

Editor's note: Reconsideration denied by order dated Aug. 22, 1978; Appealed -- summary judgment for DOI (failure to exhaust) Civ. No. 77-0050-HEC (D. Nev. Oct. 31, 1978), aff'd, No. 79-4183 (9th cir. Feb. 6, 1981)

WESLEY LAVERNE EDWARDS

v.

PAUL UNRUH

IBLA 77-149

Decided January 5, 1978

Appeal from decision of Administrative Law Judge Dean F. Ratzman, dated January 18, 1977, Contest No. N-7251, rejecting the final proof for the homestead entry of contestee Paul Unruh and denying appellant Wesley Edwards a preference right to the tract in question.

Affirmed.

1. Appeals--Homesteads (Ordinary): Contests

A private contest decision canceling a disputed homestead entry will, in the absence of a timely and proper appeal, cut off all rights which the contestee may have acquired by his entry, and this result will not be affected by the fact that the contestee failed to appear at the contest hearing and, through his own neglect, failed to receive notice of the decision of the administrative law judge.

2. Federal Land Policy and Management Act of 1976:
Repealers--Homesteads (Ordinary): Contests

Repeal of the homestead laws renders moot the question of whether a private contestant can earn a preference right to enter by procuring the cancellation of a contestee's homestead entry for reasons not shown by Bureau of Land Management (BLM) records.

3. Homesteads (Ordinary): Contests

The question of whether a private contestant has procured the cancellation of a contestee's entry for reasons not

shown by records of the BLM, is a factual question which is unrelated to the subject matter jurisdiction of the tribunal and which is entirely ancillary to the prior and primary question of the validity of the contestee's entry.

4. Homesteads (Ordinary): Contests

The fact that BLM is not a party to a private contest proceeding does not affect the force or validity of a decision rejecting a final proof.

APPEARANCES: William J. Crowell, Jr., of Crowell, Crowell and Crowell, Carson City, Nevada, for appellant, Wesley Edwards; Ralph M. Crow, Carson City, Nevada, for appellant Paul Unruh.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

This contest is the latest in a series of disputes between Paul Unruh and Wesley L. Edwards, both appellants herein, over a 160-acre portion of sec. 35, T. 14 N., R. 20 E., M.D.M., Nevada.

Paul Unruh, entryman in homestead entry N-7251, allowed March 2, 1973, for the SW 1/4, sec. 35 T. 14 N., R. 20 E., M.D.M., Douglas County, Nevada, submitted final proof August 29, 1974. Before final action on this proof was taken by BLM, Wesley Laverne Edwards filed a complaint against the Unruh entry in private contest N-7251, charging essentially that he, Edwards, had a superior right to the land from an earlier homestead entry, Nevada 064160, and that Unruh had not cultivated the entry as required by statute and had not built a permanent residence on the land. Unruh denied the charges and the matter was heard before Administrative Law Judge Dean F. Ratzman on June 24, 25, 1976, at Carson City, Nevada. Both contestant and contestee were represented by counsel.

The Judge's decision of January 19, 1977, adequately discusses the issues and applicable law. It would serve no useful purpose to add to what he there stated. Accordingly, we adopt his decision and attach it hereto as Appendix A. The Judge made these conclusions:

The final proof submitted by Mr. Paul Unruh in August, 1974, is rejected because in the period selected for proving up he did not cultivate the lands in a manner reasonably calculated to produce profitable results. Mr. Wesley L. Edwards is not entitled to a preference right under either of the acts cited in 43 CFR 4.450-1 because he failed to initiate this contest for a reason

not shown by the records of the Bureau of Land Management. Action consistent with these determinations should be taken by the Bureau. 43 CFR 4.450-2.

The findings of fact requested in the proceeding are adopted only to the extent they are incorporated in this decision.

Contestant Edwards appeals on four counts, asserting error in the following findings of the Administrative Law Judge:

a) that the hearing on or about December 1, 1970, and the subsequent decision dated April 26, 1971, 1/ by Hearing Examiner Dent D. Dalby cancelling the Homestead Entry of the Contestant, Wesley Laverne Edwards, was not void for lack of jurisdiction;

b) that the Contestant, Wesley Laverne Edwards, should not be awarded a preference right;

c) that the Contestee had a habitable house on the entry; and

d) that the Contestee resided upon the entry.

Contestee Unruh has challenged the jurisdiction of the Judge in the matter of a private contest as well as in the rejection of the final proof.

[1] In his decision Judge Ratzman found Edwards' complaint about the due process accorded him at the 1970 hearing to be without merit. As the opinion notes, Edwards' request for a second continuance, made on the day of the 1970 hearing, "was not based upon the existence of an emergency and was untimely." Judge Ratzman properly held, moreover, that Edwards' present contention in relation to this request for continuance, to the subsequent withdrawal of Mr. Edwards' counsel, to the service of decisions and notices on Mr. Edwards, and to the nature and reliability of the evidence submitted at the 1970 hearing are all part of an impermissible, collateral attack upon a prior departmental proceeding (N-064160). These issues should have been raised by a timely appeal. Judge Ratzman correctly stated he was without jurisdiction to review them in connection with a private contest brought some 6 years after the time limit for a proper appeal had passed.

43 CFR 4.411 provides that a person who wishes to appeal a decision made by an Administrative Law Judge in the Office of Hearings and Appeals must file a notice "within 30 days after the person taking the appeal is served with the decision from which he is appealing."

1/ Decision in Contest Nev. 064160, dated April 27, 1971.

While Edwards concedes that he did not appeal the 1971 decision canceling his entry, he argues that he was never served with the decision since the decision and subsequent legal notices were sent to him both at an outdated address and in care of an attorney who had withdrawn from being Edwards' counsel. Edwards alleges that he received actual notice of the 1971 decision when, in 1974, the files pertaining to that decision were retrieved from Washington and he was permitted to examine them. He contends, however, that the time limit for an appeal of the 1971 decision never began to run, due to the Department's 'failure to obtain a correct address' and formally serve the decision on him. This contention is without merit and ignores the regulatory requirements that a public land applicant keep the Department apprised of his current address. 43 CFR 4.22(d).

Edwards, as a party to the 1970-71 action, was fully apprised of the time, place, and possible consequences of the hearing in that contest. By absenting himself from the hearing with only the most tenuous justification, Edwards assumed the risk that his request for a continuance would be denied and the hearing held in his absence. Even if Edwards had not, by his failure to make a timely appeal, waived all objections to the conduct of the 1970 hearing, there was no abuse of discretion, of due process, or (as Edwards now contends) of jurisdiction in the denial of his motion for continuance. Judge Ratzman properly held in his opinion that: "Although it is not my function to pass upon Hearing Examiner Dalby's denial of the continuance, it is obvious that even as a matter of hindsight the motion was not based upon the existence of an emergency and was untimely." Having thus assumed the risk of a default judgment, Edwards cannot avoid the consequences of that action by asserting that, "he did not know what had happened" at the hearing (Contestant's Appeal Brief, p. 5). Service of the 1971 decision was made to the address specified in Edwards' answer, in accordance with 43 CFR 4.22(d). As Judge Ratzman correctly states, "If a new address for service was required it should have been provided by the attorney who withdrew or by Mr. Edwards * * *." Edwards argues on appeal that, "the government changed the address by permitting the (Edwards') attorney to withdraw, and it was the government's obligation to ascertain a new address." This analysis is wholly insupportable in that it would allow a contestee to avoid the effect of any contest decision by merely failing to attend the hearing and then avoiding all contact with the other parties to the proceeding. The assertion that, "it was the government's responsibility to ascertain a new address," not only absolves Edwards of the responsibility for looking after his own affairs, but would reward his neglect by making him immune to the holding of the contest tribunal. Such a result is unthinkable. We conclude, therefore, that any rights which Edwards may have had under his 1964 homestead entry were cut off by the decision of Judge Dalby in 1971 and, furthermore, that the 1971 decision is

not subject to attack in this proceeding, the time for a proper appeal of that holding being long past. 43 CFR 4.411.

Edwards was aware, or should have been, that the statutory life of a homestead entry is only 5 years. If he was serious in his endeavor to perfect his entry, surely he would have made inquiry to BLM long before 1974 to learn what the result of the private contest had been, and what was the ultimate disposition of the entry he made in 1964.

[2] Appellant Edwards complains on appeal that Judge Ratzman erred by denying him a preference right to the contested tract. We point out that the Federal Land Policy and Management Act, section 702 of Public Law No. 94-579, 90 Stat. 2743, 43 U.S.C.A. § 1701 et seq., (West Supp. 1977), repealed the homestead laws with respect to which Edwards seeks to acquire a preference right to entry. Even assuming without conceding that Edwards had prevailed in his private contest and secured the cancellation of the homestead entry of Unruh, this could entitle him to the first right of homestead entry on the contested tract only if he is shown to be entitled to make a second homestead entry. Such right is now a nullity since the only laws under which he might have made homestead entry are no longer of any force and effect. 2/ We do not, therefore, find it necessary to pass upon the merits of this claim, and Edwards' appeal respecting his asserted preference right is hereby declared moot.

The Judge did not cancel the homestead entry of Unruh so there was no place for preference right of entry to be allowed. But even assuming, arguendo, that the homestead entry had been canceled, the contentions of Edwards that he would be entitled to a preference right of entry as a result of the private contest are moot.

[3] Contestee Paul Unruh, in an answer to Contestant's Statement of Reasons for Appeal, objects to the decision of the Administrative Law Judge asserting that the Judge should have dismissed the contest complaint on jurisdictional grounds. This contention is mistaken because, contrary to Unruh's assertions, Edwards' complaint is drafted in full compliance with the provisions of 43 CFR 4.450-3 et seq. Unruh argues, however, that Edwards is not a "person by whom private contest may be initiated" within the meaning of 43 CFR 4.450-1, since he does not state, "any facts as to any reasons to invalidate the existing entryman's entry not shown by the records of the bureau." (Contestee's Answer, supra.) While it may be correct that Edwards has

2/ See 90 Stat. 2787, § 702 (Oct. 21, 1976), repealing the Homestead Act, 21 Stat. 141 (May 14, 1880), under which Wesley Edwards seeks to acquire title to the public lands at issue herein. (See Contestant's complaint, p. 2).

not stated any grounds for contest which were not reflected in the Bureau records, this fact is not relevant to the question of jurisdiction. Indeed, Unruh's brief cites the decision of this Board in Unruh v. Edwards, 8 IBLA 231 (1972), in support of the proposition that:

Whether or not a person is entitled to a preference is no part of the elements of a private contest to invalidate an entryman's entry, the invalidation being a condition precedent to a preference right which is a matter of statute, based on a factual question after a contestant has procured the invalidation in a private contest for reasons not shown by the records of the Bureau.

Appellant's argument thus rings its own death knell by admitting, in effect, that the question of whether a private contestant has stated new or unique grounds for invalidation (the test of preference entitlement) is merely ancillary to the prior and primary issue of the validity of the existing entry. There was unquestionably proper jurisdiction for the hearing and decision in this case under the provisions of 43 CFR 4.1 et seq. (1976), delegating to the Office of Hearings and Appeals the authority to conduct hearings in cases required by law to be conducted pursuant to 5 U.S.C. § 554 (1970). We find, additionally, that the proceedings below appear to have been conducted in full compliance with the mandate of 43 CFR 4.450 et seq., the record not reflecting any reversible error or jurisdictional deficiency in the complaint, hearing, or final decision.

[4] In addition to his challenge to the jurisdiction of the tribunal below, Unruh alleges that Judge Ratzman, upon determining that contestant Edwards had failed to procure the cancellation of the existing entry for a reason not shown by BLM records, was "without power" to reject Unruh's final proof. This contention, that the decision rejecting the final proof is "a nullity" does not differ in substance from Unruh's jurisdictional arguments, supra. Judge Ratzman was unquestionably vested with full subject matter jurisdiction over all the issues necessarily involved in a private contest including, if proper, especially the cancellation of the existing entry. It is irrelevant that BLM is not a party to a private contest proceeding where, as here, the private contestant comes forward with facts and reasons sufficient to invalidate the contestee's proof. As we stated above, the central issue for determination in the contest hearing was the validity of the contestee's entry and, impliedly, the sufficiency of his final proof. Unruh, however, contends on appeal that:

The Decision in this case is more than just anomalous. It is contrary to law in so far that it in any way affects the Contestee's subsisting or underlying right of entry, previously given by the Bureau of Land

Management. There is no provision, much less any occasion or proceeding, for turning down or declining final proof of an existing entryman that is regular in form, under oath, and is a statement of his evidence for having perfected the requirements, and is within the time allowed for submission. It is implicit that it may not be declined or turned down without a hearing for that purpose.

This argument is wholly without merit. Unruh has had the benefit of a formal hearing in full compliance with the due process safeguards of the Administrative Procedure Act. The purpose of this hearing was, quite simply, to determine whether Unruh had complied with the provisions of the Homestead Act and thereby established a right or entitlement to title to the lands which are the subject of this appeal. Unruh's claim that "there is no provision * * * for turning down final proof of an existing entryman that is regular in form * * *" ignores the language of 43 CFR 4.452-8, which reads as follows:

(b) As promptly as possible after the time allowed for presenting proposed findings and conclusions, the Administrative Law Judge shall make findings of fact and conclusions of law (unless waiver has been stipulated), giving the reasons therefor, upon all the material issues of fact, law, or discretion presented on the record. [Emphasis added.]

The sufficiency of Unruh's entry as reflected in his final proof was the major 'material issue' of fact and law 'presented on the record' within the meaning of section 4.452-8, supra. Judge Ratzman properly made the findings of fact and conclusions of law which lead him to a decision rejecting Unruh's final proof, and we find no error in that decision.

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 adopted and affirmed.

Douglas E. Henriques
Administrative Judge

I concur:

Frederick Fishman
Administrative Judge

ADMINISTRATIVE JUDGE GOSS CONCURRING:

I concur in the result but do not feel it is necessary to reach the question of the effect of the Federal Land Policy and Management Act upon Appellant Edwards' claim to have a preference right. If Edwards had perfected his right by procuring cancellation of the homestead entry prior to repeal of 43 U.S.C. § 185 (1970), then it would be necessary to construe the intent of Congress as expressed in FLPMA §§ 310, 701-02. ^{3/} The Supreme Court discussed a similar question in Emblen v. Lincoln Land Company, 164 U.S. 660, 664 (1902):

The Weed entry had not been cancelled when the act of 1894 took effect, so that Emblen had no right to make entry under the act of May 14, 1880. * * *

As Emblen never made an entry on the land, nor perfected a right to do so, it results that he had no vested right or interest which could defeat the operation of the act of 1894. [Emphasis added.]

Joseph W. Goss
Administrative Judge

^{3/} Section 701 provides in part:

"(a) Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act.

* * * * *

"(h) All actions by the Secretary concerned under this Act shall be subject to valid existing rights."

January 18, 1977

DECISION

Wesley Laverne Edwards,	:	<u>Contest No. N-7251</u>
	:	
Contestant	:	Homestead Entry
	:	
v.	:	
	:	
Paul Unruh,	:	
	:	
Contestee	:	

Before: Administrative Law Judge Ratzman

This is the latest in a series of contests relating to 160 acres of public lands in Douglas County, Nevada. Prior to the institution of this private contest by Wesley Laverne Edwards against Paul Unruh, there were several contests against Mr. Edwards (brought by Mr. Unruh), a Government contest against Mr. Edwards (initiated by the Bureau of Land Management), and consideration of questions involved in the contests at the appellate level within the Department of the Interior, and in Federal District Court. A decision dated April 26, 1971, by Hearing Examiner Dent D. Dalby stated that the 1964 homestead entry of Wesley Laverne Edwards (at that time the contestee, now the contestant) was canceled. The record associated with that cancellation was reviewed by the Interior Board of Land Appeals in Paul Unruh, 8 IBLA 231 (November 29, 1972). That decision states at 8 IBLA 233:

"No appeal has been taken from the decision canceling the entry, and thus the decision invalidating it is final. Rather, the issue here is solely limited to the preference right, if any, of the appellant [Unruh]. For reasons stated infra, we find that the cancellation of the entry was procured by appellant within the meaning of 43 U.S.C. s 185 (1970), and that he is entitled to a preference right, all other things being normal."

Mr. Edwards' 1964 homestead entry was allowed after he successfully contested an entry by Cletus Downs. The Complaint in this proceeding, filed on May 28, 1975, opposes the effort of Paul Unruh to acquire title under the homestead laws asserting:

1. the contestant (Edwards) "is lawfully entitled to the land involved herein by virtue of his prior [1964] homestead" and that Mr. Edwards had completed all necessary steps for the granting to him of a patent,
- (2) that the December 1, 1970, hearing violated Mr. Edwards' right to due process of law because a motion for continuance was refused, and counsel for Mr. Edwards was permitted to withdraw, assertedly without good cause,
- (3) that notices of the results of the 1970 hearing, appeals and other processes were sent to Mr. Edwards "at an address which the Bureau of Land Management knew was no longer a valid address, and at a time when the proper address was known . . . because the Bureau had at that time on file the correct address of Contestant [Edwards], resulting in Contestant's not receiving any notices of appeal, decisions, etc."
- (4) that Hearing Examiner Dalby erroneously determined that Mr. Edwards had not complied with the homestead laws, and that testimony of a witness at the hearing was false
- (5) that the contestee [Unruh] has not cultivated the required acreage
- (6) that the contestee "has not built a permanent dwelling for residence on said property, in that his residence is by mobile home in an area not zoned for mobile homes in Douglas County, Nevada, and his use of the mobile home was for one year only in which he was to have constructed a dwelling for residence, which . . . has not been done"
- (7) that the well allegedly installed for irrigation by the contestee [Unruh] "was not operable until a few weeks before Contestee filed final proof of his entry."

The first four of the seven issues set forth above are concerned with determinations made by Hearing Examiner Dalby at and subsequent to the 1970 hearing in another private contest (Nevada No. 064160). Mr. Edwards' counsel contends that justification exists for a collateral attack on rulings made at the 1970 hearing and on the cancellation of Mr. Edwards' homestead. This would lead to a declaration that Mr. Unruh has no entry on the land. Tr. 6-24-7.

In the fall of 1970 Hearing Examiner Dalby granted one continuance at the request of Mr. Edwards, but denied a second request, made on the day of the hearing, December 1, 1970. The attorney for Mr. Edwards stated in an affidavit that:

"* * on November 6, 1970, your affiant wrote to Contestee requesting his presence in Reno, Nevada, within the next ten days to assist in the preparation for trial . . .; that no reply was received to said letter, and that on November 20th your affiant sent a telegram requesting Contestee to come to Reno immediately to help in the preparation for trial, or to relieve the undersigned from responsibility, and requesting that Contestee telephone your affiant at 9:30 a.m. on . . . November 23rd; that your affiant heard nothing further until receipt of a telephoned Western Union telegram at 10:15 on November 30, 1970, stating: 'Under doctor's care impossible for me to appear', signed 'Wesley Edwards.' That it is completely impossible for your affiant to defend the above matter without presence of Contestee."

The motion was opposed on the grounds that it was untimely, was not accompanied by a doctor's statement, and gave no indication of the character of Mr. Edwards' illness. Hearing Examiner Dalby concluded that Mr. Edwards had been derelict in meeting his responsibilities in the contest, and denied the motion for a continuance observing that it "is untimely, it does not appear to be an extreme emergency that could not have been anticipated and . . . is insufficiently supported."

I reiterate the ruling made at the hearing, that I do not have jurisdiction to review determinations made in another contest by the late Judge Dalby. Such action can be taken only at an appellate level. The contestant's attorney was allowed to submit an offer of proof accompanied by documents. Included are copies of records from the

Veteran's Administration Hospital in San Francisco indicating that on December 1 and 2, 1970, Mr. Edwards was examined by physicians for a lower back pain condition which had caused increasing discomfort for 15 years and for which his private physician had prescribed an empirin compound. Mr. Edwards' general health was found to be good and he was ambulatory. There was no pain or weakness radiating to his legs or other parts of his spine, and no other joints or bones in his body were involved. One doctor concluded that the discomfort was due to a muscle spasm. The doctor in the orthopedic unit found that Mr. Edwards walked without a limp or list. He concluded that the lower back pain resulted from degenerating discs, and recommended exercises and the avoidance of bending and lifting.

Although it is not my function to pass upon Hearing Examiner Dalby's denial of the continuance, it is obvious that even as a matter of hindsight the motion was not based upon the existence of an emergency and was untimely. Like elective surgery there can be an elective visit to the hospital.

The issues related to the withdrawal of Mr. Edwards' counsel in 1970, service or non-service of decisions and notices on Mr. Edwards, and the nature and reliability of the evidence submitted at the 1970 hearing, are part of the collateral attack upon the Departmental determinations in the earlier contest (Nevada 064160). Those questions should have been raised at the appellate level in a proper and timely fashion. The change of address filed by Mr. Edwards in a Bureau of Land Management office in Nevada would not constitute a change of address in the Office of Hearings and Appeals, which is not part of the Bureau of Land Management. In 1970 and 1971 the address for service of papers, of record in the Office of Hearings and Appeals, was the one set forth in the Contestee's Answer dated May 13, 1968, in accordance with 43 CFR s 1852.1-6. That regulation provided at all material times that an answer in a private contest shall contain or be accompanied by the address to which all notices or other papers should be sent for service upon contestee. Service of the Dalby decision in Nevada 064160 was made at the address specified in Mr. Edwards' Answer. If a new address for service was required it should have been provided by the attorney who withdrew, or by Mr. Edwards, an experienced public lands litigant.

Mr. Edwards asserts that in 1971, 1972, 1973 and some than one-half of 1974 he had no written or actual notice that his entry had been canceled, or of the 1972 decision of the Interior Board of Land Appeals which declares that the Dalby decision is final. Whatever the facts may be concerning his awareness of the Interior decisions in that period, Mr. Edwards concedes that he learned in August, 1974

that Paul Unruh intended to submit final proof for an entry on the 160 acre tract under consideration. Tr. 6-24-138. On August 27, 1974, he went to the Bureau of Land Management and "talked to them over the counter about what had happened." On that day or the day after B.L.M. employees showed him "on the books, that my entry had been cancelled." Tr. 6-24-146. The B.L.M. file on Contest Nevada 064160 discloses that Mr. Edwards inspected that file on at least four occasions in the fall of 1974 and obtained copies of hundreds of pages from the file in November, 1974. Since the 1971 and 1972 decisions are in that file, these steps must be viewed as an acknowledgement of actual notice. Yet during the last four months of 1974 and first five months of 1975 he took no action to appeal the 1971 Dalby decision or request the Interior Board of Land Appeals to reconsider or rescind its 1972 statement that cancellation of his entry was final.

On the basis of the above discussion and my ruling on the jurisdictional question, I reject the proposed Findings and Conclusions in Section II (pages 1-4) of the Contestant's post-hearing Opening Statement.

The Remaining Issues

The issues which remain are (i) cultivation of the required acreage, (ii) the habitable house requirement, and (iii) compliance with other cultivation requirements, particularly the one calling for application of such quantities of water as may be reasonably needed to produce a crop.

Two factors in this proceeding distinguish it from a Government contest. First, in a private contest the contestant has the burden of proof of establishing his case by the preponderance of substantial evidence. Glenn M. Clarke v. Bertha Mae Tabbytite, 72 I.D. 124 (1965). The second factor is the following restriction in 43 CFR 4.450-1:

"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, 1871 (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. Such a proceeding will constitute a private contest and will be governed by the regulations herein."

There seems to be no serious question about the number of cleared acres involved in Mr. Unruh's efforts to seed and cultivate a grain crop. About 22 or 23 acres had been cleared by a former entryman. I conclude that the work actually performed by the contestee was on the required number of acres. This is not a finding that the lands were cultivated to produce profitable results.

The Roberts Report

Mr. Nolan W. Roberts, a B.L.M. Realty Specialist, examined the Unruh homestead entry in October and November, 1974, and submitted a report on Mr. Unruh's "compliance with Homestead requirements as to residence, cultivation and habitable house . . ." On February 6, 1975 the Carson City District Office Manager transmitted the Roberts field report to the Nevada State Director of the Bureau of Land Management. That report is Exhibit 2 in this contest.

On October 23, 1974 Mr. Roberts obtained power billings for the Unruh mobile home and for the contestee's irrigation well (East Valley Road Location). He verified the fact that a two bedroom, one bath, 67' x 14' "well furnished" mobile home was on the entry. His report repeats rumors or speculative statements by others that the Unruhs had not used the homestead as their principal place of residence. However, most of the people interviewed stated that the contestee has lived on the entry.

The Roberts report describes a 22' x 27' structure, placed on the entry by a former entryman. Since Mr. Unruh is not contending that this structure was habitable in 1973 or 1974, I will not list its features or deficiencies.

On the entry Mr. Roberts found an operating domestic well near the mobile home, a large gasoline storage tank and pump, a new irrigation well with a submersible pump and a booster pump, a portable sprinkler system (approximately 1/4 mile of main line and 1/2 mile of lateral lines--this system to be moved by hand), plus telephone, propane and electrical service. Sewage facilities served by a septic tank were connected to the bathroom plumbing, but not to the kitchen equipment.

Prior to Mr. Roberts' inspection of October 23, 1974, a B.L.M. employee had participated in measuring the capacity of the Unruh irrigation well. It was found to have a capacity of about 200 gallons per minute. Mr. Roberts concluded that this would irrigate the required 20 acres.

Prior to his final proof examination, Mr. Roberts had visited or driven by the entry on approximately five occasions. On several of his visits there was a motorhome on the homestead, near the Unruh

mobile home. Also there was a light blue car, in plain view from Johnson Lane, having personalized license plates with the letters "Unruh."

Mr. Roberts did not give a full explanation of his reasons for questioning the contestee's good faith, but on the basis of an observation of the "way he spoke" to a woman who came out of the mobile home at nine a.m. in the morning just prior to the taking of Mr. Unruh's final proof, Mr. Roberts suspected that she was not Mrs. Unruh or that the contestee "had not spent the night before in the mobile home or both."

In the "Conclusions and Recommendations" section of his report, Mr Roberts expressed the view that "Mr. Unruh did not produce a crop on his entry in 1973 and did not produce a crop on his entry in 1974." Comparison of work on the entry with another Unruh farming operation will be discussed at another point in this decision. The Roberts report also furnishes information concerning the initial periods when irrigation water was available on the entry.

Mr. Roberts suggested that the Unruh homesteading effort was a "good case of subterfuge, "and expressed the belief that Mr. Unruh "thinks he is above dwelling in a house trailer." The report recommends cancellation or contest of the entry for the following reasons:

- "1. It is very questionable that Mr. Unruh's principal place of residence from March 1973 to March 1974 was his entry on Johnson Lane.
2. Mr. Unruh does not have a habitable house on the entry, at least he told me he wouldn't reside in the shack that is on the entry. The mobilehome on the entry has skirts and a porch but so do many other portable trailers.****
3. Cultivation of the lands in a manner reasonable calculated to produce profitable results was not accomplished."

In a discussion of the cultivation requirement the Roberts report indicates that rainfall in the Carson Valley is inadequate for crop production without the application of such amounts of water as may reasonably be required to produce a crop. The report states that instances of production of heads on small grain crops without supplemental water have occurred. These instances are referred to as "rare exceptions rather than the rule." Mr. Unruh was aware of the need for irrigation. In the 1970 hearing before Hearing Examiner Dalby (Contest Nevada 064160) Mr. Unruh testified on direct examination (Tr. 86):

"Q. Could you produce any crop, marketable crop or productive crop, without irrigation in this particular area on this particular land?"

A. I think it would be impossible.

Q. Why?

A. * * * your moisture is a winter moisture in that area, the last five or six years I've lived there its been that way. Your moisture comes in winter, summertime once in a while you will get a shower but it's not enough to keep a crop growing or in some cases not even enough to start it by germinating your seeds or whatever you are growing."

On the final page of his report Mr. Roberts reiterated that Mr. Unruh, as of the winter of 1974-1975, had not produced a crop.

The attorneys in this contest have made the following assertions in their post-hearing briefs (the contestant's position is quoted first):

"1. Proposed Finding: Government records do not show the impermanency of the trailer foundation; the fact that no water, except possibly rain, was used on the entry prior to final proof; the fact that no crop was ever harvested; the fact no crop was ever planted that could have been grown without irrigation well water; the fact that the only irrigation well was not drilled until just before final proof; the fact no other wells were utilized or applied; the fact that no other source of pumping of water was used; the fact rainfall was insufficient; the fact the zoning ordinances were applicable to the entry barring trailers; the fact Unruh did not intend the trailer to be permanent but stated he was going to remodel the existing dwelling; the fact Unruh did not live on the entry; the fact cultivation stopped shortly after final proof; the fact the crop of oats, if any, needed water every two weeks and was planted too late;

the actual elements of failure of bona fide compliance with the requirements of proof."

The response of the contestee's counsel is as follows:

"* * * the only reasons for the initiation of this Contest, aside from those relating to previous trial matters and due process, were lack of residence and cultivation. To show these reasons, the Contestant has merely refined them by alleging facts such as (1) no cultivation of the required acreage (2) failure to build a permanent dwelling to establish or meet the requirement for a residence (3) no well was operable until a few weeks before the filing of the final proof as showing acts calculated to produce a crop.

All of these reasons in one form or another were matters of record in the report of Noland Roberts . . ."

It is clear that in this proceeding the distinction must be made between reasons which will sustain invalidation of an entry, and evidence which may establish that justification exists for advancing a reason as the basis for a private contest.

The Applicable Proof Period

Because of service by Mr. Unruh in the armed service, he is entitled to a one year proof period both for residence and for cultivation. Stipulation, Tr. 6-24-51.

The Period of Residence by the Contestee

Mr. Unruh and his foreman testified that the Unruhs moved into the mobile home on the entry in the spring of 1973, and have lived there continuously since that time. Tr. 6-24-191, 193; Tr. 6-25-7, 34. The testimony of utility representatives or repair men confirms that the Unruhs resided on the entry. When Mr. Roberts drove by the entry prior to final proof Mr. Unruh's car was there. Mr. Eugene V. Maple, a plumber who observed the entry during 1973 and 1974 saw a car there "some of the time." Tr. 6-24-98. Mr. Charles D. Edwards, the contestant's father, lives about two miles from the entry and was asked by his son to "keep an eye on it." Tr. 6-24-98. He could see the entry on clear days from his

residence, and observed it with binoculars. He testified that he saw absolutely nothing going on at the homestead, except for a yellow truck with several people in it on one occasion. Tr. 6-24-104. Taken literally, this would mean that he saw none of the work that went on when the utilities were connected to the mobile home, when the lawn was planted on the west and south sides of the mobile home, or when well drilling work was performed at several locations on the entry. The contention that "nothing happened" on the entry is not sustainable.

There is no convincing evidence in the record to support the suspicion that the contestee was living at a location other than the homestead during the period under consideration. I find that the entry which is the subject of this contest was the principal place of residence for Paul Unruh and his family during the last nine months of 1973 and at all times in 1974.

The Mobile Home

On March 13, 1973, the contestee purchased a 14' x 70' Skyline Mobile home under a contract with a Reno, Nevada dealer. Exhibit F. He paid 10% down on a price of \$8274.83. The cost of delivery and set up was included in the price. The mobile home was moved on to the entry prior to March 25, 1973. Tr. 6-25-9. Mr. Unruh testified that he applied for a Douglas County permit in order "to comply or try to comply with the state laws. You have to have a permit to move it from Reno to the area. And the trailer company wouldn't move it without a permit." Tr. 6-25-45. The Trailer Court Permit was issued on March 20, 1973, in conjunction with a building permit, and was good for six months. Exhibit 4. On May 24, 1974, the Chief Building Inspector for Douglas County wrote to the Paul Unruh, advising that the permit had expired, and that the matter would be turned over to the District Attorney for action if the trailer was not moved within ten days. Exhibit 6. Mr. Unruh did not comply with that demand, and no action has been taken by the County. The contestee regards the "Federal land" status of the entry as a bar to enforcement of the County's restrictions related to the character and quality of structures. Tr. 6-25-46. Douglas County zoning provisions applicable to the portion of the county in which the entry is located do not carry a trailer overlay. Tr. 6-24-61. I am not impressed by the contestee's assertions that he intended to remodel the structure ("shack") on the entry, and changed his mind two or three months after moving on to the entry, after "deciding the cost would be too much to fix it up for what it was worth." He had been looking at that structure (he referred to it as a shack in the 1970 hearing in Contest Nevada 064160) for many years. The Interior Board of Land Appeals decided in November, 1972, that he had procured the cancellation of the Edwards' homestead entry. I

conclude that Mr. Unruh, an experienced farmer and businessman, would have thoroughly inspected and made up his mind about the potential of the 600 square foot shack before he committed himself to 120 monthly installments on the mobile home. In all likelihood, taking out the building permit for remodelling the shack was a ploy to enable the trailer agency to transport the mobile home over Douglas County roads to the entry.

If the homestead laws or the regulations issued under those laws contained provisions requiring a structure placed upon an entry to conform with city or county zoning ordinances, I would strictly enforce such provisions. I do not find authority in support of the contestant's contentions that zoning regulations apply to public lands used by a homesteader, or that to meet the habitable house requirement a structure must comply with local zoning regulations.

The wheels were taken off the mobile home, it was placed on concrete blocks, and skirting, steps and porches were added. Provisions for water, electricity and butane gas were made. The septic tank does not have sufficient capacity to accept water from the kitchen facilities but this is the only deficiency that has caused a problem.

I find that the contestee's mobile home was installed on the entry with a proper degree of permanence, and meets the habitable house requirement.

Cultivation Requirements

The case record shows beyond question that any seed planted by the contestee would have required water from an irrigation system, and that the contestee did not grow a crop on the entry either in 1973 or 1974.

Because this appears to be the crucial inquiry in this proceeding I repeat the contestant's contentions concerning cultivation:

[that Bureau records do not show] "the fact no irrigation water, except possibly rain, was used on the entry prior to final proof; the fact no crop was ever harvested; the fact no crop was ever planted that could have been grown without irrigation well water; the fact that the only irrigation well was drilled until just before final proof; the fact that no other wells

were utilized or applied; the fact no other source of pumping water was used; the fact rainfall was insufficient; . . . the fact cultivation stopped shortly after final proof; the fact the crop of oats, if any, needed water every two weeks and was planted too late; . . ."

The above elaboration of the theory that the contestant had brought forth an independent or new reason for cancellation contains a number of references to facts and evidence. With the contest grounds advanced by the contestant in mind, statements in the Roberts report should be reviewed:

1. Mr. Roberts reported that the initial power billing for the irrigation well on the entry was August 15, 1974, two weeks prior to submission of final proof by Mr. Unruh. He referred to power records which show that irrigation water wasn't available until August 11, 1974.
2. He referred to the well located near the mobile home and shack as the "domestic well."
3. He stated that approximately 23 acres seeded to small grain "had not sprouted by examination date." That date was October 23, 1974.
4. He referred to the irrigation facility placed on the entry by the contestee as a new well.
5. He indicated that "poor action" of the irrigation system observed in late October, 1974, several months after the final proof submission, resulted either from well failure or insufficient pressure.
6. He stated flatly that the contestee did not produce a crop on the entry either in 1973 or 1974. He compared the entry with the Unruh operation on lands less than two miles away where with wells, underground main lines and "motor driven wheel rigged sprinkler systems" Mr. Unruh produced 80 acres of onions and 80 acres of turf sod, all "in less time than he had to prove up on his homestead."

7. He recommended directly that a cancellation action or contest should be initiated by the B.L.M. for the reason that cultivation had not been accomplished in a manner reasonably calculated to produce profitable results. The paragraphs following his recommendation are critical of the contestee's failure to apply supplemental water. It is clear that Mr. Roberts attributed Mr. Unruh's inability to cultivate, i.e., failure to apply the necessary amounts of water in an arid locality, to the failure to complete an operating irrigation system on a timely basis.

Mr. Maple, the contestant's witness, went by the entry a dozen times or more in 1973 and 1974 and didn't see any green crop being grown there in those years, or water being applied to the ground. That is not greatly different from what Mr. Roberts reported.

The contestant examined the entry once or twice a month, usually on weekends. He would view it at night, after he had driven up from Los Angeles. He did not notice any irrigation or evidence of crop planting prior to the date of Unruh's final proof. On that date he saw a sprinkler system, and the new well installation. Tr. 6-24-115.

It is apparent that Mr. Edwards' observations of the entry were not made under the best conditions. He did not notice that telephone and electrical lines had been installed for the mobile home, or the tank for butane, and was under the erroneous impression that wheels had not been removed from the mobile home. He testified that he assumed the mobile home had been placed on the entry by a friend or associate. Tr. 6-24-132, 135, 1973.

The report filed by Mr. Roberts, based on examinations made prior and subsequent to the date of the Unruh final proof, is more reliable and detailed than the testimony of the contestant, his father or Mr. Maple. That report leaves little to the imagination. The reason specified in the Roberts report is the same reason as that advanced with embellishments by the contestant--that Mr. Unruh failed to meet the requirement for cultivation of arid lands because he did not make a timely completion of all components of his irrigation system, and was unable to apply needed supplemental water. Reverting to the complaint in this contest, one finds that there is no real difference in the reasons that are tied to cultivation (which includes irrigation). The complaint charges that the contestee "has not cultivated the required acreage," and that "the well allegedly constructed for irrigation by Contestee was not operable until a few weeks before Contestee filed final proof of his entry."

It is ironic that information from the power company on power consumption by the Unruh irrigation pump during the last two weeks of August, 1974, is not available because Mr. Edwards, the contestant, removed the meter. Tr. 6-24-143. The statement of account for that period provides a meaningless "estimated" reading, with the notation "Meter stolen." Exhibit 7. However, it is clear from the testimony of the contestee and his farm foreman that prior to final proof they never did bring together the key elements of the irrigation system. The new well was completed sometime during the summer of 1974, but the power was not cut in until mid-August, and the equipment installed at the time of submission of final proof did not pump enough water to irrigate a crop. The first crop (wheat) was not irrigated and blew away. Part of the second crop, oats planted in 1974, may have been eaten by wild horses, but in any event it would not have been successful due to lack of supplemental water. Tr. 6-24-207, 209, 214, 221, 223. Tr. 6-25-27, 32.

CONCLUSION

The final proof submitted by Mr. Paul Unruh in August, 1974, is rejected because in the period selected for proving up he did not cultivate the lands in a manner reasonably calculated to produce profitable results. Mr. Wesley L. Edwards is not entitled to a preference right under either of the acts cited in 43 CFR 4.450-1 because he failed to initiate this contest for a reason not shown by the records of the Bureau of Land Management. Action consistent with these determinations should be taken by the Bureau. 43 CFR 4.450-2.

The findings of fact requested in this proceeding are adopted only to the extent they are incorporated in this decision.

Dean F. Ratzman
Administrative Law Judge

Appeal Information

An appeal from this decision may be taken to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations in 43 CFR Part 4 (revised as of October, 1976). Special rules applicable to public land hearings and appeals are contained in Subpart E. If an appeal is taken, the notice of appeal must be filed in this office (not with the Board) in order to facilitate transmittal of the case file to the Board. If the procedures set forth in the regulations

are not followed, an appeal is subject to dismissal. Reference is made to the requirement for service upon counsel for the adverse party of any document filed in this proceeding, including a notice of appeal.

Enclosure: Additional information concerning appeals.

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