

THOMAS D. HICKEY

IBLA 77-275

Decided February 22, 1978

Appeal from the decision of the Idaho State Office, Bureau of Land Management, rejecting an application for a third extension of time in which to file final proof on desert land entry I-1504 and canceling the entry.

Affirmed.

1. Desert Land Entry: Extension of Time

Where a desert land entryman admits that there were alternate measures which might have been taken to achieve compliance by the deadline date therefor, as extended, but which he failed to employ, BLM's determination that resulting delays were not beyond his control, and that accordingly he is not entitled under 43 CFR 2522.5 to a third extension of time within which to make final proof, will not be disturbed. Inadequacy of financial resources to take available alternative steps does not excuse his failure to comply.

2. Desert Land Entry: Extension of Time

A third extension of time to file final proof of compliance on a desert land entry is properly denied to an entryman who acknowledges that he failed to make full use of previous extensions.

3. Desert Land Entry: Cancellation–Desert Land Entry: Extension of Time

Where the deadline for making final proof of compliance on a desert land entry passes

without the entryman having made final proof, his entry is properly canceled, even though a request for an additional extension of time within which to file such final proof was pending on the deadline date, where the request for extension is subsequently denied.

4. Administrative Procedure: Adjudication--Desert Land Entry: Extension of Time

Where the entryman makes admissions and submits evidence which establish conclusively that his failure to "prove up" his desert land entry during its initial term and two extensions was not the result of unavoidable delay, and that the failure was not without fault on his part, no further administrative proceedings are required prior to rejecting his application for a third extension.

APPEARANCES: William F. Ringert, Esq., Boise, Idaho, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Thomas D. Hickey (appellant), has appealed from a decision of the Idaho State Office of the Bureau of Land Management (BLM), rejecting his application for a third extension of time in which to file final proof on desert land entry I-1504, and canceling this entry because the time for making final proof had expired on April 21, 1976, without his having filed final proof.

On April 21, 1970, BLM allowed Lillian N. Hickey's application for a desert land entry on 320 acres of land in Idaho, designating this entry as I-1504. Final proof was due 4 years later, *i.e.*, by April 21, 1974. 43 U.S.C. § 329 (1970); 43 CFR 2521.6(a).

On August 14, 1973, a copy of a quitclaim deed transferring this entry from Lillian N. Hickey to appellant was filed with BLM, along with a completed desert land entry assignment claim form. On August 20, 1973, BLM issued a decision allowing the assignment. The decision erroneously indicated that appellant's final proof was due by August 21, 1974.

On January 4, 1974, BLM sent appellant a courtesy notice that final proof on entry I-1504 was due by April 21, 1974, the correct date. On February 7, 1974, appellant filed a request for a 1-year extension of time in which to file final proof, stating as grounds

that he had been misled by the erroneous indication in the decision of August 20, 1973. He stated that his well was nearly finished, and that he had contacted Idaho Power Company regarding supplying the site with power to run an irrigation pump. He indicated that all of his irrigation system was on order but that, relying on BLM's incorrect indication of the due date for final proof, he had not requested a delivery date early enough to meet the April 21 deadline. He also noted that even if he did receive the irrigation system needed for compliance, he might not be able to install this system in time to meet the April 21 deadline if the weather did not "break" early enough.

On March 13, 1974, BLM conducted a field examination pursuant to appellant's request for an extension, and determined that appellant had demonstrated that the delay was the result of a situation for which he was not responsible, and which he could not readily have foreseen. On April 2, 1974, it granted him an extension of 1 year in which to make final proof.

On November 26, 1974, BLM received an inquiry on behalf of a prospective purchaser of appellant's interest in the entry lands, as to whether, after purchase, he could expect an extension of time to make final proof. BLM responded on December 17, 1974, noting that an assignee would take the place of the entryman and would only qualify for an extension if the seller would have qualified. BLM advised him that there are no provisions for granting an extension to an assignee solely on the basis of there being a short time left after purchase before the deadline for making final proof.

On January 13, 1975, BLM sent appellant a courtesy notice that his extension was up on April 21, 1975, and that final proof was due by this date. On March 26, 1975, appellant filed a request for a second extension of time in which to file his final proof. In this request, appellant stated that, although it had been nearly finished in January 1974, the well on the property had since backfilled, and that his driller, Dave Johnston, had repeatedly lost tools down it. Appellant alleged that, although Johnston had stayed on the job "as much as he could," he had been unable to bring the well to completion because of these difficulties and the press of his other business.

On May 1, 1975, BLM conducted a field examination of the entry lands. This examination revealed that, apart from the removal of brush about 4 years before and the placement of a well-drilling rig on the site, there were no improvements on the land. On or before July 3, 1975, appellant and his father, Carl Hickey, met with representatives of BLM's Boise District Office. They indicated that the well on the site had been drilled to 750 feet and had produced 55 inches of water, but had not been tested; that they had applied with Idaho Power for connection of electricity at the site 3 years earlier; that they had 6- and 8-inch portable aluminum main lines

and hand lines, but had yet to purchase 10-inch main line; and that Dave Johnston would attempt to return to work on their well in July 1975.

In its investigation of this request for a second extension, on May 5, 1975, BLM contacted Elmer D. Johnston seeking to verify appellant's allegation that he was responsible for the delays in finishing the well. BLM was informed by Mrs. Johnston that they had not been drilling this well, but that appellant had rented their well-drilling rig from them to do the work himself. Appellant indicates in the statement of reasons filed with this appeal that his father, who is a licensed well driller, ran the rented drilling rig after one Leon Nielson had discontinued drilling efforts on appellant's behalf. He states that he worked on the entry on weekends or during vacations, assisting his father in the drilling.

On July 7, 1975, BLM's Boise District Manager wrote a memorandum stating that, although the situation at the entry site appeared not to have changed much in the year since the granting of the first extension, circumstances beyond appellant's control were responsible for his failure to be able to make proof by the extended deadline date. Accordingly, on July 25, 1975, BLM's Idaho State Office granted appellant a second 1-year extension of time within which to make final proof, setting a new deadline date of April 21, 1976.

On February 13, 1976, BLM sent appellant a courtesy notice that final proof for his desert land entry was due by April 21, 1976. On April 6, 1976, appellant filed a request for a third extension of time. Appellant stated therein that the well at the site had caved in and that he had to drill a new well, which he had just completed, and that Idaho Power would not construct power lines to the entry site until after July 1976, so that it was impossible to pump water and to irrigate the land until after the deadline date. With this request, appellant filed a corroborating letter from Idaho Power stating that, as of March 29, 1976, it could not construct power lines to the entry site until around July 15, 1976.

On April 19, 1976, appellant filed two statements in support of his application for an extension. The statement dated April 14, 1976, by Elmer D. Johnston, indicates that he had seen both the old and new wells, that appellant intended to farm the land as soon as possible, and that he needed power in order to be able to do so. The statement of Rulon Hansen, also dated April 14, 1976, indicates that he had "seen the old well and [had] witnessed the new one," that the new well was drilled beside the old one and was "down better than 700 feet," and that appellant intended to farm the acreage as soon as he could obtain power to run an irrigation pump. Appellant also filed a statement by a representative of Idaho Power that appellant had first contacted him on January 20, 1976, regarding getting power supplied to the site.

On April 22, 1976, the Boise District Office of BLM conducted a field examination of the entry site and noted that, apart from having been cleared 4 to 5 years previously (which clearing was revegetating), no work other than well drilling had been done on the land. An inquiry on May 4, 1976, by a BLM employee indicated that on March 18, 1976, appellant entered into a contract with Idaho Power to construct a power line to the entry site, but that Idaho Power could not do so earlier than June 1, 1976. <sup>1/</sup> Additionally, an inquiry by a BLM representative on May 19, 1976, to El Rancho Realty revealed that it was apparently attempting to sell the entry on appellant's behalf for between \$150,000 and \$200,000. The District Manager's report to BLM's State Director on June 17, 1976, suggested that the request for an extension be denied, since appellant was not developing the entry in good faith, and since the delay in getting power to the site was not unavoidable.

On July 1, 1976, the Idaho State Office of BLM issued a decision denying appellant's request for an extension of time and cancelling his entry. This decision noted appellant's failure to take positive action toward executing a contract to get electrical power to the site until just 34 days before final proof was due. The decision announces the following rule:

Delays in the construction of irrigation works intended to convey water to the land will not be considered unavoidable if the entryman failed to take all reasonable steps to anticipate or avoid the cause of delay at least 6 months before the end of the final proof period.

The decision concludes that appellant did not adequately demonstrate that he had taken all reasonable steps to anticipate or avoid the cause of delay.

The decision also notes the apparent attempt by El Rancho Realty to sell the entry lands on appellant's behalf. BLM concluded that it was doubtful that appellant was seeking the extension in order to complete the entry for his own use, but instead, that he apparently desired the extension in order to sell or assign the entry at a profit. BLM held that "[a]pproval of an extension of time under such conditions would amount to a mockery of the spirit and intent of the desert land laws and the statutory relief authorizing extensions of time."

On July 27, 1976, appellant filed a request for reconsideration of this decision, along with supporting documentation. In this request, he asserts that he had taken steps to arrange financing for an irrigation system; that Idaho Power would not arrange to supply

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<sup>1/</sup> It was determined later that appellant in fact did not enter into this contract.

electric power to the new well site until a pump test was completed and the well was certified; that on February 4, 1976, he contacted Layne Pump Company, but despite every possible effort to promote the well test, it was unable to test the well until July 5, 1976, "[d]ue to weather conditions and their scheduling;" and that further compliance efforts, including cultivation, had to be held up until after the site was provided with power to run the irrigation pump, because the ground had to be "ripped," and without water, the wind would erode the topsoil. <sup>2/</sup> Appellant also asserted that he did not have, and had never had, any intentions of selling any property involved with his entry. He suggested that BLM had confused his entry with land owned by his father, which was listed for sale with El Rancho Realty, as was the adjacent land of one Rulon Hansen. However, there is considerable evidence in the case record that he had in fact made the entry available for sale.

On July 29, 1976, the Idaho State Office of BLM vacated its decision of July 1, 1976, pending reconsideration in light of appellant's letter of July 27. On August 12 and December 10, 1976, Kirby Boldan, an employee of the Boise District Office of BLM filed a memorandum indicating that appellant's entry had been for sale several times since 1974. On December 20, 1976, he filed a memorandum acknowledging that Idaho Power would not enter into a contract to supply power to appellant's desert land entry until his well was tested, and that appellant had been aware of this problem for some time. This memorandum also corrects an erroneous indication in the record that appellant and Idaho Power had entered into a contract on March 18, 1976, prior to a well test, to construct a power line to the entry site.

On March 14, 1977, the Idaho State Office issued a decision again denying appellant's application for an extension of time and cancelling his entry. This decision held as follows:

There has not been an adequate showing that the delay in the construction of the irrigation works was unavoidable due to no fault on the part of the entryman for which he was not responsible and could not have readily foreseen. The application for extension of time is denied for this reason alone. In addition, however, there is still the

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<sup>2/</sup> This statement hardly accords with the affidavit of Carl Hickey, appellant's father, who states:

"During the spring of 1976 snowfall occurred on this desert entry clear into the middle of April, and it would have been difficult to cultivate and irrigate one-eighth of the land in the entry before April 21, 1976, because of the wet ground conditions. Also, it would have been a waste of electrical power and water to irrigate the land during April because the ground already was too wet."

specter, circumstantial as it might be, that the application for extension was filed to extend the life of the entry so that it could be disposed of by sale or assignment.

Appellant has appealed from this decision.

There was a delay in the construction of the irrigation works intended to convey water to the entry land in that appellant was unable to have electricity supplied to the site to run an irrigation pump in time to meet the deadline for compliance. Appellant submits that this delay was not his fault and was unavoidable. Appellant's second well was completed around February 5, 1976. He alleges that adverse weather conditions at that time prevented transportation of regular testing equipment to the site, and smaller testing equipment which could be used instead was unavailable. Thus, testing was delayed until after the April 21 deadline. Idaho Power allegedly would not enter into a contract to run power to the well until after it had been tested, <sup>3/</sup> so, appellant argues, he could not operate his irrigation system until after the deadline date. Further, appellant argues that it was unreasonable to expect him to expend money installing a pump and irrigation system until the productivity of the well was established by a well test. Thus, he asserts that his failure to comply was due to bad weather and unavailability of testing equipment, coupled with the strictures of Idaho Power's policy and the demands of financial prudence, rather than any fault of his own.

Assuming the truth of his allegation that he could not get his pump tested in February 1976, there is merit to appellant's argument that his immediate inability to get an electrically pumped irrigation system by the April 21 deadline date was beyond his control. However, appellant's argument is too shortsighted as to how he came to be in the predicament he faced in February 1976, and he has failed to demonstrate that he arrived in this position through no fault of his own.

The long-range cause of the delay in 1976 of the completion of the irrigation works was that appellant and his predecessor were unable to finish a working well within the first 6 years of this entry. After the granting of the second extension in 1975, the

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<sup>3/</sup> Appellant's father admitted as follows in his affidavit in appellant's statement of reasons: "I feel that Idaho Power would have given some priority to this job had it been made known to us that, even with the new well completed, the Bureau of Land Management would not grant an additional extension of time." This admission casts serious doubt on appellant's assertions in his request for extension and on appeal that Idaho Power could not have installed power by April 21, 1976.

project was delayed by the cave-in and the backfilling of the first well in September 1975.

[1] Assuming that the failure of the first well was beyond his control, he nevertheless has failed to demonstrate that he took available alternative steps to achieve compliance. When he completed his second well, appellant could have rented a gasoline or diesel irrigation pump to supply water temporarily until his well could be tested and power could be supplied, as admitted in the affidavit of Carl Hickey. He still had 75 days after completion of his well to achieve full compliance, which, as pointed out in his statement of reasons, was more than enough time to cultivate the land and establish his irrigation system. An entryman's failure to comply is not excused where the record indicates that he reasonably could have done more than he did to comply. Pamela M. Brower, 26 IBLA 366 (1976).

Appellant may not excuse his failure to take such alternative action on the grounds that his alleged inability to get his well tested made further expenditure of money risky. Development of a desert land entry necessarily involves a certain financial risk. Inadequacy of available financial resources to undertake proper development of the land does not excuse failure to comply with reclamation requirements on a timely basis. Ivan J. Brower, 32 IBLA 286 (1977); Pamela M. Brower, *supra*, and cases cited therein.

[2] A report in the record indicates that on April 22, 1976, long after the February 5, 1976, date of completion alleged by appellant, a well-drilling rig was still in place over a well on the entry, with a rig cable running into the well. This fact indicates that the existence of a finished well was still uncertain. Putting aside the questions which this raises concerning appellant's good faith in making the allegations in his request for an extension of time, and on appeal, that his well was completed and ready for testing in February 1976, it also strongly indicates that appellant had failed to use the year's extension granted in 1975 to take even one step toward completion of compliance requirements. In April 1976, the condition of the entry was identical to that in April 1975. Except for a questionable well and, except for clearing undertaken years earlier, the land was unimproved. A further extension of time to file final proof is properly denied to an entryman who fails to make use of a previous extension. Ivan J. Brower, *supra*; Pamela M. Brower, *supra*.

[3] In the affidavits submitted along with appellant's statement of reasons, both appellant and his father submit that they could and would have installed an irrigation system which satisfied the requirements of the regulations by April 21, 1976, if BLM had advised them before this date that it would not grant the request for a third

extension of time within which to make final proof. <sup>4/</sup> This argument that BLM was to blame for appellant's failure to perform the work prerequisite to making final proof because it did not inform appellant that his request for an extension would be denied, and the suggestion that the government is therefore estopped from canceling his entry, are entirely without merit.

Appellant asserts that he and his father did not attempt to comply further so as to be able to make final proof because it never occurred to them that they would not receive an extension. However, appellant knew or should have known from his experience with his second request for an extension that BLM conducts investigations into these requests and that extensions are not automatically granted. BLM did nothing to mislead appellant to believe that his request would be granted automatically, and, to the contrary, expressly warned him twice before that he should not expect to receive an extension as a matter of course. Thus, appellant had no one but himself to blame for his failure to realize that an extension might not be granted. By relying on his self-assured belief that he would have as much time as he wished to comply and, accordingly, doing nothing further to comply with reclamation requirements, appellant took the risk that his previous efforts toward compliance, such as they were, would not be regarded by BLM as justifying the granting of another extension.

BLM was well acquainted with the facts of this case. In the 7-year history of the entry, it saw that virtually no progress had been made toward completion, and this failure to make progress seemed to result from absence of effort. Appellant's assertions on paper as to his seriousness in completing the entry was consistently unsupported by his actions. In April 1974, he stated that his well was almost finished and that he could easily complete his reclamation by August 21, 1974. In March 1975, his almost-completed well was still unproductive, and there was no evidence of the irrigation system which he had allegedly had nearly ready to go in 1974. Appellant blamed his driller for his noncompliance, despite the fact that his driller was his father, who had undertaken compliance efforts on his son's behalf and was behaving as though he were himself the entryman. Despite the weakness of appellant's blaming an uninvolved third party for the delay, when the fault for the delay in fact lay very close to appellant, BLM elected that year to give him the benefit of the doubt and allow the second extension.

A year later, nothing more had apparently occurred at the entry site. This time, the blame, said appellant, lay with the power company.

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<sup>4/</sup> Appellant's father goes even further, asserting that he could have finished cultivation by the deadline date.

[4] Pursuant to 43 U.S.C. § 336 (1970), it is the obligation of the applicant to "show to the satisfaction of the Secretary that because of unavoidable delay in the construction of irrigation works \* \* \* he is, without fault on his part unable to make proof \* \* \* as required by law within the time limit therefor \* \* \*." If the entryman fails to make a satisfactory showing to this effect, he has failed to demonstrate his qualification to obtain the relief sought, and the Secretary is without authority to grant the extension, in which case the Secretary has no discretion to exercise.

Only by demonstrating to the satisfaction of the Secretary (or his duly authorized delegate) that the delay was in fact unavoidable and without fault on his part can the entryman establish that he is qualified, and thereby invoke the Secretary's discretionary authority to grant or deny the application, either on the basis of the merits of the application, the extent of the entryman's equity, etc., or on the basis of some extraneous consideration, such as the supervening need to devote the land to some Federal purpose.

In a recent decision, the Court of Appeals for the Ninth Circuit considered a closely analogous case involving an application for a second extension pursuant to 43 U.S.C. § 334 (1970). Stickelman v. United States, 563 F.2d 413 (1977). There the court noted:

[I]f the entryperson meets the criteria of the first proviso of § 334, he or she is entitled to the Secretary's exercise of discretion on the claim for an extension. There are thus two stages in an extension decision, the first stage requires a finding of fact, and the second stage involves an exercise of discretion.

The court then held that where field examiners of the BLM render an unfavorable report in the fact-finding phase, the entryperson should be given opportunity to read and reply in writing to the report, to confront the reports authors, and to present contrary evidence, although the court said, this "does not mean that she had a right to a full evidentiary hearing." 5/ The court then went on to say:

If the entryperson appeals to the IBLA there must be an opportunity to rebut the deciding officer's findings, to respond to the reasons for the discretionary decision, and to answer any other new material. The IBLA has discretionary authority to grant or deny an evidentiary hearing. 43 CFR 4.415 (1976). It should

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5/ We must admit to some confusion on our part concerning the court's meaning here. We have no procedure for providing the opportunity for such confrontation and receipt of contrary evidence except in the form of an administrative evidentiary hearing.

grant a hearing when there are significant factual or legal issues remaining to be decided and the record without a hearing would be insufficient for resolving them. The IBLA should also find whether the entryperson meets the requirements of the proviso and explain its discretionary decision if it refuses the extension. These findings and explanations are necessary for adequate judicial review.

Applying these criteria to the case at hand, we find that appellant Hickey has obviously read and responded in writing to the field examination reports, and has submitted contrary evidence; it also appears that he has had some contact with the field examiners, although it is doubtful that these contacts were in the nature of the confrontation referred to by the court in Stickelman, supra.

The question, then, is whether we should (1) remand this case to BLM to afford Hickey an opportunity to confront the field examiners in some sort of informal ad hoc proceeding, or (2) order a full-blown evidentiary hearing pursuant to 43 CFR 4.415, or (3) proceed to decide the appeal on the basis of the record before us. Although appellant has requested a hearing before an administrative law judge, and although there are certain factual disputes which have not been resolved, we are of the opinion that appellant's own statements and the evidence submitted by him establish conclusively that he is not qualified to receive a third extension. Therefore, in this particular case, further proceedings would be only a useless, pro forma gesture leading to a foregone conclusion.

The evidence of record to which we allude are the sworn statements of appellant and his father to the effect that he had sufficient time to complete the required reclamation and cultivation of the entry after completion of the second well, and he could have accomplished the work by installing a rented gasoline or diesel irrigation pump to supply water until he could get electric power, but he did not do so because BLM did not tell him in advance that it would not grant a further extension; that he did not choose to incur the financial risk of proceeding until he could get the well professionally tested; and that prior to the expiration of his second extension he did not attempt cultivation because (1) according to appellant, the land was too dry to cultivate without water and would have caused the topsoil to blow away, or (2) according to the affidavit of appellant's father, the ground was so wet with natural moisture that the application of irrigation water would have been a waste of water and energy.

These statements are, in fact, admissions that appellant could have completed all of his requirements by the end of the second extension, but that he made an election to await the allowance of a third extension for which he had filed application. While

it no doubt would have been more comfortable, financially and otherwise, for appellant to have yet another year to prove up, his own declarations and those of his father conclusively establish that this was purely a matter of appellant's own choice. The matters which were beyond his control, i.e., the backfilling of the first well and the inability to get electric power service to the second well, did not prevent appellant from proceeding to cultivate and irrigate. They simply were factors which caused appellant to decide not to do so during the time remaining. Appellant's assertion in his statement of reasons that he had worked on the entry on weekends or during vacations, assisting his father in the drilling, is further evidence that he did not fully utilize the additional time which BLM made available to him during the first two extensions. Even if he did not acquire the alternative gasoline or diesel pumping systems, as Carl Hickey acknowledges could have been done, appellant could have had his land cleared and cultivated and his irrigation system in place. Had he done so, perhaps this would have been regarded as a demonstration of sufficient bona fides to merit the third extension. Instead, he relied upon the lack of electric service as his excuse for doing nothing.

On the basis of the record before us it does not appear that "there are significant factual or legal issues remaining to be decided." Stickelman v. United States, *supra*.

Where the entryman's own evidence shows conclusively that his inability to make final proof of the reclamation and cultivation of the lands within the time provided by law was the result of his lack of diligence, or his own lack of desire to take a financial risk, his lack of qualification to receive another extension is established. Appellant has failed to meet the requirements of the statute, and this Board concludes that, for the reasons above-stated, no evidentiary hearing is required.

In view of our holding, it is unnecessary to consider the validity of BLM's announced rule that delays in the construction of irrigation works will not be considered unavoidable if the entryman failed to take all reasonable steps to anticipate or avoid the cause of the delay at least 6 months prior to the end of the final proof period. We also do not consider the validity of BLM's apparent conclusion that an attempt by an entryman to sell his entry is *prima facie* evidence of bad faith which justifies rejection of an application for an extension of time within which to make final proof.

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.

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Edward W. Stuebing  
Administrative Judge

We concur.

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Martin Ritvo  
Administrative Judge

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Douglas E. Henriques  
Administrative Judge

