

**Editor's note: Reconsideration denied by order dated Feb. 22, 1980; Reconsideration granted, decision vacated by order dated Oct. 23, 1980 -- See 43 IBLA 275A and B below.**

HOWARD D. MARSHALL

IBLA 79-395

Decided October 15, 1979

Appeal from decision of the Idaho State Office, Bureau of Land Management, cancelling desert land entry I-1995.

Affirmed.

1. 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 where there is no reasonable prospect that, if the extension is granted, he will be able to make final proof of reclamation, irrigation, and cultivation within the time required by law.

APPEARANCES: Daniel A. Slavin, Esq., Stephan, Slavin, Eaton & Stephan, Twin Falls, Idaho, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Howard D. Marshall appeals from a decision dated March 26, 1979, by the Idaho State Office, Bureau of Land Management (BLM), denying an application for extension of time and cancelling his desert land entry I-1995.

As related in the decision the facts with respect to the entry are as follows: The entry was originally allowed on October 8, 1968, to one Leola M. Givens, based on her plan for construction of a well as a source of irrigation water. The initial date for submission of final proof was October 8, 1972. On March 17, 1971, an assignment of the entry to appellant herein was approved by BLM.

On October 2, 1972, appellant filed an application for a 3-year extension of time to make final proof. This application was initially denied because it failed to show that there was an unavoidable delay

in the construction of the irrigation works, through no fault of the entryman, that prevented him from making proof of reclamation and cultivation of the entry.

On November 13, 1972, appellant requested reconsideration of the denial, advising BLM that the land of his entry had been declared a critical groundwater area, that he had abandoned the plan for a well, and had become a stockholder in Canyon View Irrigation Company (CVIC), incorporated for the purpose of delivering irrigation water to the stockholders. On December 22, 1973, CVIC filed with BLM a petition (1-5966) to be approved as a source of water for desert land entries.

On September 7, 1973, appellant was granted a 3-year extension of time based on additional information supplied by appellant and "premised on [his] abandonment of the plan for a well because of the critical groundwater declaration and the anticipated project that [CVIC] would be approved as a source of water and would have their system constructed, and operating for delivery of water by the time of the extended final proof date which was October 8, 1975." (Dec. p. 2.)

On October 3, 1975, appellant filed a second application for a 3-year extension of time alleging that because of conditions beyond his control he was unable to get water on his land. This alluded to CVIC's inability to finalize its water delivery system. The requested extension was granted, the final proof date was set for October 8, 1978.

On October 6, 1978, appellant filed a third application for extension, asserting that CVIC was still unable to deliver water.

In its decision BLM conceded that the conditions preventing appellant from making final proof were beyond his control but found that there was no prospect, if a further extension were granted, that appellant would be able to complete the requirements for final proof. BLM concluded therefore that a third extension, with final proof date of October 8, 1981, "would only serve to postpone the day of reckoning", for [appellant]." It therefore denied the application for extension and cancelled the entry.

In his statement of reasons appellant asserts in effect that he has a legal right to complete his entry until October 8, 1981. This erroneously postulates that a desert land entryman has as a matter of right, 13 years to prove up. Appellant further asserts that the basis for refusing the third application for extension and for cancelling the entry is "purely speculative" and "should be reviewed in the light most favorable to the entryman."

In the alternative appellant puts forward a request, a time of 180 days after the effective date of the cancellation, within which to remove growing crops from the land.

[1] The statute pertinent to this appeal is 43 U.S.C. § 336 (1976). It provides:

§ 336. Further extension in addition to that authorized by sections 333-335 of this title

The Secretary of the Interior may, in his discretion, in addition to the extensions authorized by sections 333-335 of this title or other law existing prior to February 25, 1925, grant to any entryman under the desertland laws of the United States a further extension of time of not to exceed three years within which to make final proof: Provided, That such entryman shall, by his corroborated affidavit, filed in the land office of the district where such land is located, show to the satisfaction of the Secretary that because of unavoidable delay in the construction of the irrigation works intended to convey water to the land embraced in this entry, he is, without fault on his part, unable to make proof of the reclamation and cultivation of said lands as required by law within the time limited therefor: And provided further, That the entryman, his heirs, or his duly qualified assignee, has in good faith complied with the requirements of law as to yearly expenditures and proof thereof, and shall show, under rules and regulations to be prescribed by the Secretary of the Interior, that there is a reasonable prospect that if the extension is granted he will be able to make the final proof of reclamation, irrigation, and cultivation required by law. Feb. 25, 1925, c. 329, 43 Stat. 982.

In response to appellant's first argument we point out that the grant of a third extension is clearly a matter within the discretion of the Secretary. The statute unequivocally requires the fulfillment of two conditions by the entryman before the exercise of the Secretary's discretion comes into play. First, he must show unavoidable delay, with no fault on his part. Second he must show that there is a "reasonable prospect" that he will be able to make final proof timely if the extension is granted. As BLM found, appellant met the first condition, but not the second. The record fails to show a reasonable prospect that appellant could make final proof in another 3 years. The circumstances militating against a "reasonable prospect" are fully detailed in BLM's decision. The major points are the following: At the time of the second extension CVIC was still negotiating with a canal company to obtain part of its water delivery system; the negotiations were apparently fruitless and CVIC initiated a condemnation proceedings resulting in a declaratory judgment adverse to CVIC on December 12, 1978; CVIC intended to appeal this verdict to the Idaho Supreme Court and it would take 2 years before the court could hear the case and render a decision; even in the event of a favorable decision, it would take another 1 or 2 years before CVIC would be able to

complete a water delivery system; the entire project, including acquisition of the necessary rights-of-way would be subject to BLM approval.

BLM's denial of the application for extension is based upon a reasonable evaluation of the circumstances. These circumstances demonstrate that the likelihood of realization of a water delivery system to appellant's entry is remote at best. Appellant, on whom rests the burden of proof, has not seriously taken issue with BLM's evaluation nor put forth countervailing evidence. We conclude that the application for extension was properly denied and that the entry was properly cancelled. 1/

The request for more time to remove crops is a matter for BLM's original jurisdiction and should be considered and acted upon by BLM, subject to the right of appeal.

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.

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Frederick Fishman  
Administrative Judge

I concur:

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Douglas E. Henriques  
Administrative Judge

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1/ In contradistinction to Stickelman v. United States, 563 F.2d 413 (9th Cir. 1977), appellant in the case at bar is not adversely affected by a report of field examination and has not requested a hearing to rebut the findings thereof. See Elaine S. Stickelman, 9 IBLA 327 (1973), rev'd supra.

ADMINISTRATIVE JUDGE GOSS DISSENTING:

I am impressed with appellant's efforts to get water to the allotment. It may be that the Idaho Supreme Court will accord the Canyon View Irrigation Company case the priority generally given condemnation actions, and that water could be available by October, 1981. See also Lance v. Udall, Civ. No. 1864 (D. Nev. Jan. 23, 1968), in which a homestead entryman was accorded additional time.

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Joseph W. Goss  
Administrative Judge

October 23, 1980

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| IBLA 79-395        | : | I-1995                       |
| HOWARD D. MARSHALL | : | Desert Land Entry            |
| :                  | : | Petition for Reconsideration |
| :                  | : | Granted                      |
| :                  | : | Case Remanded                |

ORDER

By memorandum filed with the Board on October 21, 1980, the State Director, Idaho State Office, Bureau of Land Management, (BLM) has requested the file in the above entitled matter be remanded to BLM for further consideration.

In Howard D. Marshall, 43 IBLA 271 (1979), the Board affirmed a decision of the Idaho State Office cancelling petitioner's desert land entry I - 1995 on the ground that he had failed to demonstrate a reasonable prospect of success for completing a water delivery system to his entry and was thus unable to make final proof. On February 22, 1980, the Board denied petitioner's petition for reconsideration in the matter. On March 14, 1980, petitioner filed a new petition for reconsideration.

BLM now advises that petitioner has acquired the right to use an existing river pumping station and necessary rights-of-way to make feasible a water delivery system to his entry within a short time. Because of these new circumstances BLM wishes to reconsider petitioner's case.

Accordingly, the Board vacates its decision in Howard D. Marshall, supra, and its order denying reconsideration thereof. The case file is returned to the Idaho State Office for further consideration of Desert Land Entry I - 1995.

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Frederick Fishman  
Administrative Judge

We concur:

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Douglas E. Henriques  
Administrative Judge

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Joseph W. Goss  
Administrative Judge

APPEARANCES: State Director  
Bureau of Land Management  
550 W. Fort St.  
Boise, Idaho 83724

D. A. Slavin, Esq.  
Stephan, Slavin, Eaton & Stephan  
Twin Falls Bank and Trust Co. Bldg.  
Twin Falls, Idaho 83301

43 IBLA 275B

