

RALPH G. FAULKNER, ET AL.

IBLA 76-460, 76-469

Decided July 26, 1976

Appeal from actions of the Idaho State Office, Bureau of Land Management, denying acceptance of desert land petition-applications, I-10568.

Affirmed as modified.

1. Applications and Entries: Generally -- Desert Land Entry:
Applications

When lands have been classified under a final order of the Secretary of the Interior as being unsuitable for disposal under the desert land laws, a desert land entry petition-application will not be allowed therefor and any payment submitted therewith will be returned. Should there be a subsequent reclassification as suitable for disposal under the desert land laws, the land will be opened to entry on an equal opportunity basis.

2. Applications and Entries: Generally -- Desert Land Entry:
Applications

One who submits a desert land entry petition-application for lands which have been classified as being unsuitable for disposal under the desert land laws gains no preference right to such lands should they be reclassified as disposable under the desert land laws. Lands which are reclassified as suitable for disposal will be opened to entry on an equal opportunity basis.

3. Applications and Entries: Generally -- Desert Land Entry:
Applications

A desert land entry petition-application for land classified as being unsuitable for disposal under the desert land laws may not be held in suspense pending the possible future availability of the land.

APPEARANCES: William F. Ringert, Esq., Anderson, Kaufman, Anderson & Ringert, Boise, Idaho, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Appellants 1/ have appealed from actions of the Idaho State Office, Bureau of Land Management (BLM), denying the acceptance for filing of their desert land entry petition-applications. All the appeals involve identical issues.

Appellants submitted desert land entry petition-applications for lands which had previously been classified as unsuitable for entry under the desert land laws. BLM declined to accept the petition-applications, explaining that according to 43 CFR 2450.6(a), all petition-applications which are inconsistent with the land classification will not be allowed and any payments submitted will be returned. Appellants were informed that the classification would be reviewed and, if the lands were reclassified, they would be opened to the public on an equal opportunity basis.

This is, apparently, appellant Ralph G. Faulkner's third attempt to file a desert land entry petition-application for the same lands. On two previous occasions, one in 1974 and one in 1975, the State Office refused to accept his petition-application for the same reasons stated above. In 1975 BLM stated that no reclassification of the land would be undertaken until the management framework plan for the unit encompassing the applied-for lands was completed, which was estimated to be sometime in 1976.

Ralph G. Faulkner's present petition-application was submitted on January 8, 1976. Counsel for Mr. Faulkner requested that the application be filed, noted on the records, and the lands re-examined

1/ By order dated February 24, 1976, this Board consolidated the appeal of Ralph G. Faulkner, IBLA 76-460, and the appeals of John L. Faulkner, Susan L. Faulkner, Laura Jo Faulkner, and R. Fred Faulkner, IBLA 76-469, under the designation IBLA 76-460. All the cases had been assigned serial number I-10568 at the State Office level.

and reclassified. By decision dated January 19, 1976, the State Office, citing the reasons set forth above, refused to accept the petition-application and returned the payment. Subsequently, the other petition-applications which are the subject of this appeal were submitted and denied acceptance.

BLM did not advise appellants that they had any appeal rights from the action taken in refusing to accept the petition-applications. However, appellants have filed the appeals herein.

The regulation, 43 CFR 4.410, governing who may appeal to the Board provides that "any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management * * shall have a right to appeal to the Board." It is apparent in view of the above-quoted regulation that appellants are within the class intended to be covered by the regulation. Appellants were adversely affected by the State Office decision not to accept the petition-applications. Therefore, it is proper for this Board to entertain these appeals. 2/

[1] The lands sought by appellants have been classified under a final order of the Secretary as unsuitable for desert land entry. The effect of a final classification order of the Secretary is set forth in 43 CFR 2450.6(a) which reads:

A final order of the Secretary shall continue in full force and effect so long as the lands remain subject to classification under the authorities cited in Subpart 2400 until an authorized officer revokes or modifies it. Until it is so revoked or modified, all applications and petition-applications for the lands not consistent with the classification of the lands will not be allowed. Any payments submitted therewith will be returned. If the order is revoked or modified, the land will be opened to entry on an equal-opportunity basis after public notice in accordance with applicable regulations for the purpose for which it may be classified.

2/ Had the BLM decision concerned a notification of land classification, appellants would have been foreclosed from appealing pursuant to 43 CFR 2450.5(d), which reads:

"No petitioner-applicant or protestant to a proposed classification decision of a State Director to whom the provisions of this section are applicable shall be entitled to any administrative review other than that provided by this section or to appeal under provisions of Parts 1840 and 1850 of this chapter."

Appellants argue that they have a right to have their petition-applications accepted and filed and that it was erroneous for BLM not to accept the petition-applications. They also contend that the BLM action deprived them of their right of preference guaranteed by section 7 of the Taylor Grazing Act, 43 U.S.C. § 315f (1970).

Appellants assert that the words "will not be allowed" in 43 CFR 2450.6(a) do not foreclose the acceptance of their petition-applications. Appellants believe the proper procedure for BLM to follow is to accept and file the petition-applications and then, in light of evidence submitted with the petitions and data available to BLM, make a determination as to the proper classification.

BLM took action on these petition-applications based on 43 CFR 2450.6(a), quoted above, and section 2451.13B1 of the BLM Manual. Such section of the BLM Manual explains the procedure to be followed for a petition-application filed after publication of a classification which segregates the lands from disposal under the statute invoked in the petition-application. It states that if sufficient data is available in the State Office "to clearly indicate that the classification is still proper, return the petition-application to the petitioner-applicant, with an explanation of the classification and the reasons why the lands will not be reclassified."

The State Office erred in not accepting appellants' petition-applications for filing. The BLM Manual section relied on by BLM speaks of petition-applications filed after publication of classification. In addition, the acceptance of the petition-applications was required by regulation. 43 CFR 2091.1 states that "except where regulations provide otherwise, all applications must be accepted for filing. * * *"

We must determine whether the fact that BLM failed to accept the petition-application actually prejudiced any rights appellants may have had.

The submission of the petition-applications by appellants entitled them to no present right or interest in the land. The submission merely granted them the right to have their petition-applications considered. See Donna M. Ker, A-28979, A-28980 (August 17, 1962); Fern Hill Hunter, A-27756 (January 13, 1959); William F. Ringert, I 015722 (September 25, 1969).

While BLM failed to accept appellants' petition-applications, it did, in fact, give consideration to them. BLM returned the petition-applications and the payments and informed appellants that if the present land classification was revoked the lands would be opened to the public on an equal opportunity basis.

Close scrutiny of the regulations reveals that BLM essentially followed the proper procedure, aside from the technicality of not accepting and serializing the petition-applications. Had BLM accepted the petition-applications, the same ultimate result would have followed, i.e., rejection of the petition-applications.

[2] Regulation 43 CFR 2450.6(a) states that petition-applications which are inconsistent with the classification of lands made under a final order of the Secretary will not be allowed. And if such order is revoked or modified, the land is opened to entry on an equal opportunity basis. Under such regulation it would be impossible for a petitioner-applicant seeking reclassification of land to obtain a preference right of entry. Appellants claim that section 7 of the Taylor Grazing Act, 43 U.S.C. § 315f (1970), guarantees them a preference right of entry. The part of section 7 relied upon by appellants reads:

* * * That upon the application of any applicant qualified to make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select, or locate such lands if opened to entry as herein provided.

Such section only guarantees a preference right to one who files an application for lands which have never been classified under a final order of the Secretary. If one filed a desert land entry application for certain unclassified lands falling within the purview of section 7, and pursuant to such application the land was classified as suitable for desert land entry, the one who made the application would have a preference right of entry.

Regulation 43 CFR 2450.8, concerning preference rights of petitioner-applicants, while not explicitly so stating, implies that a preference right is possible only at the time the land is originally classified. ^{3/} To read the regulation in any other way would mean the negation of 43 CFR 2450.6(a), concerning the effect of a final classification order of the Secretary.

^{3/} 43 CFR 2450.8 reads as follows:

"Where public land is classified for entry under section 7 of the Taylor Grazing Act or under the Small Tract Act pursuant to a petition-application filed under this part, the petitioner-applicant is entitled to a preference right of entry, if qualified. If, however, it should be necessary thereafter for any reason to reject the application of the preference right claimant, the next petitioner-applicant in order of filing shall succeed to the preference right.

Therefore, any re-examination of the classification and subsequent reclassification of land, even though initiated by the filing of a petition-application would not guarantee the petitioner-applicant a preference right, regardless of whether the reclassification opened the land to the type of entry sought by the petitioner-applicant.

[3] It is also clear that petition-applications such as those herein may not be held in suspense pending future availability of the land because 43 CFR 2091.1 provides in pertinent part:

* * * However, applications which are accepted for filing must be rejected and cannot be held pending possible future availability of the land or interests in land, when approval of the application is prevented by:

* * * * *

d) Classification under appropriate law; * * *

While BLM erred in not accepting and serializing appellants' petition-applications, the consideration it gave the petition-applications was the same, whether they were formally accepted or not. In essence, even though BLM stated that it was not accepting the petition-applications, it gave the petition-applications the same consideration and review it would have had they been accepted for filing. Appellants could gain no preference right to entry to lands classified as unsuitable for the purpose sought so the technical failure of BLM to accept the petition-applications for filing must be judged as harmless error.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Douglas E. Henriques
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

Edward W. Stuebing
Administrative Judge

fn. 3 (Continued)

If there is no other petitioner-applicant the land may be opened to application by all qualified individuals on an equal-opportunity basis after public notice or the classification may be revoked by the authorized officer."

