

Editor's note: 82 I.D. 377; Reconsideration denied by order dated Oct. 14, 1975

WALLACE S. BINGHAM

IBLA 75-343

Decided August 11, 1975

Appeal from the decision of Administrative Law Judge Robert W. Mesch canceling Desert Land Entry Idaho 186.

Reversed.

1. Desert Land Entry: Generally -- Desert Land Entry: Applicants

Except in Nevada, no person shall be entitled to make entry of desert lands unless he is a resident of the state in which the land is located. An applicant's conditional, future-oriented intention to reside in the state is insufficient to qualify.

2. Desert Land Entry: Assignment -- Desert Land Entry: Cancellation

Where an allowed desert land entry was assigned to a qualified individual and the assignment was duly approved, a subsequent determination that the entry was illegal from its inception because the original entryman was not qualified will not afford a basis for cancellation of the entry where it is established that the assignee was unaware of his assignor's lack of qualifications and proceeded in good faith to develop the entry.

3. Desert Land Entry: Distribution System

Neither the law nor the regulations prohibit the use of a portable aluminum pipe irrigation system in the reclamation of lands in a desert entry, nor is there any affirmative requirement that the irrigation system or specific components thereof be permanently installed on the entry.

4. Regulations: Generally -- Regulations: Interpretation

A regulation should be so clear that there is no basis for a patent applicant's noncompliance with it before it may be so interpreted as to deprive him of a statutory right to receive title to his desert land entry.

If there is doubt as to the meaning and intent of a regulation, such doubt should be resolved favorably to the applicant.

Appearances: Richard H. Greener, Esq., Kidwell and Greener, Boise, Idaho, for the appellant; Riley C. Nichols, Esq., Office of the Regional Solicitor, Department of the Interior, for the appellee.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

In 1973 the Idaho State Office of the Bureau of Land Management (BLM) initiated contest proceedings seeking the cancellation of a desert land entry designated Idaho 186. The contest complaint charged, in paragraph V, that the entry should be canceled because:

- (a) An irrigation system sufficient for the proper irrigation of all the irrigable lands in the entry has not been installed on the entry.

(b) The entry has not been developed substantially in accordance with the plans filed with the application for entry.

(c) At the time she applied for entry, the contestee's assignor did not intend in good faith to reclaim the land for her own use and benefit.

(d) At the time the entry was allowed, the contestee's assignor did not intend in good faith to reclaim the land for her own use and benefit.

The hearing was conducted on June 28, 1973, at Shoshone, Idaho, by Administrative Law Judge Dent D. Dalby. 1/ After receipt of the evidence on the four original charges, the contestant withdrew charge V (b) of the complaint, as the evidence indicated only a slight deviation from the original plan of irrigation, for which there appeared to be good reason 2/ (Tr. 254). However, during the course of the hearing a question arose as to the residence qualifications of the original entrywoman,

1/ Judge Dalby retired from Government service on August 3, 1974. The case was then assigned to Administrative Law Judge Robert W. Mesch for initial decision. See 5 U.S.C. § 554(d).

2/ The elimination of this charge was not noted in Judge Mesch's decision.

Mrs. Maribah Winsor, whereupon Judge Dalby allowed the complaint to be amended to add the following charge:

(e) The contestee's assignor was not a resident of the State of Idaho at the time she applied for entry, or at the time the entry was allowed. (Tr. 232-235.)

The hearing was continued to provide the contestee an opportunity to meet the allegation added to the complaint during the hearing. The parties subsequently agreed that a further hearing was not necessary and in lieu thereof they submitted, as a joint exhibit, a deposition of the contestee's assignor taken on May 21, 1974, in Boise, Idaho.

[1] After studying the record and the briefs submitted by respective counsel, Judge Mesch found no need to consider any issue other than the following:

1. Was the original entrywoman, the contestee's assignor, a resident citizen of the State of Idaho at the time she applied for entry or at the time the entry was allowed and, if not, was the entry illegal in its inception?

2. If the entry was illegal in its inception, is the contestant estopped, as alleged in the contestee's brief, "from denying the issuance of a patent for the entry to Mr. Bingham by virtue of his status as a bona fide purchaser?"

In 1891, the Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. § 321 et seq., was amended by adding the following:

Excepting in the State of Nevada, no person shall be entitled to make entry of desert lands unless he be a resident citizen of the State or Territory in which the land sought to be entered is located.

(Act of March 3, 1891, 26 Stat. 1096, 43 U.S.C. § 325 (1970)).

The entry of Idaho land was applied for and allowed to Mrs. Maribah Winsor, whom Judge Mesch found to be a resident of the State of Utah. The entrywoman's daughter and son-in-law were residents of Idaho, and each of them had previously entered lands pursuant to the Desert Land Entry Act and received patents to their respective entries, thereby disqualifying them from making any further entries under the Act. Mrs. Winsor had established a regular practice of some 18 years' duration of spending a substantial portion of the late summer and early fall visiting her daughter's family in Idaho, where she assisted them by performing various services around the farm. This involved

frequent commuting between her home in Utah and her daughter's home in Idaho. The services she performed were not regarded by the families as employment, although her son-in-law, Fred Stewart, testified that he did cover the cost of her transportation back and forth, by automobile, train and bus. The land at issue was adjacent to land privately owned by Stewart, who testified that he assisted his mother-in-law with the filing of the application, financial negotiations and improvement of the entry in an effort to get the Winsors back into farming, "to get Father Winsor up there [from Utah] to pretty well supervise this whole operation," and to help to repay Mrs. Winsor for her past efforts.

Nevertheless, about a year after the entry was allowed arrangements were made by Stewart to sell the entry and the adjacent private land of Stewart to the appellant, Wallace Bingham. The sale was consummated and Bingham then proceeded to improve and to farm the entry.

It was Mrs. Winsor's testimony that at the time she applied for the entry and at the time it was allowed, she intended to be a resident of Idaho. However, she qualified this intention, and made it prospective, by conditioning her establishment of residency in Idaho on success in obtaining the entry and, presumably, the requisite financing, stating, "if we knew that it was to be ours and if things had gone right for us." (Tr. 66.)

There is absolutely no evidence that Mrs. Winsor has ever been a resident of Idaho other than her own conditional, future-oriented statement that she intended to be one. To the contrary, all of the considerable evidence which was adduced on this issue and recounted in the decision below indicates that at all times material to this inquiry she was in fact a resident of Utah, and Judge Mesch so found.

On the basis of his finding that the entry was thus illegal in its inception, Judge Mesch, by his decision of January 8, 1975, canceled the entry without reference to any of the other charges in the contest complaint. Wallace Bingham appeals from that decision.

We concur with the finding that Mrs. Winsor was not qualified to make the entry by reason of her non-residence, and that the entry was illegal from its inception.

[2] However, we cannot agree that the lack of the assignor's qualification should result in the cancellation of the entry in the possession of a bona fide assignee who, apparently, is qualified to hold the entry.

By taking an assignment of a desert-land entry, the assignee is substituted for the original entryman, and his rights under the entry are the same as they would have been had he made the

entry in the first instance. By assignment the entry becomes his entry, and the date thereof is when it was first made. Albert A. Bandy, 41 L.D. 82 (1912).

A number of Departmental decisions have held that where an assignee who is qualified under the desert-land law receives his assigned entry from an intermediate (mesne) assignor who was not so qualified, the lack of qualification of the assignor does not invalidate the entry, notwithstanding that section 2 of the Act of March 28, 1908, as amended, 43 U.S.C. § 324 (1970), declares that assignments to disqualified persons and to associations shall not be allowed or recognized. Amos N. S. Kelly, 50 L.D. 268 (1924); Ruple v. DeJournette (On Rehearing), 50 L.D. 139 (1923); Augusta Ernst, 42 L.D. 90 (1913). The only distinction between these cases of disqualified assignors making assignments to qualified assignees and the circumstances of the case at bar is that the foregoing cases all involved mesne assignees, whereas in the instant case the disqualified assignor was the original entrywoman. However, we fail to see how this distinction requires a different result, particularly in light of the discussion in Augusta Ernst, *supra*, at 92:

A desert land entryman is permitted to assign his entry, and if such transferred or assigned entry be found by the Government in the hands of a person qualified to hold, the title should not be questioned simply because an intermediate transferee was not qualified to hold. The Government would not knowingly

approve a transfer which would fix title in one not qualified to take, but where one qualified to hold is asking recognition of a transfer of an apparently valid entry, no reason is seen, in the light of the principles above illustrated, why such transfer should not be recognized and approved, even though the prior holder was disqualified.

In this case the BLM allowed the entry to Mrs. Winsor without knowing that she was not qualified, and subsequently approved the assignment to Bingham, whose qualification has not been challenged.

A further illustration that an entryman cannot influence the status of the entry after it has been assigned is found in Sharp v. Harvey, 16 L.D. 166 (1892). That case held that where an entryman assigned his desert-land entry to another by an assignment which was recognized under Departmental regulations, the right of the assignee could not be defeated by the subsequent relinquishment of the entry by the original entryman.

Of course, our conclusion that the assignee holds the entry in his own right and is unaffected by the disqualification of his assignor is dependent upon a finding that the assignee took the assignment in good faith, without knowledge of any defect in the entry or in his assignor's right thereto. That problem does not arise in this instance, as the contestant stipulated to Bingham's good faith at the hearing (Tr. 45): 3/

3/ Both Mrs. Winsor and Bingham testified that they had never met prior to the hearing, Stewart having acted as intermediary in effecting the assignment.

MR. GREENER: Prior to may cross examination, Your Honor, I believe that Counsel will stipulate with the contestee that at this point in time the Government is not contesting in any way the good faith of Mr. Bingham.

MR. NICHOLS: The Government so stipulates, Your Honor.

JUDGE DALBY: All right, it is so stipulated.

Appellant cites United States v. Detroit Timber and Lumber Co., 200 U.S. 321 (1906), for the proposition that the Government is estopped to deny the title of a bona fide purchaser. Judge Mesch held that case to be inapplicable, in that there patents had been issued by the United States prior to the commencement of the proceedings. While we are of the opinion that the case at bar is not one which presents an example of estoppel against the United States, we consider the Court's opinion in Detroit Timber and Lumber Co. to be relevant:

* * * The equity is founded on the rightful conduct of the purchaser and not on the wrongful conduct of the entrymen. It upholds the purchaser in his honest purchase notwithstanding the wrongful character of the entries. This is akin to the ordinary rule in respect to a bona fide purchaser. Equity sustains the title in spite of the fact that his grantor may have wrongfully obtained it, and upholds it because of his rightful conduct. (Emphasis supplied.)

200 U.S. at 336.

Immediately following the quoted passage the Court examined and rejected the argument of counsel that a purchaser from an entryman cannot be regarded as a bona fide purchaser unless he

becomes such after the Government, by issuing a patent, has parted with the legal title.

Accordingly, we hold that where an allowed desert land entry was assigned to a qualified individual and the assignment was duly approved, a subsequent determination that the entry was illegal from its inception because the original entryman was not qualified will not afford a basis for cancellation of the entry where it is established that the assignee was unaware of his assignor's lack of qualification and has proceeded in good faith to develop the entry.

[3] The only remaining charge which concerns the appellant's entitlement to receive a patent is V (a), to the effect that he has not installed on the entry an irrigation system sufficient for the proper irrigation of all of the irrigable land in the entry.

The charge, as so expressed, is an appropriate one. However, it developed at the hearing that the contestant is primarily concerned with the fact that Bingham has reclaimed and irrigated the entry lands by using the same portable aluminum mainlines and laterals which he also uses to irrigate his adjacent private lands. It is the Government's contention that a portable irrigation system, no matter how efficient, will not satisfy the requirements for patent, but that, rather, the mainlines of the irrigation system must be permanently installed on the entry (Tr. 194).

The Department has long recognized that the Desert Land Act does not prescribe a particular mode of irrigation and by Departmental rulings it early on required the method of irrigation to be such as would evince the good faith of the claimant and render the land suitable for agriculture. See Vibrans v. Langtree, 9 L.D. 419 (1889), a case in which the entryman constructed no ditches or canals for the conveyance of water onto the entry, but instead flooded most of the land during about three months each year by building a dam across a river which ran through the property, thereby providing ample moisture to reclaim the land and achieve good agricultural success. The Department held that this mode of irrigation was satisfactory in view of the claimant's demonstration of his good faith.

The very first reported Departmental decision concerning desert land entries dealt with this issue, holding that there must be a demonstration of a good faith endeavor to irrigate the land, and that the method employed must be such that a sufficient quantity of water is conveyed and distributed on the land to prepare it for cultivation. Wallace v. Boyce, 1 L.D. 26 (1882). The proof was held to be satisfactory where it showed the claimant to be the owner of a quantity of water sufficient to irrigate the land for agricultural purposes, and that he conveyed such water on the land so that it could be used in irrigating the crop. Secretary's Letter to Commissioner,

3 L.D. 385 (1885). The manner of irrigation and distribution of the water is indicative of the good faith of the entryman. George Ramsey, 5 L.D. 120 (1886); Wallace v. Boyce, supra.

The first reference to "permanence" which we have discovered is contained in Orin P. McDonald, 13 L.D. 30 (1891), in which the following points of inquiry were identified as determinative of the sufficiency of a final proof on the issue of reclamation:

* * * 1st, Has water been brought upon the land? 2d, Is it of sufficient quantity to irrigate and reclaim the land, rendering it capable of producing agricultural products? 3d, Is the supply permanent and controlled by the entryman and the means of distribution sufficient?

13 L.D. at 31.

It will be noted that the concern of the Secretary was that the water supply and the entryman's control of it be permanent, not that the irrigation works be permanent. This view comports with the requirement in the current regulation, 43 CFR 2521.2(d), which refers to the entryman's showing that he has "a right to the permanent use of sufficient water to irrigate * * *."

Section 7 of the Act of March 3, 1891, 26 Stat. 1096 (1891), 43 U.S.C. § 329 (1970), speaks of minimum expenditures for "* * * irrigation, reclamation, and cultivation of the land by means of main canals and branch ditches, and in permanent improvements upon the land and in purchase of water rights * * *." We cannot

construe this to mean that the irrigation system must be permanent; the reference to permanent improvements could just as easily refer to fences, buildings, roads and physical land improvements, such as clearing, grading, etc. See Instructions, 50 L.D. 443, 455 (1924).

In the appeal of United States v. Swallow, A-30000 (April 8, 1965), it was noted that at the hearing, "there was a confusion of the issues to be resolved * * * e.g., the arguments over whether the main pipeline had to be permanently attached to the land * * *." This merely suggests that the Department regarded the question as an appropriate one for argument. The case was remanded for rehearing and was the subject of a second appeal to the Department, United States v. Swallow, 74 I.D. 1 (1967), but it does not appear that this precise question was resolved in that case.

The language of the decision in Clinton C. Douglass, Jr., A-28961 (September 20, 1962), would certainly suggest that a portable system would be acceptable if it were of sufficient capacity, extent and condition to do an adequate job of irrigation. That decision states:

Since the appellant planned to utilize a portable system of sprinkler irrigation pipes and fixtures, it was, of course, unnecessary that these pipes and fixtures be affixed to the land in a permanent fashion.

However, it was necessary that he have sufficient pipe and fixtures actually on the land and set up in a manner which would permit him to demonstrate a successful irrigation of a sufficient portion of the entry which would point to the conclusion that, by merely moving the equipment, all other portions of the entry, comprising the entire irrigable acreage, could be successfully irrigated.

The decision affirmed the partial rejection of Douglass' final proof and canceled part of his entry not because he used a portable system, but because it was inadequate to serve the entire entry, and because he had an insufficient water right.

The contestant argues that permanent main conduits are required by 43 CFR 2521.6(f). That regulation reads, in pertinent part, as follows:

* * * The final proof must clearly show that all of the permanent main and lateral ditches, canals, conduits, and other means to conduct water necessary for the irrigation of all the irrigable land in the entry have been constructed so that water can be actually applied to the land as soon as it is ready for cultivation. * * *

We are unable to translate this employment of the adjective "permanent" into a mandatory requirement that all desert land irrigation systems must be permanently affixed to the land. Were we able to do so, however, we could not limit the requirement only to the main lines, as contestant asserts is intended, but we would

be obliged to hold that the adjective refers to laterals, conduits and other means to conduct water as well, so that the entire system would have to be permanently installed. The Department has never required this. See United States v. Swallow, 74 I.D. 1, 11 (1967); Clinton C. Douglass, Jr., *supra*.

[4] The use of the word "permanent" in the regulation must be considered ambiguous at best if it is to be construed as imposing a requirement not articulated elsewhere in the law or the regulations. Regulations should be so clear that there is no basis for an applicant's noncompliance with them before they are interpreted so as to deprive him of a statutory right. Louis Alford, 4 IBLA 277 (1972); Mary I. Arata, 4 IBLA 201, 78 I.D. 397 (1971). If there is doubt as to the meaning and intent of a regulation, such doubt should be resolved favorably to the applicant. Mary I. Arata, *supra*; A. M. Shaffer, 73 I.D. 293 (1966); Madge V. Rodda, 70 I.D. 481 (1963); William S. Kilroy, 70 I.D. 520 (1963); Jack V. Walker, A-29402 (July 22, 1963). Had it been the intention of the Secretary to impose a mandatory requirement that irrigation systems, or specific components thereof, be permanently installed on the entry, he could easily have done so by promulgating an explicit regulation to that effect. This has not been done.

Testimony elicited at the hearing suggests that there may well be good reason for not prohibiting the use of portable

irrigation systems. Three witnesses testified concerning the advantages of a portable system over a permanent one. ^{4/} Among these are:

(1) Where a line is permanently installed it must be buried at least 2 1/2 feet below the surface in order to prevent it from being damaged by equipment and to allow mechanical cultivating and harvesting. Where the field is rocky the cost of burying the line to the proper depth, including blasting, can be excessive (Tr. 262). Crops along a permanent line leave "a tremendous strip" on both sides, which must be avoided by tractors and cultivators and which must be worked by a hired "hand crew to come in and hoe these potatoes" (Tr. 263); but portable line can be picked up and set off in a pile to allow the machines to work (Tr. 263, 282).

(2) Maintenance problems are more difficult to handle on buried permanent lines. With a hot sun there will be "a tremendous amount of fluctuation * * * and you have a terrible lot of trouble with these risers that come from the ground up to where this valve [to a lateral line] fits in,

^{4/} Fred Stewart, a farmer of 35 years' experience; James H. Westfall, with 30 years' experience, Grant L. Butler, 22 years' farming experience. All are currently farming in the vicinity and all have made extensive use of portable irrigation systems. The recitation of the advantages of such a system is a condensation of their several testimonies.

breaking off" (Tr. 274). Permanent steel lines will eventually rust and have to be replaced, and careless workers damage a lot of a permanent system by trying to work equipment too close to it (Tr. 278, 279). Portable pipe sections can easily be removed for repair and replaced (Tr 286). Moreover, portable pipe is not damaged as often; "You don't get near the busting -- you don't bust these pipes, portable. * * * I never hardly ever replace them" (Tr. 282).

(3) A portable system requires a much lower initial capital outlay at a time when the farm developer's other costs are very high. With proper diversification of crops a smaller portable system can be moved as needed to serve a large area. Moving pipe involves additional labor, but it saves on investment costs (Tr. 268, 274, 275, 277, 280, 281).

The concern of the contestant and the Bureau employees who testified appears to be that unless the system is permanently installed, the entryman might remove it after obtaining patent, and discontinue farming the land, perhaps even using the same system to qualify another entry for patent (Tr. 197-198). Although there was no evidence adduced to indicate that the entryman intended any such thing, the Bureau's Realty Specialist testified, "You see, the potential exists * * *" (Tr. 198).

The record clearly establishes that nearly all the land in the 261 acre entry had been brought under cultivation, and that the water supply from four wells on appellant's adjacent private land is adequate to irrigate both the private land and the entry. Moreover, all the witnesses, including the contestant's, 5/ agreed that the portable irrigation system is of sufficient size to irrigate both the entry and the adjacent private lands, and although the system is not capable of watering all of the lands simultaneously, as would be necessary if they were all planted with the same crop, in the words of James Westfall, "I don't think anybody would plant that way" (Tr. 287).

It is quite apparent that the contestant's objection to a portable system is not based (in this case) on a finding that it is inadequate for the proper irrigation of the entry as well as the adjacent private land of the entryman. Cf. Clinton C. Douglas, Jr., supra. Rather, the contestant is demanding the installation of a more extensive, permanently installed system as a demonstration of the entryman's good faith, not only in this case, but as a general requirement which all desert land entrymen must meet.

5/ The contestant's chief witness, Realty Specialist Donald Runberg, testified that if the entry was patented the appellant would not have to buy any more pipe to farm the total area of the entry and the adjacent private land, assuming that he planned his farming operation so that he did have to irrigate too much at once (Tr. 204, 205).

We find this position to be untenable. If there were other evidence sufficient to raise serious doubt that the entryman's efforts constituted a good faith endeavor to reclaim the land for the purposes of the Act, then his use of a portable system might be considered contributive to the overall evidentiary picture. But where, as here, there is nothing to suggest that the entryman has any other motive than to reclaim and farm the land for his own benefit, his use of a portable irrigation system is of no significance.

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 reversed.

Edward W. Stuebing
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

Martin Ritvo
Administrative Judge

