

RONALD E. GEIGER

IBLA 78-238

Decided September 18, 1978

Appeal from decision of the Alaska State Office, Bureau of Land Management, dated January 23, 1978, rejecting homestead entryman's final proof and directing entryman to reduce his entry and submit a description of the lands to be relinquished, or to amend his entry to a 5-acre homesite application. AA-6304.

Affirmed.

1. Homesteads (Ordinary): Generally

An entryman's final proof is properly rejected when it is defective on its face, with the final proof showing that the applicable cultivation requirements have not been met.

APPEARANCES: James Ottinger, Esq., Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Ronald E. Geiger appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting his homestead entry final proof and directing him to reduce his entry and submit a description of the lands which will be relinquished and those which appellant would retain. In the alternative, the decision appealed from directed Geiger to amend his homestead entry to a 5-acre homesite application.

[1] Geiger, who filed his final proof for homestead AA-6304, embracing lot 6, SW 1/4 NE 1/4, NW 1/4 SE 1/4, sec. 30, T. 20 N., R. 10 E., Seward meridian, Alaska, seeks to obtain title for the entire 109.83 acres described in that final proof. The decision below held that Geiger was entitled only to approximately 60 acres of land due to his failure to completely meet the mandatory cultivation requirements set forth in the homestead law and in the Departmental regulations under the law which require that, at the time of the filing of final proof,

There must be shown also cultivation of one-sixteenth of the area of the claim during the second year of the entry and of one-eighth during the third year and until the submission of proof, unless the requirements in this respect be reduced upon application duly filed. Cultivation, which must consist of breaking of the soil, planting or seeding, and tillage for a crop other than native grasses, must include such acts and be done in such manner as to be reasonably calculated to produce profitable results.

43 CFR 2567.5(b). Applying this regulation to the 109.83 acres which Geiger seeks to claim, the decision below outlined the amounts of cultivation required each year and contrasted these amounts with the acreage which Geiger and his various witnesses claimed were, in fact, cultivated. That table reads as follows:

<u>Entry Year</u>	<u>Cultivation Acres Required</u>	<u>Entryman M. Kimball Claimed</u>	<u>R. T. Pope Witness</u>	<u>Witness</u>
1st 7/26/71 - 7/25/72	-0-	-0-	-0-	-0-
2nd 7/26/72 - 7/25/73	6.86	3/4	3/4	3/4
3rd 7/26/73 - 7/25/74	13.72	7.7	9	7.5
4th 7/26/74 - 7/25/75	13.72	7.7	9	7.5
5th 7/26/75 - 7/25/76	13.72	14	14	14

That these figures represent the acres required to be cultivated and the acres claimed stands undisputed on the record, and the complaint which Geiger raises on appeal is that the decision below failed to consider his rights under 43 U.S.C. § 279 (1976), which allows veterans of World War II and the Korean conflict 2 years credit for military service in meeting the cultivation requirements of the homestead act. 43 CFR 2096.1-4.

In his Statement of Reasons for Appeal, Geiger makes reference to a private contest which was filed against his homestead entry on April 10, 1975. According to Geiger, Robert E. Sorenson, Chief of Lands and Mineral Operations, Alaska State Office, BLM, "allowed the contest in the face of these veteran's rights," thereby causing Geiger to lose "a good paying job" and forcing Geiger to expend "enough money to preclude completion of cultivation during the fourth year."

The contest to which Geiger refers was dismissed by a July 13, 1977, decision of Administrative Law Judge E. Kendall Clarke who

also rejected a Notice of Appeal from that decision as untimely on December 8, 1977. Since that case is not before this Board, we have no reason to inquire into the decision of Mr. Sorenson to refer the case to Judge Clarke for a hearing. We note, however, that when a complaint initiating a private contest is filed, the Manager is specifically empowered to decide the contest himself only when the contestee defaults by failing to respond to the contestant's complaint. 43 CFR 4.450-7(a). The fact that Geiger was required to defend the validity of his entry in a private contest hearing is completely without merit as an excuse for failure to comply with the mandatory cultivation requirements of 43 CFR 2567.5, supra.

Although the contest is not before us, we may take official notice of that case, Hutson v. Geiger. See 43 CFR 4.24(b). Essentially the same data relating to the clearing and cultivation of the homestead entry (up to the time of the hearing, February 25, 1976) were introduced as were expressed in the final proof given July 27, 1976. In his decision of July 13, 1977, the Administrative Law Judge said:

DISCUSSION

Under a normal homestead entry, a homesteader must establish his residence within six months; however, he can secure an extension up to six months in time. He must then clear and cultivate one-sixteenth of the land area of his entry by the end of the second entry year. He must cultivate a total of one-eighth of the homestead entry by the end of the third year, and thereafter, he must continue to keep the one-eighth under cultivation until he submits his final proof.

A veteran under 43 U.S.C. 279-284, has until the end of the fourth entry year to clear and cultivate one-sixteenth of his homestead entry and until the end of the fifth entry year to clear and cultivate a total of one-eighth of his homestead entry.

Here the Contestee has cleared and cultivated 7.7 acres during the fourth year of his entry having cleared the land and seeded it prior to November 5, 1974. At the time of the hearing, he still had several months to complete any further requirements concerning his cultivation for the fifth year providing he had two years credit for his military service.

I find that Mr. Geiger's military service for a period of four years where he was honorably separated and transferred to inactive status is sufficient to give him the credit available under 43 U.S.C. 279-284.

The homestead entry in this case is 110 acres in size. This would require that he would have to clear and cultivate 6-7/8 acres on or before July 26, 1975. The evidence clearly shows that this amount of clearing and cultivation took place on that date. He had until July 26, 1976, several months after the date of hearing, to clear and cultivate an additional 6-7/8 acres. There is no question from the evidence that Mr. Geiger and his family have complied with the provisions of the Homestead Act of 1862 as it applies to Alaska in regard to the establishment of residence and also of the clearing and cultivating of the land to the extent required at the time of the hearing.

CONCLUSION

The contest herein is dismissed for the reason that the Contestant did not bear the burden of showing that the Contestee was in any violation of the provisions of the Homestead Act at the time or up to the time of the hearing.

The contestant's appeal from this decision was summarily dismissed because it was untimely filed.

Appellant contends herein that inasmuch as the Judge, in the contest decision, ruled that he had until the end of the fifth entry year to complete his cultivation, and as he had made the necessary cultivation during that year, his final proof should be accepted and patent be granted for the entire area in his homestead entry.

BLM was not a party to the private contest, Hutson v. Geiger, and so the doctrine of res judicata does not apply to consideration de novo of the final proof by BLM, and its different conclusion as to the compliance with the homestead requirements by Geiger. See generally Unruh v. Edwards, A-31083 (April 9, 1970); City of Phoenix, 53 I.D. 245 (1931).

It is correct that an entryman with military service of more than 19 months is entitled to 2 years' credit toward the cultivation requirements under the homestead laws, and so is required to meet the cultivation requirements for any 2 of the 4 years in which cultivation is ordinarily required. Edgar A. Adler, A-30077 (April 6, 1964). The cultivation requirements for a homestead are one-sixteenth during the second entry year, and one-eighth during the third, fourth and fifth entry years, unless final proof is submitted earlier than the end of the fifth year. From his military service, Geiger is entitled to substitute that service for a maximum of 2 years of cultivation. His final proof shows less than one-sixteenth of the entry cultivated during the second entry year, one-sixteenth during the third and fourth years, and one-eighth during the fifth year. Thus, by any scheme of substitution, Geiger will still be short of the required

cultivation for 1 year of his entry. We point out that the Judge erred in his conclusion that only one-sixteenth of the entry had to be cultivated in the fourth entry year if the military service was substituted for the cultivation necessary in the second and third years.

Judge Clarke's error, however, visited no adverse effects upon appellant. By the time Judge Clarke's decision was rendered, appellant had already submitted final proof, and the 5 years of the entry had run its course. Appellant could scarcely contend that he relied on a decision which had not yet been entered when he performed the cultivation and tendered the final proof.

As the decision herein appealed properly found, Geiger, as a Korean War veteran with more than 19 months service, is entitled to 2 years' credit for cultivation. A homestead entryman who by reason of his military service is entitled to more than 19 months' credit toward the cultivation and residence requirements for patent under the homestead law may substitute service credit for any 2 years of cultivation but must cultivate at least one-eighth of the area of the entry whether he elects to file final proof at the end of the first entry year or at the end of the fifth year. Franklin P. Rambo, A-30068 (May 13, 1964). Geiger's final proof, and the evidence of record, which stands uncontradicted on appeal, show him to be deficient with respect to the cultivation requirements for an entry of 110 acres for the second, third, and fourth entry years. Thus, Geiger was properly directed to reduce his entry to approximately 60 acres (the maximum claim which can be supported by Geiger's maximum 2-year cultivation), or to amend his homestead entry to a homesite claim. The cultivation shown by Geiger would be satisfactory to prove up a homestead entry embracing only lot 6, NW 1/4 SE 1/4, sec. 30, T. 20 N., R. 10 E., Seward meridian.

No material issues of fact being at issue, Geiger's request for a hearing is denied. 43 CFR 4.415. See David Budinski, 31 IBLA 139 (1977).

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 and appellant shall be allowed 30 days from the receipt of this decision to amend homestead entry

AA-6304 to a smaller area or to apply for a homesite claim of the 5 acres surrounding his house.

Douglas E. Henriques
Administrative Judge

We concur.

James L. Burski
Administrative Judge

Edward W. Stuebing
Administrative Judge

