

WILLIAM S. ARCHIBALD

IBLA 83-70

Decided August 24, 1983

Appeal from a decision of the Nevada State Office, Bureau of Land Management, rejecting application for desert land entry N-30543.

Affirmed as modified.

1. Desert Land Entry: Cultivation and Reclamation

An application for a desert land entry is properly rejected where the entryman's plan of operations calls for the construction of a greenhouse and supplemental irrigated finishing shade houses in order to propagate seedling coniferous trees but does not provide for the actual tilling of the soil for raising crops.

APPEARANCES: William S. Archibald, pro se.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

William S. Archibald appeals from a decision of the Nevada State Office, Bureau of Land Management (BLM), dated September 20, 1982, rejecting his application for desert land entry N-30543. Appellant seeks to enter a 40-acre parcel in E 1/2 SE 1/4 NW 1/4 and W 1/2 SW 1/4 NE 1/4 sec. 7, T. 33 N., R. 53 E., Mount Diablo meridian, Elko County, Nevada.

The State Office rejected application N-30543 for the following reasons:

In the application, you stated that the intended crop to be cultivated was various types of coniferous trees. The growing of coniferous trees cannot be considered as cultivation, under the Desert Land Act. The courts have held that cultivation is ordinarily understood to mean wheat, corn, potatoes or other annual crops which are cultivated and harvested during a single growing season. It does not apply to the planting of timber seeds or cuttings, United States v. Shinn, 14 Fed. 447, Kennedy v. Spaulding, 143 Kansas 76.

This Bureau also has held that coniferous tree growing cannot be considered cultivation under agricultural land laws. Herman H. Moore, Sacramento 049601 (February 8, 1956).

Therefore, your desert land application is rejected because the proposed crop is not within the scope of the Desert Land Act.

The Desert Land Act authorizes the Department to patent lands not exceeding one-half section to an individual who makes satisfactory proof that he has reclaimed a tract of desert land by conducting water thereon. 43 U.S.C. § 321 (1976). All lands exclusive of timber lands and mineral lands that will not, without irrigation, produce some agricultural crop are deemed desert lands. 43 U.S.C. § 322 (1961). A declaration announcing an entryman's intention to reclaim a tract of land must be accompanied by a map of such tract exhibiting a plan showing the mode of contemplated irrigation. This plan shall be sufficient to irrigate thoroughly and reclaim the land and, inter alia, shall prepare the land to raise ordinary agricultural crops. 43 U.S.C. § 327 (1976). No land shall be patented to a person unless he or his assignors shall have expended at least \$3 per acre in the necessary irrigation, reclamation, and cultivation of the land, inter alia. 43 U.S.C. § 328 (1976).

Appellant's operation calls for a "greenhouse with supplemental irrigated finishing shade houses" to be constructed on the land. The greenhouse complex, occupying forty-five one-hundredths acre of irrigable acreage, will be used to propagate seedling coniferous trees. East and west shade houses, occupying 4.45 acres, will be the site of containerized trees. There is no evidence that the containerized trees are planted in the ground. An adult tree stand, to be used as a seed source and for measured growth, will occupy fourteen one-hundredths acre. Scotch pine, blue spruce, white fir, and other types of trees will be grown.

Appellant contends that greenhouse production is 800 percent greater than open field production and uses only one-tenth the water. BLM's decision to reject trees as a viable agricultural crop, he argues, has become antiquated with modern accelerated growth techniques. Citations to provisions of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 (1976), calling for multiple use and sustained yield provide the bulk of appellant's statement of reasons on appeal.

Although BLM's decision contains several citations to prior case law, we do not find these citations to be directly on point. United States v. Shinn, supra, involved an interpretation of the Act of March 13, 1874, 18 Stat. 21, known as the Timber-Culture Act. Kennedy v. Spaulding, supra, sought to determine whether nursery stock as, e.g., ornamental trees, shrubs, privet, fruit trees, qualified as "crops" under a Kansas statute. Finally, Herman H. Moore, supra, interpreted the homestead law to hold that growing Christmas trees did not constitute cultivation of the land.

[1] As set forth in 43 U.S.C. § 328 (1976), no land shall be patented to a person unless he or his assignors shall have expended at least \$3 per acre in the necessary irrigation, reclamation, and cultivation of the lands, inter alia. Cultivation of one-eighth of the area entered must be shown at

the time of final proof. 43 U.S.C. § 328 (1976). This cultivation requirement is discussed at some length in Brandon v. Costley, 34 L.D. 488, 498 (1906):

There is nothing from which it can be inferred that the word "cultivation" was employed in the act in any different sense from what is ordinarily understood by that term, namely, tillage, which, as defined by Webster, is "the operation, practice, or act of tilling or preparing land for seed, and keeping the ground in a state favorable for the growth of crops." The evident purpose of the additional requirement of proof as to cultivation of one-eighth of the land was to show the sufficiency of the irrigation system. The primary object of the act of 1877 was the change of lands from a desert to an agricultural state, "to secure the actual and permanent reclamation of land which in a natural state is unproductive," and that title might not pass upon a mere constructive compliance with the law, the additional requirement of cultivation was put in the amendatory act of 1891.

In Nancy M. Hough, 47 L.D. 621, 624 (1921), further treatment of this term is given:

The popular definition of "cultivation" is the working of ground for the purpose of raising crops, the raising of crops by tillage, etc. In a legal sense the term cultivation means plowing and preparing the ground for crops or the raising of something that grows from the ground, besides grass. It is ordinarily understood as something more than the spontaneous growing of crops. To cultivate has been defined as to improve the product of the earth by manual industry (citations).

See also Claude E. Crumb, 62 I.D. 99, 102 (1955); Instructions, 45 L.D. 345, 372 (1916); Instructions, 32 L.D. 456, 457 (1904).

A regulation consistent with Brandon v. Costley and Nancy M. Hough, *supra*, presently set forth at 43 CFR 2520.0-5(a)(2), states: "'Cultivation' requires the operation, practice, or act of tillage or preparation of land for seed, and keeping the ground in a state favorable for the growth of crops." See also 43 CFR 2521.6(g).

The type of crop that may be grown on a desert land entry is set forth in the case law and regulations. In Babcock v. Watson, 2 L.D. 19 (1883), cited with approval in Brandon v. Costley, *supra*, it was said: "The expression 'some agricultural crop' does not refer solely to the amount of the crop; it also refers to kind. It may be grass, it may be wheat or barley, or some other crop to which the country and climate in the region of the land are generally adapted." A current regulation, found at 43 CFR 2520.0-5(a)(4), defines "crop" in this manner: "'Crop' includes any agricultural product to which the land under consideration is generally adapted and which would return a fair reward for the expense of producing it."

[2] On the basis of the record before us, it does not appear that appellant's greenhouse and shadehouse operation will require that he cultivate the lands for the raising of crops. Cf. Monte L. Lyons, 74 I.D. 11 (1967). In the absence of actual tilling of the soil for raising crops, we find that appellant does not meet the cultivation requirements of a desert land entry. <sup>1/</sup> BLM's decision rejecting desert land entry application N-30543 is affirmed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Nevada State Office is affirmed as modified.

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Anne Poindexter Lewis  
Administrative Judge

I concur:

Franklin D. Arness  
Administrative Judge  
Alternate Member

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<sup>1/</sup> In view of our determination, we do not reach the question whether coniferous trees constitute an agricultural crop within the meaning of the Desert Land Act.

## ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While I agree with the majority that, to the extent that appellant's use does not contemplate the actual tilling of the soil, the use of the land for a greenhouse is not within the ambit of the Desert Land Act, 43 U.S.C. § 321 (1976), I would go further and rule as well that the raising of coniferous trees, regardless of whether the land is tilled, is not growing of an "agricultural crop" within the meaning of the Desert Land Act.

The animating purpose of the Desert Land Act was to facilitate the reclamation of the arid lands of the western United States. It differed from the Homestead Act of 1862, 12 Stat. 392, as amended, 43 U.S.C. § 161 (1976), in a number of important ways, not least of which was the fact that the Desert Land Act had no requirement of settlement on the land. However, insofar as the type of agricultural endeavors which were contemplated, historic treatment has been similar. Thus, in Ferdinand J. Clifford, 42 L.D. 535 (1913), the First Assistant Secretary held that the planting of fruit trees was cultivation of agricultural crops within the meaning of the general Homestead Act. This ruling was thereafter applied under the Desert Land Act. See Samuel D. Block, 45 L.D. 481 (1916). But the key to these cases was the fact that the crop involved was not the trees, themselves, but rather the fruits which they bore. In Block, for example, the First Assistant Secretary noted that "[w]here it is shown \* \* \* that deciduous fruits are the only kind of crop that may be produced, cultivation of such trees is sufficient to meet the requirements of the law, for such crops may be considered as ordinary agricultural crops." Id. at 484.

This must be contrasted with the treatment of attempted timber production. In Lauren M. Lucas, Oregon 09887 (December 7, 1960), the Director, Bureau of Land Management, noted that "the courts have held that cultivation is ordinarily understood to mean wheat, corn, potatoes, or other annual crops which are cultivated and harvested during a single growing season. It does not apply to the planting of timber seeds or cuttings." It is true that this case and the decision in Herman H. Moore, Sacramento 049601 (February 8, 1956), both involved homestead applications. But I think that the principle is applicable to entries under the Desert Land Act with even greater force, since that Act applied only to lands which were not timber lands or mineral in character. See 43 U.S.C. § 322 (1976). To allow entries under the Desert Land Act for the purpose of "cultivating" timber, when timber lands themselves could not be so entered, would stand logic on its head. Accordingly, I would rule that, as a matter of law, growing of coniferous trees does not constitute cultivation of an agricultural crop within the meaning of the Desert Land Act.

I recognize that appellant was advised by BLM to file an application for a desert land entry. However, I would recommend that appellant file a special use permit application under section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (1976). That section provides, in relevant part:

[T]he Secretary shall \* \* \* regulate, through easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate, the use, occupancy, and development of the public lands, including, but not limited to, long-term

leases to permit individuals to utilize public lands for habitation, cultivation, and the development of small trade or manufacturing concerns \* \* \*.

The applicable procedures are set out at 43 CFR Subpart 2920. I do not, of course, express any opinion as to whether such an application should be allowed. I do feel, however, that this is the only proper mechanism by which appellant might obtain use of Federal land for the purposes disclosed in his application.

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James L. Burski  
Administrative Judge

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