

JOHN ANTHONY CONSLA  
v.  
ROBERT L. WETHERELT

IBLA 77-83

Decided June 6, 1977

Appeal from decision dated November 12, 1976, of the Alaska State Office, Bureau of Land Management, dismissing private contest complaint (AA 3254-B).

Affirmed as modified.

1. Alaska: Homesteads -- Homesteads (Ordinary): Generally -- Homesteads (Ordinary): Applications -- Homesteads (Ordinary): Settlement

Where the initial actions of a homesteader are inconsistent in that he appears to initiate his claim both by settlement and by application for allowed entry, the nature of his claim will be determined by the type of official form used by him to initiate the claim, and by his actions with regard thereto.

2. Alaska: Homesteads -- Homesteads (Ordinary): Applications

Where a homestead in Alaska is initiated by an application for allowed entry, the filing of the application creates a valid existing right which is protected from the effect of a subsequent withdrawal which is subject to valid existing rights.

3. Alaska: Homesteads -- Homesteads (Ordinary): Applications

Where a homestead in Alaska is initiated by an application to enter, the statutory period for compliance with the requirements of the

homestead laws begins to run on the date of allowance of the entry.

4. Alaska: Homesteads -- Homesteads (Ordinary): Contests

A contest complaint is properly dismissed where the only basis for cancellation of the homestead suggested by it is failure to comply with the residence and cultivation requirements of the homestead law, and where the time for compliance with these requirements by the entryman has not yet begun.

APPEARANCES: M. Ashley Dickerson, Esq., Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

John Anthony Consla has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated November 12, 1976, summarily dismissing his contest complaint (AA 3254-B) against the homestead entry of Robert L. Wetherelt (AA 3254). 1/

[1] In order to consider the validity of appellant's contest complaint, it is essential first to review the history of the homestead claim of Wetherelt, the contestee. On September 5, 1968, Wetherelt filed with the BLM an application for homestead entry on 156 acres of land in Alaska, using the official BLM form for this purpose entitled "Homestead Entry Application." On the same day, he also filed an informal handwritten notice stating that he had occupied the land on August 19, 1968. These actions were plainly inconsistent, since if Wetherelt had already occupied the land, the appropriate procedure by which to initiate his homestead claim would have been to file a notice of location settlement claim form rather than this form application for allowed entry. As discussed below, these inconsistent actions by the entryman in originating his claim have resulted in confusion in both the BLM and the contestant/appellant regarding the nature of the interest which Wetherelt sought and the status of his application and/or entry during its several stages. However, having examined the record in this case, we conclude that Wetherelt filed an application for allowed entry in September 1968. Although his state!

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1/ Pursuant to section 2 of the Act of May 14, 1880, as amended, 43 U.S.C. § 185 (1970), a person who by contest has procured the cancellation of a homestead entry has a preference right of entry for the lands in the canceled entry.

ment alleging occupancy of the land in August 1968 <sup>2/</sup> was inconsistent with an application for an allowed entry, his choice of the official application form must be regarded as controlling, especially in light of the fact that he did not remain on the land thereafter, made no improvements, nor took any action consistent with a declaration of location and settlement.

Wetherelt filed his application for allowed entry on September 5, 1968. On July 1, 1969, the BLM suspended action on this application pending settlement of Alaska Native claims. On December 27, 1973, the BLM contacted Wetherelt by telephone to inquire whether he still retained a "present interest" in the lands, and he replied that he did not. Shortly afterwards, on January 3, 1974, the BLM wrote Wetherelt to invite him to "relinquish any interest" in the lands. The record does not indicate that Wetherelt withdrew his application as a result of this suggestion. In September 1974, a BLM land law examiner examined and photographed the land. On January 22, 1975, he filed in Wetherelt's case record a field report of this examination which noted that there were no recent improvements or signs of use found on the land. It also noted that the homestead had been initiated by application for entry and that entry had never been allowed. The filing of this report of a field inspection indicates that there was confusion among some of the BLM's personnel at this time concerning the nature of Wetherelt's homestead. In a settlement situation, the statutory 5-year period during which all improvements must be completed and final proof must be made begins as of the date of settlement; in an application for allowed entry, it does not begin unless and until the BLM officially allows the entry. Since Wetherelt's homestead was initiated by application, he had no right thereunder to enter unless and until the application was allowed. Since the entry had not yet been allowed, there was accordingly no reason to expect that he would have made improvements at this time. The BLM land examiner apparently mistakenly believed that Wetherelt's failure to improve the property would be grounds for disallowing his homestead application, as it would have been only if the homestead had been initiated by settlement. Nevertheless, the examination, narrative report, photographs and sketch plat amply documented the fact that Wetherelt had not performed qualifying residence or cultivation at that time.

[2] Although Wetherelt had indicated that he had no present interest in the lands, he had never formally withdrawn his application for allowed entry, and it was therefore still extant. Accordingly, on December 1, 1975, BLM issued a decision which granted his application and allowed his homestead entry despite his oral disclaimer of further interest in the matter. However, in a decision dated May 18, 1976,

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<sup>2/</sup> Wetherelt may have made this statement pro forma, as there is no evidence of actual occupancy by him.

the BLM retracted this decision and held the entry for cancellation, asserting that the entry had been erroneously allowed in December 1975 because the lands had been under the effect of PLO 5418 then, and were thus withdrawn from all forms of appropriation under the public land laws. In this latter decision, although the BLM acknowledged that Wetherelt had applied for an allowed entry, it again confused the distinction between settlement and application for entry by incorrectly applying case law concerning settlements to the instant case. As the BLM pointed out, an entry initiated by settlement will survive a subsequent withdrawal only if the settler has undertaken at least some acts of use, occupancy, and development prior to the withdrawal. <sup>3/</sup> However, where, in Alaska, the homestead is initiated by an application for allowed entry, the homesteader need not have made acts of settlement in order to preserve his rights against subsequent withdrawals. The filing by a qualified applicant of a homestead application to enter lands in Alaska segregates the lands applied for from appropriation, and such an application will be considered to have created a valid existing right which is protected from the effect of a subsequent withdrawal which is subject to valid existing rights. Albert A. Howe, 26 IBLA 386, 387-388 (1976); Richard T. Pope, 27 IBLA 33, 36 (1976). The segregative effect of PLO 5418 is specifically subject to valid existing rights. By his application, Wetherelt therefore had a valid existing right in the lands which survived the effects of this withdrawal, and which became a valid right of entry when the BLM officially allowed the entry in December 1975. We conclude that the BLM erred by cancelling Wetherelt's entry for the reason given.

We turn now to the immediate subject of this appeal, appellant's contest complaint. He filed this complaint concerning Wetherelt's homestead entry on March 24, 1976, and the substantive allegations thereof are as follows:

The contest complaint alleges that you signed statement of occupancy for [August 19, 1968] and did enter same in the records on [September 5, 1968]. Further allegations are as follows: You have failed to meet minimum residency requirements in any entry year as required by 43 CFR 2211.9-5. Further you have failed at any time to meet minimum cultivation requirements as required by 43 CFR 2211.9-5. The above entry year is based on the date [August 19, 1968] stated above. The above date is taken from the records of settlement claim #AA-3254, based on 43 CFR 2211.0-8[a] and [b].

Appellant's contest complaint is premised on the erroneous belief that Wetherelt had initiated his homestead by settlement rather

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<sup>3/</sup> Steven P. Remme, 24 IBLA 23 (1976).

than by allowed entry. On November 12, 1976, the BLM issued a decision summarily dismissing this complaint because it did not state any reason for invalidating Wetherelt's claim which was not already shown by the public records of the BLM. In this decision, the BLM did not correct appellant's misapprehension, but instead assumed, as the appellant had, that Wetherelt had located a settlement claim on the land. Assuming, arguendo, that Wetherelt had settled on the land in August 1968, the rule applied by the BLM would properly have disposed of the complaint. Although Wetherelt would have failed to meet the cultivation and residence requirements of the homestead act before the expiration of the 5-year statutory period (in August 1973 under this assumption), information clearly establishing that Wetherelt had failed to do so was within the public records of the BLM at the time the complaint was filed. It would have been proper to dismiss the complaint in these circumstances, since appellant did not supply the BLM the basis for canceling the entry. <sup>4/</sup> However, since Wetherelt in fact did not settle on the land, the BLM properly disposed of the appellant's complaint, but erred insofar as its dismissal relied on the mistaken belief that he had an obligation to perform which related back to the filing of his application.

[3, 4] As we noted above, Wetherelt was given a formal allowance of entry as of December 1, 1975, notwithstanding the BLM's subsequent cancellation of this allowance. The statutory 5-year period for compliance with the requirements of the homestead laws begins on the date of allowance of the entry. Howe, supra at 389. Wetherelt, therefore, had 5 years from December 1, 1975, in which to comply with the requirements of the homestead laws and make final proof of compliance. The sole substantive basis for cancellation asserted by appellant in his contest complaint is that, as of March 24, 1976, the date the complaint was filed, Wetherelt had failed to meet the minimum residence and cultivation requirements of the homestead laws. Wetherelt's failure to meet these requirements at this time was not an adequate basis for contest of his entry, since Wetherelt was not legally required even to have begun compliance by this time. It would have

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<sup>4/</sup> Departmental regulation 43 CFR 4.450-1 states that:

"Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land or who seeks to acquire a preference right pursuant to the act of May 14, 1880, as amended (43 U.S.C. 185), or the act of March 3, 1891 (43 U.S.C. 329), may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management \* \* \*" (Emphasis added.)

Where allegations in the contest complaint are reasons shown by the records of the BLM at the time of the filing thereof, a contest complaint is properly dismissed. Christie v. O'Glesbee, 23 IBLA 155 (1975) and cases cited therein.

been premature to cancel Wetherelt's entry for failure to improve the land at this early stage of his entry, since he had nearly all of the 5-year compliance period. Although only about 4 months had elapsed between the allowance of the entry by BLM and the filing of the private contest complaint by appellant, Wetherelt had 6 months (minimum) to establish actual residence, and no cultivation was required until at least the second entry year. Moreover, as Wetherelt is a veteran, he could claim credit on that basis. We conclude accordingly, that, even assuming the truth of the allegations in appellant's contest complaint to the effect that Wetherelt had failed to meet the cultivation and residence requirements of the homestead laws at the time of its filing, it failed to state a proper cause of action and should have been summarily dismissed for this reason.

Finally, we note that Wetherelt has failed to appeal the erroneous cancellation of his entry by the BLM in May 1976. He has therefore accepted as final the decision to extinguish his right of entry to the land, and, with the closing of his case file, there is nothing left of his claim to the land. Thus, Wetherelt may not now enter the land, and no contest may be heard presently or in the future concerning his failure to develop this entry. We also note that the extinguishment of Wetherelt's entry was in no way brought about by the appellant's contest, and that appellant therefore may not assert that he is entitled to a preferred right of entry.

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.

Edward W. Stuebing  
Administrative Judge

We concur:

Douglas E. Henriques  
Administrative Judge

Joseph W. Goss  
Administrative Judge

