

CLARENCE RAY MATHIS

IBLA 76-758

Decided March 4, 1977

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting final proof and canceling appellant's homestead entry.

Affirmed.

1. Alaska: Homesteads--Equitable Adjudication: Substantial Compliance--Homesteads (Ordinary): Generally-- Homesteads (Ordinary): Cultivation

Where a homestead entryman has cleared and broken ground and allowed a portion of the cleared, plowed acreage to grow up with a species of native wheat grass, such acreage is not "cultivated" within the meaning of 43 CFR 2567.5(b), and the entryman's final proof is properly rejected where it shows on its face that the native grass acreage constituted an indispensable portion of the entryman's attempt at meeting the cultivation requirements of the homestead laws. Since there was not substantial compliance with the cultivation requirements, equitable adjudication cannot be properly invoked.

APPEARANCES: Sarah Elizabeth Fussner, Esq., of Ely, Guess and Rudd, Anchorage, Alaska, for the appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Clarence Ray Mathis has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting his final proof and canceling his homestead entry.

On February 16, 1972, appellant Mathis was notified that a temporary withdrawal, Public Land Order 4582, affecting lands as to which he had a preference right, had been lifted. Appellant's preference right arose from a previously litigated contest complaint (A-057781). Upon receipt of this notice he prepared a homestead entry application and submitted it to the Anchorage office of the BLM on February 28, 1972.

[1] Appellant's final proof shows that he and his family took up residence on the tract in question in August 1971 and made various permanent improvements. It appears that during the first entry year, appellant began to clear portions of the entry tract for cultivation, and continued this activity into the second year of his entry. While the homestead laws (43 U.S.C. § 164 (1970)) require no cultivation during the first entry year, they and departmental regulation 43 CFR 2567.5(b) provide that the claimant must cultivate:

\* \* \* one-sixteenth of the area of the claim during the second year of the entry and of one-eighth during the third year and until the submission of proof \* \* \*.

Appellant in his sworn final proof statement listed 15 acres cultivated for each of the second and third entry years. However, he specifically stated that:

\* \* \* lands were not seeded second entry year. A good crop of "Russian Wheat," which is a natural grass, was grown. \* \* \*

Reason for cultivating less acreage than required -- Claimant misunderstood requirements & thought with commutation proof cultivation was required for only 1 year.

One of his witness listed 7-1/2 acres for the second year with grass as the kind of crop planted. He stated he did not view seeding, but that he flies the area frequently and viewed a good grass crop. The other witness also listed 7-1/2 acres for the second year, stating "wild grass" under the caption "Kind of crop planted." However, he also stated "uncertain if seeded."

On its face the final proof clearly shows the entryman did not meet the cultivation requirement for the second entry year. Regulation 43 CFR 2567.5(b) also provides that:

\* \* \* Cultivation, which must consist of breaking of the soil, planting or seeding, and tillage for a crop other than native grasses, must include such acts and be done in such manner as to be reasonably calculated to produce profitable results.

Counsel for appellant emphasizes the last phrase quoted above in contending that the Russian Wheat grass crop should meet the cultivation requirements. Unless there had been an application allowed which eliminated the cultivation requirement for the second year, the entryman was obligated to meet that requirement. Regardless of the merits of the practice of allowing the natural self-seeding of a native grass, the regulation clearly proscribes acceptance of such a practice as constituting cultivation. The regulation requires either "planting or seeding." It would strain credulity to imply this means the natural seeding by existing native grasses. However, the regulation removes any remaining doubt by expressly referring to a "crop other than native grasses."

Counsel has referred to several departmental decisions including Kimball v. Selby, 20 IBLA 23 (1975), and United States v. Garret, A-31064 (May 28, 1970), to support his contentions that the cultivation requirement was met for the second year. Those cases, however, do not support a conclusion that the self-seeding of a native grass can be considered cultivation. Other cases cited by counsel are likewise distinguishable on their facts. Counsel also attempts to infer some ambiguity in the cultivation showing for the second year by referring to the witnesses' statements showing the planting of 7-1/2 acres. However, one of the witnesses specifically stated the grass was wild, and the other indicated he had not seen the seeding. In any event, in the face of the unequivocally clear statement by the entryman that he did not seed the second entry year, we find no ambiguity. There has been no showing that the entryman erred in his original statement or misrepresented the facts to which he swore under criminal penalties for falsehood. Thus, counsel's suggestion that 7-1/2 acres may have been sown in oats the second year cannot be accepted.

Because appellant is not a veteran he had to show the requisite cultivation for the second year as well as the third year and until final proof was filed. Where the final proof on its face shows that the cultivation requirement was not met, it is properly rejected and the entry cancelled. James R. Murphey, 20 IBLA 129 (1975); Lois A. Myer, 7 IBLA 127 (1972).

Counsel also requests equitable adjudication to allow some share of the entry because of appellant's good faith attempts to meet the homestead law. Generally if there is some basis to consider equitable adjudication, we would refer a case to the Bureau of Land Management for an initial determination. However, one of the requisites for applying equitable adjudication is substantial compliance with the law. 43 CFR 1871.1-1. Where there was not an attempt to plant a crop other than native grasses during the second entry year, we cannot conclude there was substantial compliance with the law, and therefore, must deny the request for equitable adjudication. Lois A. Mayer, supra; United States v. Wells, 2 IBLA 247, 78 I.D. 163 (1971).

We note that the Bureau suggested appellant may be able to obtain the land containing his improvements through a homesite application which has been filed. When this case is returned to BLM, there will be a determination of appellant's compliance with the homesite law.

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 affirmed.

Joan B. Thompson

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Administrative Judge

We concur:

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Edward W. Stuebing  
Administrative Judge

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Joseph W. Goss  
Administrative Judge

