

UNITED STATES

v.

JOE W. BRYANT

IBLA 75-12

Decided June 23, 1976

Appeal from order of Administrative Judge John R. Rampton, Jr., dismissing contest against Alaska homestead entry A-064051.

Reversed and remanded.

1. Alaska: Homesteads--Homesteads (Ordinary): Final Proof

In proper circumstances, the issuance of an order to show cause why final proof should not be rejected and entry canceled, is within the discretionary authority of the Bureau of Land Management in adjudicating a homestead application.

2. Alaska: Homesteads--Homesteads (Ordinary): Final Proof

Under section 7, Act of March 3, 1891, 26 Stat. 1098, as amended, 43 U.S.C. § 1165 (1970) an order to show cause why final proof should not be rejected and entry canceled, which order requires the showing of a material fact, is considered a contest or protest.

3. Alaska: Homesteads--Homesteads (Ordinary): Final Proof

The showing of "kind of crop planted" and "quantity of crop harvested" are reasonable requirements for final proof submitted for an Alaska homestead.

4. Alaska: Homesteads--Contests and Protests: Generally-- Homesteads (Ordinary): Contests -- Homesteads (Ordinary): Final Proof -- Rules of Practice: Government Contests -- Words and Phrases

"Final entry." When an amended homestead final proof has been submitted, the term "final entry" in the proviso in section 7, Act of March 3, 1891, 26 Stat. 1098, as amended, 43 U.S.C. S 1165 (1970) refers to the submission, to the proper officials, of the amended final proof and required fees.

5. Alaska: Homesteads--Contests and Protests: Generally-- Homesteads (Ordinary): Contests--Homesteads (Ordinary): Final Proof--Rules of Practice: Government Contests

Under section 7, Act of March 3, 1891, 26 Stat. 1098, as amended, 43 U.S.C. § 1165 (1970) which requires issuance of a patent 2 years after receipt upon final proof for a homestead entry, a contest against an entry should not be dismissed where the complaint was filed within 2 years following the submission of additional affidavits amending the entryman's deficient final proof, despite the fact that the receipt in connection with the deficient proof had been issued more than 2 years before filing of the complaint and the receipt had never been canceled or a new receipt issued.

APPEARANCES: James R. Mothershead, Esq., Office of the Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the United States, appellant; Charles R. Tunley, Esq., Anchorage, Alaska, for appellee.

OPINION BY ADMINISTRATIVE JUDGE GOSS

The Bureau of Land Management (BLM) has timely appealed from an order of Administrative Law Judge John R. Rampton, Jr., dated May 29, 1974, dismissing its complaint against Joe W. Bryant involving Homestead Entry A-064051. The appeal calls for the construction of the following proviso in section 7 1/ of the Act of March 3, 1891, 26 Stat. 1098:

1/ While the proviso is included in 43 U.S.C. § 1165 (1970), Title 43 has not been enacted into law.

* * * Provided, That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry [2/] of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

The Judge determined that this proviso bars a contest of Bryant's homestead entry.

On November 6, 1970, Bryant filed his final proof and obtained a receipt. On December 10, 1970, the Alaska State Office, Bureau of Land Management, issued a notice directing Bryant to show cause why his final proof should not be rejected and his entry canceled. The notice stated that the final proof testimonies of both witnesses showed a failure to meet the cultivation requirements for 3 years, and that Bryant's military service excused the required cultivation for only 2 years. On January 6, 1971, Bryant filed affidavits stating that 20 acres were reseeded and recultivated with orchard grass during the fifth entry year. On January 4, 1973, the BLM initiated the contest 3/ by filing a complaint against Bryant charging that the cultivation requirements had not been met.

Bryant has argued that the contest must be dismissed because issuance of any show cause order was beyond the authority of the Bureau, and the 2-year period ended before the government filed its complaint. BLM has contended that the 2-year period was tolled by the show cause order and that the 2-year period commenced anew with the filing of the affidavits on January 6, 1971. The Judge determined that the only appropriate Bureau action with respect to Bryant's final proof was either acceptance or rejection, and that the show cause order was an unauthorized act which could have no effect in tolling the 2-year period. The Judge thereupon dismissed the complaint.

[1] The argument that issuance of any show cause order was unauthorized is without merit. This Board has referred to the

2/ Receipts formerly issued by receivers are now issued by other designated personnel in the Bureau of Land Management. See e.g. 43 CFR 1862.6(a), n. 1. The term "final entry" is treated as referring to the submission of final proof. E.g., Zwang v. Udall, 371 F.2d 634 (9th Cir. 1967).

3/ 43 CFR 4.450-3, 4.451-2.

practice in a number of cases, e.g., Dock W. Jones, Jr., 10 IBLA 303, 304 (1973). The Board itself has ordered suspension of action rather than rejection in certain cases where the final proof submitted by an entryman was insufficient on its face. James R. Murphey, 20 IBLA 129 (1975); Lon Philpott (On Reconsideration), 16 IBLA 285 (1974); Robert W. Blondeau, 1 IBLA 8 (1970). In proper circumstances, the issuance of an order to show cause why final proof should not be rejected and entry canceled is within the discretionary authority of the BLM. It is not necessary that in all instances the final proof be rejected.

[2] The principal issue herein concerns application of the phrase in section 7, "date of the * * * receipt upon the final entry." Because of the longstanding Departmental interpretation of section 7, discussed infra, it is necessary to consider the effect of the show cause order and the filing of the additional affidavits. Bryant argues that the show cause order was not sufficient to toll the 2-year period, i.e., that it did not initiate a protest or contest within the meaning of the proviso.

While the show cause order was not pending after appellee submitted additional data in response thereto, the effect of the order is important in determining whether such data should be treated as an amendment to proof, without which his proof would properly have been rejected. Under Jacob A. Harris, 42 L.D. 611, 614 (1913), 4/ it is clear the show cause order constituted a contest or protest:

Upon mature consideration, the Department is convinced that a contest or protest, to defeat the confirmatory effect of the proviso, must be a proceeding sufficient, in itself, to place the entryman on his defense or to require of him a showing of material fact, when served with notice thereof; and, in conformity with the well established practice of the Department, such a proceeding will be considered as pending from the moment at which the affidavit is filed, in the case of a private contest or protest, or upon which the Commissioner of the General Land Office, on behalf of the Government, requires something to be done by the entryman or directs a hearing upon a specific charge.

 4/ The Court in Zwang, supra, n. 2, has considered the Department's authority to determine what constitutes a contest or protest for the purposes of the proviso, and ruled at 638:

"The determination of whether a contest or protest has been initiated within the statutory period lies within the discretion of the Secretary. The discretionary action of the Secretary should not be set aside unless his conclusion can be said to be capricious or arbitrary or so unreasonable as not to be tenable."

The Harris decision and the history of section 7 are discussed in detail in Marvin M. McDole, 70 I.D. 506, 507-08 (1963):

Section 7 of the 1891 act applies only where there is no pending "contest or protest" against the validity of an entry after the lapse of two years from the issuance of the receipt. Its purpose was to prevent undue delay in acting upon final proof; the period of limitation is tolled while a case is being closed following a timely challenge of final proof.

Shortly after the passage of the 1891 act, the Department considered the question as to what proceedings would remove a case from the operation of the act. In instructions issued on May 8, 1891 (12 L.D. 450, 452), the Department stated that "when there are no proceedings initiated within that time [the two-year period] by the government or individuals the entryman shall be entitled to patent * * *." In further instructions issued on July 1, 1891 (13 L.D. 1, 3), the Department defined the word "proceedings" as

* * * including any action, order or judgment had or made in your office [Commissioner of General Land Office] canceling an entry, holding it for cancellation, or which requires something more to be done by the entryman to duly complete and perfect his entry, and without which the entry would necessarily be canceled.

The same view was expressed in a later decision and instructions. Jacob A. Harris, 42 L.D. 611 (1913); Instructions, 43 L.D. 322 (1914). And, in Lane v. Hoglund, 244 U.S. 174 (1917), the Supreme Court cited and indicated its approval of the instructions and the Harris decision. [Emphasis added.]

Appellee argues that the show cause order herein only requested clarification of inconsistencies and thus did not meet the Harris test. This argument is apparently based on the following polite language in the show cause order:

It is possible that the entryman and his witnesses made an error in showing on the final proof testimonies the years the cultivation was actually performed. If

so, 5/ the entryman and his witnesses should clarify this matter by submitting notarized statements clearly showing which years the cultivation was actually performed and how much was cultivated each year.

However, the show cause order further states:

The final proof testimonies of both witnesses shows failure to cultivate the required amount during the second, third, and fifth entry years.

* * * * *

Since the entryman is a veteran with over 19 months' creditable military service, he may use such service credit to satisfy the cultivation requirements of the homestead law for any two of the four entry years during which cultivation was required. However, he must show compliance with the cultivation requirements of the law for the two remaining entry years. The Department has consistently held that the cultivation requirements of the homestead law are mandatory and cannot be waived, and that a final proof which shows on its face that these requirements have not been met must be rejected and the entry canceled.

The entryman is allowed 30 days from receipt of this notice within which to submit sworn statements clarifying his cultivation, being sure to clearly show the years during which the cultivation was performed or show cause why his final proof should not be rejected and his entry canceled. Failure of the entryman to take one of the above actions within the time allowed will result in rejection of the final proof and cancellation of the entry.

The show cause order unambiguously challenged the adequacy of Bryant's final proof and required him to make an additional showing and thus clearly met the test set forth in Harris, i.e., appellee was placed "on his defense" and required to make "a showing of material fact."

[3] Bryant, however, asserts that his final proof was not invalid on its face so that additional affidavits were not necessary. He recognizes that his final proof and witnesses' testimony

5/ Emphasis added.

submitted on November 6, 1970, only showed agricultural use in 1967 and 1969 in the spaces provided on the forms (Part 11 of the final proof form and Part 8 on the witnesses' forms). However, Bryant points to that section of the forms in which the character of the land is to be described, where he and his witnesses state that 20 or 25 acres are "now cultivated" (Part 7 of the witnesses' forms and Part 10 of the final proof form). Bryant argues that this is adequate to assert cultivation during the fifth entry year and thus makes the final proof valid on its face.

The question presented is a question of degree. Certainly a form which was almost entirely blank could hardly be termed a final proof at all. Bryant's proof for the fifth entry year clearly does not show the cultivation of a "crop other than native grasses" as required by regulation. 43 CFR 2567.5(b) (1975), formerly 43 CFR 2211.9-5(b). The showing of "KIND OF CROP PLANTED," as required in Parts 11 and 8 of the respective forms and "QUANTITY OF CROP HARVESTED" in Part 11, are reasonable requirements as a proof of cultivation. The final proof submitted on November 6, 1970, was therefore not acceptable as a basis for the patenting of valuable Federal land, and the show cause order effectively notified Bryant that it was essential to submit additional information.

[4] Appellee could have attempted to rely upon his proof as originally submitted and then appealed to this Board any cancellation of entry. Instead, he chose to amend his final proof by filing additional proof. It is clear that an amendment was required for Bryant "to duly complete and perfect his entry, and without which the entry would necessarily be cancelled." Instructions issued July 1, 1891, quoted supra. Bryant's position is thus substantially different from that of the entryman in Stockley v. United States, 260 U.S. 532 (1923), who had submitted what was apparently complete final proof with the required information properly filled in. In Stockley the Supreme Court stated at 538-41:

The evidence shows that prior to the passage of the statute, and thereafter until 1908, the practice was to issue receipt and certificate simultaneously upon the submission and acceptance of the final proof and payment of the fees and commissions. In 1908 this practice was changed, so that the receipt was issued upon the submission of the final proof and making of payment, while the certificate was issued upon approval of the proof and this might be at any time after the issuance of the receipt. * * *

* * * * *

* * * It was in this sense that the term "final entry" was used in this statute. Having submitted to the proper officials proof showing full compliance with the law, and having paid all the fees and commissions lawfully due, Stockley had done everything which the law required on his part and became entitled to the immediate issuance of the receiver's receipt, and this receipt was issued and delivered to him. * * *

* * * * *

* * * The purpose and effect of the statute are clearly and accurately stated by the Commissioner of the General Land Office in Instructions of June 4, 1914, 43 L.D. 322, 323, in the course of which it is said:

There is no doubt that Congress chose the date of the receiver's receipt rather than of the certificate of the register as controlling, for the reason that payment by the claimant marks the end of compliance by him with the requirements of law. * * *

[Emphasis added.]

It seems clear from Stockley that an entryman who submits inadequate proof is not within the class of entryman which the statute was originally intended to protect. Payment by Bryant did not mark "the end of compliance by him with the requirements of law." The fact that the Department in 1908 changed its practice, so that the receipt is issued upon submission of, rather than acceptance of final proof, should be immaterial in applying the statute, where an entryman in effect admits that his final proof is inadequate and files an amendment thereto. The term "final entry" in the proviso in section 7, Act of March 3, 1891, 26 Stat. 1098, refers to the submission to the proper officials, of amended final proof where such proof is required "to duly complete and perfect his entry." See United States v. Stockley, supra at 540, and Instructions issued July 1, 1891, quoted supra.

[5] In Marvin M. McDole, supra, a desert land entryman submitted his final proof and was issued a receipt on March 27, 1959. The proof was rejected on May 14, 1959, but the receipt issued earlier was not canceled. McDole filed new final proof on July 15, 1959. The land office canceled McDole's entry on July 11, 1961, more than 2 years after the issuance of the receipt but less than 2 years after McDole submitted his new final proof. The Department held that for the purposes of the proviso, the date of the issuance

of receipt upon final proof would be considered as July 15, 1959, when the new final proof was submitted:

There can be no doubt then that the land office decision of May 14, 1959, rejecting McDole's final proof and holding the entry for cancellation unless proper proof were filed within the time allowed, stopped the operation of section 7 of the 1891 act which had commenced with the issuance of the receipt on March 27, 1959. New final proof was not filed until July 15, 1959, and before two years from that date elapsed the proof was rejected and the entry canceled as to the NE 1/4 sec. 34.

It is true that the money paid by McDole and receipted for on March 27, 1959, was not returned to him with the decision of May 14, 1959. That payment, however, having been made in connection with a final proof which was rejected outright on May 14, 1959, could not serve to effect a relation back to March 27, 1959, for the purpose of determining the running of the two-year period specified in section 7 of the 1891 act. Rejection of the proof on May 14, 1959, no appeal therefrom having been taken, closed out that phase of the case. Moreover, failure to return the money receipted for could not have prejudiced McDole since it relieved him of what would otherwise have been the necessity to have made a new payment when the new proof was submitted on July 15, 1959. For the purposes of the operation of section 7 of the 1891 act, the money that remained on deposit will be considered as having been paid and receipted for on July 15, 1959. To conclude otherwise would be to produce the absurdity that, if McDole had failed for two years to submit new proof as required, the Department would be compelled to issue him a patent merely because it had failed to close out his case and refund his money.

Id. at 508.

Appellee attempts to distinguish McDole from the instant case by pointing out that the land office had rejected McDole's final proof in its entirety while Bryant was only issued a show cause order. Under Lane v. Hoglund, *supra*, and Harris, *supra*, however, the show cause order is a "protest or contest." Both McDole and Bryant were notified of the deficiencies in their final proof, and in neither case was there a cancellation of the receipt issued upon

the deficient proof. Both McDole and Bryant amended their inadequate final proof. The consequences flowing from such amendments are the same, despite any difference in terminology. This construction is in accord with the interpretation in Joseph A. Leman, 59 I.D. 458 (1947). In that case, it was also held that allowing an entryman to amend his application tolled the 2-year period. The period then commenced anew upon filing of the amendment, notwithstanding the fact that a new receiver's receipt was not issued and entryman's proof was never rejected.

As an alternative basis for dismissal of the complaint, it was asserted that even if the show cause order was sufficient to meet the Harris test, the compliance with the show cause order and successful resolution of that proceeding caused the original 2-year period to continue to run without interruption until it expired on November 6, 1972. The cited authority for this proposition is Willie L. Seely, A-30104 (March 1, 1966), but Seely is readily distinguishable because it did not involve an essential amendment of final proof. Bryant's submission of affidavits amending his final proof requires application of the McDole rule.

Accordingly, we hold that section 7 provides no basis for dismissing the contest.

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 and the case remanded to the Hearings Division, Office of Hearings and Appeals, for further proceedings. 6/

Joseph W. Goss

Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Anne Poindexter Lewis
Administrative Judge.

6/ Appellee has initiated Bryant v. The Secretary of Interior, Civil Action No. A76-84 CIV (D. Alaska, filed April 27, 1976).

