right-of-way to the entryman of record. It already had it all. It is difficult to believe that even the most naive of entrymen would not have recognized the peril inherent in such an arrangement. The only plausible explanation is that each entryman had no intention of assuming any financial responsibility for the cost of the irrigation facilities and never expected to regain control of his entry.

Other aspects of the arrangement point to the same conclusion. Pima had complete control of the entry for the 15-year term. The entrymen had no obligations except to deliver a deed to the escrow agent for delivery to Pima at the expiration of the term or sooner if mutually agreeable. The agreement provided that if the lessees failed to perform, "any payments made by the Lessees will be kept by the Lessor as liquidated damages." Rental payments under a lease are earned when due and are not liquidated damages in the event of a breach of contract by a lessee. The payments, therefore, are not rental payments but are part of the consideration to be paid for the purchase of the land. Thus the arrangement establishes that

the entrymen intended to convey the land when they entered into the lease-option agreements.

Next, after the lease-option agreement had been signed, the entrymen pointed out to the lessee that the purchase price was \$8,000 instead of the \$4,800 set out in the agreements. Again this bespeaks a concern much more relevant to a sale than a lease.

Nor are the substantial sums invested by Pima sufficient reason to permit an erosion of the desert land law. As the Court said in Hoodco, supra,

We cannot escape the conclusion that the district court gave undue weight to the substantial investment of Hoodco in developing the lands. Id. at 639.

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But secret "arrangements" and "understandings," like more formal contracts to pass title to desert land grants after patent, undermine the Interior Department's power and duty to enforce the restrictions on the recipients of the government's bounty. However quixotic it may seem at this late date to say so, Congress never intended bargain-price desert land to be provided for the benefit of corporations or large landholders. Id. at 641-42.

Finally, none of the rescission cases involve facts such as we have here. They have been concerned with an individual entryman

dealing with an individual "purchaser." Here we have not only a plain violation of the law, but a violation involving one purchase and at least five entries.

In view of the circumstances of this case, the doctrine of voluntary rescission is not to be used to permit the disregard of so many provisions of the desert land law.

There remain two other charges which, while related to the arrangement with Kemper and Marley and Pima, deserve some separate comment.

Charge (d) alleges that the entrymen did not expend the amount of money required by law in the necessary irrigation, reclamation, and cultivation of their respective entries. The Judge, while dismissing this charge, did not find that the entrymen expended their own funds or incurred a personal obligation for expenditures made by others. He held that expenditures made by McDermott, Manley et al., created a lien by operation of law against the entries and the obligation of the lien is sufficient to satisfy the requirement of the desert land law. The imposition of a lien against this land would not make the entrymen responsible for the debt in any other way. The lien, assuming that there is one, runs only against the land in the entry. The entrymen incurred no other

obligation. The entrymen then are in the same position as though they had borrowed money from Pima secured only by mortgages on the entries, so that the notes were not their personal obligations.

This was exactly the situation in United States v. Shearman, supra. There all of the cost of development was paid by Hoodco. The notes and mortgages expressly provided that the entrymen should have no personal liability and that the only recourse of the holders of the notes in the event of default would be to foreclose upon the lands in the respective entries.

The Department concluded that each of the entrymen had failed to expend \$3 per acre for the irrigation, reclamation, and cultivation of his entry. 73 I.D. at 388, 389. It held:

In order to comply with the requirements of section 2 of the act of March 3, 1891, a desert land entryman must either expend his own money on the necessary irrigation, reclamation, and cultivation of the entry or incur a personal liability for any money so expended. Syllabus at 386.

The Chief Hearing Examiner's decision, which was published as an appendix to the decision, concluded that expenditures made by others than the entryman which impose no personal liability on him do not satisfy the statutory requirement. Id. at 428-32. The Solicitor had reached the same conclusion and set out his reasoning in full in a memorandum to the Secretary reporting on the

legality of the entries involved in Reed v. Morton, *supra*, Idaho Desert Land Entries 72 I.D. 156, 168-72 (1965).

The Circuit Court noted that the entrymen had not incurred any personal obligations, but drew no particular conclusions from that circumstance. Since it held that a formal contract or the existence of an understanding that title to the land would pass after patent required the cancellation of the patents already issued and of the entries still outstanding, it did not find it necessary to consider this other ground which would only have supported the same result.

In the instant case, the entrymen neither expended their own funds nor incurred any personal liability under the lease-option agreements. Even if a lien is found to have replaced the lease-option agreement, the entrymen still have neither expended their own funds nor incurred a personal liability for the expenditures for the reclamation of the entries.

Accordingly, for this reason alone, the entries must be canceled.

Charge (f) alleged that:

The entrymen have not maintained the entries in good faith with intent to irrigate, reclaim and cultivate the

therein as required by Section 1, Act of March 3, 1877 (supra).

The Administrative Law Judge held that good faith is shown if the entrymen brings unproductive desert land into production, and his methods and motives are not to be examined in order to determine his good faith. The Judge held that the lease-option agreements, while illegal, do not amount to a demonstration of lack of good faith because they were a substitute for mortgage financing permitted by the regulation, and were adopted on advice of counsel with the knowledge of the Bureau of Land Management.

The concept that an entryman's motives and methods are not to be examined so long as his purpose is to bring desert land into production and to make money is startling. While these goals are legitimate, they are not enough to establish an entryman's "good faith." He must proceed by means sanctioned by the desert land law.

At no time did the appellants intend to assume any personal liability for the huge expenses necessary to reclaim, irrigate and cultivate the land. During the last year of the entry's statutory life and long thereafter the entries were subject to the illegal lease-option agreements. However innocently the entrymen may have entered into the agreements, they never had the intention of reclaiming the lands themselves. Without such an intention, they cannot

have maintained their entries in good faith. United States v. Shearman, supra at 388, 389, 414-25.

Accordingly for this reason, too, the entries should be canceled.

[2] We now consider contestee Inez Mae Pearson's 4/ appeal. After having noted that there had been no cultivation of, nor had any improvements been placed on, the land in that entry, the Judge expressed no opinion on the statutory life remaining in entry LA 039326 embracing the E 1/2 sec. 35, T. 15 S., R. 11 E.

Mrs. Pearson pleads that she be allowed 19 months in which to complete the reclamation of her entry, contending that delays in completing the work were not of her own making but were caused by the actions of officials of the Department of the Interior. The combination of facts and assertions prompting this plea follow.

In constructing the irrigation system to serve the lands in the subject entries as well as other lands in the vicinity, Pima Cattle Company extended the irrigation ditch northward with the intention of carrying water to the E 1/2 sec. 35. However, construction was stopped at a point one-half mile from that land in 1964 when an official of the Riverside office advised McDermott not to do any further work on the land until further advised by that office because of a decision by the Riverside district and

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4/ Now deceased.

land office on September 10, 1964, which declared null and void a 1959 decision of the Los Angeles land office, which had recognized an assignment of the entry to Mrs. Pearson from her mother, on the ground that the entry had expired before the assignment was made. On appeal to the Secretary, the Department reversed and remanded the case for further action. Inez Mae Moore Pearson, A-30507 (March 31, 1966).

The Department held that the entry still had 19 months of statutory life remaining on December 2, 1965, the date on which notices that the suspension was revoked were sent to the affected entrymen whose entries were suspended under Havens, supra. Nevertheless, in view of the pending interim status of the case, as an equitable matter, the Department held that Mrs. Pearson's period would run from the date of its decision. The decision concluded, among various alternatives, with the following:

\* \* \* or if she was in the process of reclaiming her entry on December 2, 1965, but had not completed reclamation she will be given the remaining life of her entry, i.e., 19 months, to complete her reclamation and submit notice thereof, but she must within 90 days of this decision give notice of her election to take such greater period. \* \* \*

Within 90 days of the March 1966 decision, specifically on June 16, 1966, Inez Mae Pearson filed with the Riverside district and land office her election to take the period of 19 months within

which to complete reclamation of the entry. She stated that the structures would be completed for serving said land and crops would be grown thereon within the period of 19 months. The Riverside office transmitted the case file to the Regional Solicitor, Department of the Interior, Los Angeles, for recommendations in July 1966. During the period of time the case was in the Regional Solicitor's office, the Department's decision in Shearman was issued, as a result of which that office concluded that the entry should be contested. The contest complaints were issued on December 20, 1967.

We find that the life of Mrs. Pearson's entry expired 19 months from the date of the March 31, 1966, decision, or on October 31, 1967; and that under the Secretary's instructions of December 2, 1965, terminating the Havens' suspension, no further extensions are warranted. A pending contest does not excuse an entryman from further performance looking toward perfection of the entry. This case is comparable to Killen v. Davidson, A-28871 (August 8, 1962), in which the Department stated:

There is, of course, no basis for the contestee's contention that he was, or should have been, excused from compliance with the requirements of the homestead law while the entry was under contest. The 5-year life of a homestead is fixed by statute (43 U.S.C., 1958 ed., sec. 164) and no officer or employee of the Department of the Interior has authority to extend it. The fact that a land office employee may have suggested to a

homestead entryman during the second year of the entry that it would be wise to postpone extensive improvement of the entry pending the outcome of a contest is not a promise that the entryman may rely upon the contest to excuse all further performance looking toward perfection of the entry in complete disregard of the statutory limitation on the life of the entry. Of course, such employee could not grant to the entryman any right in public land not authorized by law. Orvil Ray Mickelberry, A-28432 (November 16, 1970); Gerald C. Chisum, A-28295 (June 7, 1960). \* \* \*

Accordingly, we hold that the statutory life of Inez Mae Pearson's entry LA-039326 embracing the E 1/2 sec. 35, T. 15 S., R. 11 E., has expired, and the entry is cancelled.

Therefore, 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 modified as to entry 039326 and reversed as to the others.

Martin Ritvo  
Administrative Judge

We concur:  
Frederick Fishman  
Administrative Judge

Douglas E. Henriques  
Administrative Judge

Newton Frishberg  
Chief Administrative Judge

Joan B. Thompson  
Administrative Judge

Joseph W. Goss  
Administrative Judge

## ADMINISTRATIVE JUDGE ANNE POINDEXTER LEWIS DISSENTING:

For the reasons stated below I disagree with the finding of the majority that the desert land entries of Alameda P. Law, Earnest J. Pearson, and Dorothy Nichols Pinkham should be canceled and I would find, in agreement with the administrative law judge herein, 1/ that contestant's complaints with respect to these entries should be dismissed.

Thus, according to Judge Steiner,

The principal basis for the Contestant's allegations of lack of good faith is the interest and activity of the Pima Cattle Company. The Contestees contend that they entered into the agreements in order to obtain financing without which improvements could not have been made. At all times the Bureau of Land Management was advised that McDermott, Manley and Pima Cattle Company were actively engaged in developing the entries. Nowhere in the record is there any evidence that the Contestees attempted to conceal their relationship with McDermott. The entrymen and McDermott could have arranged the necessary financing through the use of mortgages as authorized by Departmental regulations (see 43 C.F.R. 2226.1-3(d)). Under those circumstances, McDermott could have proceeded with the actual development work in the same manner as has been done. The mortgages could have been executed in amounts which would have amply provided for all costs. \* \* \*

The entrymen were apparently acting under advice of counsel. They did not know that their agreements could possibly result in the cancellation of the entries, and were not so informed by the Bureau of Land Management [although BLM at all times was kept informed of contestees' actions].

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1. I adopt as part of this dissent the quoted portions of his decision.

When they became aware that the entries could not be so assigned, payments on the leases were terminated. Nowhere in the record is there any evidence, or even an inference, that the Pima Cattle Company, or its agents in any way "promoted" the entries as was done in the Shearman case. It is clear that these lands were brought under cultivation in good faith.

As to the legal effect of the lease option agreements in California, Judge Steiner found them illegal, void, and unenforceable, under the authority of Griffis v. Squire, 276 CA 2d 461 (1968), 73 Cal. Rptr. 154. He further found that the agreements, having been executed in good faith, do not preclude the processing of the entries to patent, under the principle of Lois L. Pollard, A-30226 (May 4, 1965). 2/

Judge Steiner further found:

Title 43 U.S.C. sec. 328, relating to expenditures and cultivation, provides, in part, as follows:

"No land shall be patented to any person under this chapter unless he or his assignors shall have expended in the

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2/ With respect to the Pollard case, Judge Steiner writes:

In Lois L. Pollard A-30226 (May 4, 1965), the entrywoman had entered into an executory agreement to convey land in the entry after patent, but, prior to filing final proof, had refunded the purchase price and regained possession through cancellation of the agreement for breach of contract by civil litigation. It was held that "voluntary rescission of an illegal agreement is recognized where the entrymen executed the agreement in good faith." (Citing Blanchard v. Butler, 37 L.D. 677 (1909); George F. Bixler, 40 L.D. 79 (1911); Martin

necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least \$3 per acre of whole tract reclaimed \* \* \*."

The Contestant takes the position that the statute requires the expenditure of personal funds for reclamation or the incurrence of personal liability therefor. The Contestant does not deny that several hundred thousand dollars has been so expended while the law requires an expenditure of only three dollars per acre for a total on the entries of approximately two thousand, one hundred and sixty dollars. The difficulty is that the bulk of the expenditures were made by the lessee.

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(Fn. 2 Cont'd)

L. Torres, 51 L.D. 247 (1925). In remanding the matter for review of the entrywoman's good faith, the Solicitor stated:

"If Mrs. Pollard had entered into the agreement in good faith and had then ascertained or been informed that the agreement was invalid and had voluntarily rescinded it, she presumably would have been allowed to process her entry to patent. The question here is whether if, in good faith, believing the agreement binding, she has it set aside on other grounds through litigation, a different rule should apply. We think not.

"As indicated earlier, however, the benefits of voluntary rescission extend only to an entryman who entered into the forbidden agreement without intent to violate the law. Mrs. Pollard states that the parties did not intend to violate the Departmental regulation and had no idea that the agreement was improper. While this is only her statement, nothing in the present record affords any basis for questioning her statement. If, upon return of this case to the Bureau, it believes, through investigation or otherwise, that Mrs. Pollard knowingly violated the regulation, a contest should be brought against the entry and a hearing held to establish the facts. If the Bureau has no reason to challenge Mrs. Pollard's assertions of good faith, her final proof should be processed in accordance with the usual procedure."

As stated hereinabove, under California law, the Pima Cattle Company is entitled to a lien against the entries to the extent of its expenditures for reclamation and cultivation. [\*\*38] The entrymen have incurred liability for those expenditures. Therefore, they have complied with the expenditure requirements of the Desert Land Act.

In holding that these three entries should be canceled, the majority relies entirely on the Court of Appeals' decision handed down in the so-called "Indian Hill" cases while the instant case was pending before this Board. <sup>3/</sup> We do not agree that the instant case is governed by this decision in the Indian Hill cases as the facts are readily distinguishable.

The Court there held that the Indian Hill patents and entries must be canceled because there was an understanding between the entrymen and the developers that title to the lands would pass after patent, which understanding was not revealed by the parties. The Indian Hill entries were clearly a fraud against the United States. In early 1961, Reed and a Raymond Michener recruited friends and relatives who, with Reed and Raymond Michener, filed twelve desert land entries. Reed and Michener at the same time purchased from the State of Idaho a section of state-owned land contiguous with parts of the twelve tracts for which the desert land applications had been filed, a total of 3,700 acres. Hoping to develop the lands, Reed and Michener organized a non-profit corporation known as Indian Hill Irrigation Company, and assumed the titles of officers of the corporation. There

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<sup>3/</sup> Reed v. Morton, United States v. Hood Corporation , 480 F.2d 634 (1973).

was no election of officers, shareholders' meeting, or payment for subscribed stock.

Reed and Michener had difficulty obtaining capital. On February 12, 1963, they called a meeting of the entrymen and informed them that because of a shortage of capital caused by the failure of anticipated loans to materialize each entryman would either have to pay to Reed and Michener \$ 983 dollars in cash and assume a personal obligation of between \$12,000 and \$14,000, or sign a long-term lease with, and turn over development of the project to, Indian Hill Irrigation Company. All of the entrymen except Reed and Michener then entered into a twenty-year "lease and development contract" with Indian Hill, and signed notes and mortgages for \$300 per acre payable on demand to secure the payments that would fall due under the lease. These notes were secured only by the mortgages on the entry lands, and were not the personal obligations of the entrymen. Indian Hill agreed to bear all expenses and retain all profits. By agreement in 1965, Hoodco Farms, Inc. took over development of the project from Reed and Michener.

After the February 12, 1963, meeting, the entrymen themselves did not behave as if they had any interest in the lands. On August 15, 1963, they signed without discussion or dissent agreements which made it practically impossible for them ever to regain possession of the lands. They received no copies of the documents which they had signed, in most cases, without reading them. They did not protest when Hoodco

Farms developed the land in such a way that it could not be farmed in individual units. They exhibited no curiosity when, upon issuance, the patents were delivered to and recorded by Hoodco Farms, although the patentees were the ostensible titleholders. At the time of the final "sale" the patentees entered into no meaningful negotiations with the purchasers. In other words, the entrymen, with the exception of Reed and Michener, were merely straw men, and the transactions in the case were clearly in violation of the Desert Land Law.

On the other hand the entries involved in the case at hand were made many years ago by predecessors in interest of the present entrymen. The entrymen and their predecessors have spent many years in trying to bring water to their lands. The entries were not made at the behest of promoters as was done in the Indian Hill cases. The agreements with McDermott, Marley, and Pima Cattle Company were entered into in good faith by the entrymen, and without knowledge by them that the agreements could possibly result in the cancellation of the entries. The parties did not attempt to conceal the agreements but instead discussed them on various occasions with officials of the Los Angeles and Riverside offices of the Bureau of Land Management. There is no evidence whatsoever of any intent by these entrymen to violate the law. Furthermore, these entries have been developed so that each one can be farmed as an individual unit, in marked contrast to the irrigation system on the Indian Hill entries, which was constructed so that none of the entries could be farmed individually.

In conclusion, we would hold that the Judge was correct in dismissing the contestant's complaints against the three improved and cultivated entries.

Anne Poindexter Lewis,  
Administrative Judge

ADMINISTRATIVE JUDGE STUEBING DISSENTING:

I find much with which I can agree in both the majority opinion and in the dissent of Judge Lewis, and the correct result seems to me to be a very close question.

However, I depart from the majority view in one major particular and several minor ones. Foremost among my concerns is the heavy reliance of the majority on the holding in Reed v. Morton, United States v. Hood Corporation , 480 F.2d 634 (9th Cir. 1973). There, the Court of Appeals reversed the District Court upon the appellate court's finding that where there was an illegal arrangement which had been kept secret from concerned officials of the United States by the suppression of facts which, if known to such officials would have made impossible the acquisition of the land, saying, at p. 641:

But secret "arrangements" and "understandings," like more formal contracts to pass title to desert land grants after patent, undermine the Interior Department's power and duty to enforce the restrictions on the recipients of the government's bounty.

In the present case there was an understanding that title to the lands would pass after patent, and that understanding was not revealed by the claimants. Because "the purpose and necessary effect of the conspiracy complained of was to obtain the lands of the United States by the suppression of facts which, had they been disclosed, would have rendered the acquisition impossible," the patents and entries must be canceled.

The Court of Appeals found that such behavior by the entrymen and those who contracted with them was almost conclusive evidence of fraud against the government, and it was on this basis that the Court held as it did.

By contrast, in the case at bar there is no evidence whatever of any deliberate fraud or any concealment of material facts from concerned officials of the Bureau of Land Management. On the contrary, the parties discussed their agreements on various occasions with BLM officials, who apparently did nothing to suggest to the parties that their arrangements were illegal. That they were illegal is now established beyond dispute, but I am convinced that the parties did not know this, and that they were acting in absolute good faith. Accordingly, I am not assured that the Court of Appeals would reach the same result in this case as it reached in Reed v. Morton, *supra*.

The rescission of the agreement occurred when the parties finally came to the realization that it was illegal. This adequately accounts for the timing of the rescission, which seems a matter of considerable concern to the majority. In my view, the fact that the agreement was nullified after the expiration of the term of the entries, rather than before, is of no great significance.

Finally, the majority concludes that one of the circumstances which militate against granting relief in this case is that, "The

entries will pass to patent subject to a huge lien held by Pima who in all likelihood will again have control of these entries." I submit that this is not only unwarranted and conjectural, but that it is none of the business of this Board. It is not shown that the "huge" lien is in excess of the value of the land, so that the entrymen would be moved to default rather than retire the lien. Nothing is known to the Board concerning the financial standing or credit of the entrymen. Moreover, by 43 CFR 2521.4(d), a desert-land entryman may mortgage his interest in the entered land if the State law treats such a mortgage as a lien against the entered lands rather than a conveyance thereof. Were this a perfectly ordinary case involving such a mortgage lien, this Department would not and could not refuse the patent merely out of concern that the entryman might not pay off the balance owing on the mortgage, and thereby lose title after the patent issued. Yet that is one of the concerns of the majority in this case.

I would, after some hesitation, affirm the decision of the Administrative Law Judge, with a modification of his decision to the effect that the statutory life of Inez May Pearson's entry, LA-039326, expired 19 months after the Departmental decision styled Mrs. Inez May Moore Pearson, A-30507 (March 31, 1966). The basis for that modification may be found in the rationale of Killen v. Davidson, A-28871 (August 8, 1962), and in this I concur with the majority.

Edward W. Stuebing,  
Administrative Judge.

