

WESLEY A. PAINTER

IBLA 86-128

Decided June 9, 1987

Appeal from a decision of the California State Office, Bureau of Land Management, rejecting desert land application CA-16102.

Affirmed as modified.

1. Desert Land Entry: Applications -- Desert Land Entry: Water Right

The Bureau of Land Management properly rejects a desert land application when the applicant proposes to irrigate his entry from underground water sources, but indicates on the face of the application that he has not taken appropriate steps, as far as then possible, toward the acquisition of a right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portions of the land described in the application.

2. Desert Land Entry: Applications -- Desert Land Entry: Cultivation and Reclamation

A ruling by BLM that the jojoba plant does not meet the requirements of the desert land entry laws will not support rejection of a desert land entry application where the record does not indicate that BLM analyzed data submitted by the applicant showing the economic feasibility of the commercial cultivation of the jojoba plant.

APPEARANCES: Wesley A. Painter, South Pasadena, California, pro se.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Wesley A. Painter has appealed from a decision of the California State Office, Bureau of Land Management (BLM), dated October 2, 1985, rejecting his desert land entry application CA-16102.

On June 28, 1984, appellant filed a desert land entry application for 160 acres of land situated in the SE 1/4 of sec. 2, T. 3 S., R. 5 E., San Bernardino Meridian, California, pursuant to section 1 of the Act of March 3,

1877, as amended, 43 U.S.C. § 321 (1982). BLM returned appellant's application with a letter dated February 1, 1985, which stated that certain deficiencies should be cured and the application returned to BLM within 30 days. Appellant had answered "yes" in response to Item 12b, which asks: "Have you proceeded as far as possible toward acquiring by appropriation, purchase, or contract, a right to the permanent use of sufficient water to irrigate and reclaim permanently all of the irrigable portions of each of the legal subdivisions applied for?" BLM explained in its February 1, 1985, letter that appellant's answer "yes" required "submission of evidence of any commitments [appellant] may have which show the legal source of [his] proposed water supply." BLM stated [**3] that if "yes" was not a correct response to the question, appellant should correct the application by answering "no" to question 12b. On March 7, 1985, appellant filed his amended application, having changed the answer to 12b from "yes" to "no."

Appellant's application indicated that he intended to irrigate 90 acres and cultivate the jojoba plant thereon, estimating that this crop would yield an annual income of \$ 90,000. Appellant proposed to irrigate the land with water produced from two 6-inch diameter wells empowered by Dempster windmills. He submitted diagrams showing the location of the wells, two water tanks, and the configuration of irrigation lines.

In its October 2, 1985, decision, BLM rejected appellant's application on two bases. BLM's analysis is set forth below:

In response to Item 10 on the application, applicant stated that of the 160 acres of land applied for, 90 acres were irrigable and would be planted to the jojoba bean. The jojoba is a desert land species which grows in the desert southwest without the need of irrigation. The commercial cultivation of the crop is a relatively recent phenomenon in the southwest and its economic feasibility has not been [**4] fully established. The water requirements of the plants and related capabilities of a tract of land to support a commercial crop of jojoba have not been adequately demonstrated. Therefore, jojoba has not yet been accepted as a proper crop for justifying desert land entries where the measured application of water is a requirement. United States v. Elodymae Zwang, Darrell Zwang, 55 IBLA 92, June 1, 1981.

The Desert Land Act calls for the filing of a map of the land which exhibits a plan showing the mode of contemplated irrigation and the source of sufficient water to thoroughly irrigate and reclaim the land and prepare it to raise ordinary agricultural crops (43 U.S.C., 1982 ed., sec. 327). Item 10(d) on the application and the irrigation plan indicate that the land will be irrigated by two wells, and Item 12(a) indicates there is an adequate water supply of suitable quality. However, the application was not accompanied by evidence to show that sufficient water could be produced by the wells to irrigate and reclaim all of the irrigable portion of the land sought. James R. Hardcastle, 69 IBLA 341, December 28, 1982; A-27847, June C. Keane, February 17, 1959.

In his statement of reasons for appeal, appellant states that he is "prepared to prove that although the jojoba is an arid plant that technically could be grown without the benefit of irrigation, it is an agricultural crop that is generally adapted to desert land." This plant, according to appellant "could not be produced commercially without the benefit of initial and/or continual supplemental irrigation." In support of this contention, appellant cites 43 CFR 2520.0-5(a)(4), which defines "crop" as including "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."

As to BLM's ruling regarding the water supply, appellant states that he "has contacted and received approval from the local water district for installation of district water main and meter for agricultural use to the subject location." Further, he asserts that "there is sufficient water available at the subject location," and that "the use of water and harvest irrigation will be commercially economical." Finally, appellant requests an extension of time to amend the desert land entry application to reflect these factors.

We will first address BLM's ruling that appellant failed to submit evidence of sufficient water to irrigate and reclaim the irrigable portions of the subject land.

[1] Section 1 of the Act of March 3, 1877, provides for the entry of desert lands of the United States for the purpose of reclaiming them "by conducting water upon the same * * * Provided, however, That the right to the use of water by the person so conducting the same * * * shall depend upon bona fide prior appropriation." (Emphasis added.) 43 U.S.C. § 321 (1982). Similarly, the implementing regulation, 43 CFR 2521.2(d), provides in relevant part:

No desert-land application will be allowed unless accompanied by evidence satisfactorily showing either that the intending entryman has already acquired by appropriation, purchase, or contract a right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portion of the land sought, or that he has initiated and prosecuted, as far as then possible, appropriate steps looking to the acquisition of such a right, or, in States where no permit or right to appropriate water is granted until the land embraced within the application is classified as suitable for desert-land entry or the entry is allowed, a showing that the applicant is otherwise qualified under State law to secure such permit or right. [Emphasis added.]

As we said in Patricia K. Scher, 59 IBLA 276, 278 (1981), "[e]vidence of water rights, i.e., the 'right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portion of the land sought,' is a vital prerequisite to approval of a desert-land entry application." See, e.g., Dale Christiansen, 82 IBLA 97 (1984); Dixie L. Bjornestad, 27 IBLA 201 (1976).

BLM's decision emphasizes appellant's failure to include with his application evidence to show that sufficient water could be produced by the wells to irrigate and reclaim the land. James R. Hardcastle, 69 IBLA 341 (1982), cited by BLM in support of that requirement, does refer to the appellant's failure to provide information that sufficient water could be produced by a well. However, of greater concern to the Board in Hardcastle was the appellant's failure to show, at the time of filing the application, that "he had taken any action to initiate the right to appropriate underground water." 69 IBLA at 342. The same failure by appellant in the instant case provides a clear basis for rejection of his application, as the discussion below will demonstrate.

As in Albert N. Smith, 87 IBLA 253 (1985), Dale Christiansen, *supra*, and Elmer A. Kubler, 80 IBLA 283 (1984), appellant in this case failed to provide, at the time of filing his application, evidence either that he had already acquired by appropriation, purchase or contract, or was taking steps, "as far as then possible," to acquire appropriate water rights as required by 43 CFR 2521.2(d). In fact, in this case, as in those cases, the application, as finally presented, indicated that the applicant had not proceeded as far as possible toward acquiring such water rights.

Under 43 CFR 2521.2(d), where an applicant has submitted evidence of water rights, "[t]he authorized officer will examine the evidence submitted * * * and either reject defective applications or require additional evidence." Where no evidence has been submitted with the application, the Board has endorsed the procedure by BLM of either rejecting the application or requiring evidence of a water right, depending upon the applicant's answer to question 12b on the application. Jean P. Walsh, 89 IBLA 311, 313 (1985). If the applicant responds in the negative to question 12b, the Board has affirmed rejection of applications for failure to submit evidence of acquisition of water rights without requiring further inquiry by BLM. Dale Christiansen, *supra*; Albert N. Smith, *supra*. The rationale for such an approach is that such an application is defective on its face. On the other hand, an affirmative response to question 12b, without accompanying evidence, should elicit from BLM a request for such information. Jean P. Walsh, *supra*; Elmer A. Kubler, *supra*. 1/

In the present case, BLM returned appellant's application, explaining that the answer "yes" to question 12b required submission of evidence of water rights. "Yes" was apparently an incorrect response, because appellant's amended application provided the answer "no" to the question. Although in his statement of reasons appellant suggests that he has contacted and has received approval from the local water district for water rights, no evidence was submitted to support this statement. Since appellant's application was not accompanied by any evidence to show compliance with 43 CFR 2521.2(d), and

1/ The Kubler case involved the same circumstances as this case, i.e., an initial "yes" to question 12b without accompanying evidence, a request by BLM, and a change in the answer to question 12b from "yes" to "no."

since appellant's application states that he had not proceeded as far as possible toward acquiring water rights, we conclude that BLM properly rejected appellant's application. That rejection is without prejudice to appellant's right to file a new complete application. See, e.g., Dale Christiansen, supra; Lee A. Fite, 82 IBLA 1 (1984).

[2] While we affirm BLM's rejection of appellant's desert land entry application for the reasons above noted, we wish to address BLM's ruling that the jojoba plant does not meet the requirements of 43 CFR Part 2520. BLM based its ruling on language contained in United States v. Zwang, 55 IBLA 83, 92 n.5 (1981), which BLM set forth in its decision and which we have quoted, supra.

Whether the jojoba plant is susceptible of commercial cultivation was the subject of the Board's decision in Joanne F. Wright, 49 IBLA 237 (1980). In that case, BLM by separate decisions rejected three desert land entry applications on the basis that the applicant in each case intended to cultivate the jojoba plant, which would not meet the requirements of 43 CFR Part 2520. BLM's decisions appeared to have been based upon BLM Instruction Memorandum No. 80-383, dated March 14, 1980, entitled, "Public Inquiries on the Availability of Public Lands for the Cultivation of Arid Land Species." BLM's decisions in Joanne F. Wright provided no factual data or analysis in support of their conclusion. Appellants in Joanne F. Wright argued that BLM's decisions failed "to reflect a large body of scientific literature and direct observation of growers of jojoba addressing the need for a water supply greater than that of the annual rainfall in the intended area of entry in order to make the plant bear fruit in commercial quantities." 49 IBLA at 239. Moreover, those appellants contended that "the literature on jojoba abounds with evidence of its commercial value and financial feasibility and that the biological and cultural requirements of jojoba have been extensively studied." Id.

The Board did not express an opinion as to the accuracy or acceptability of appellants' arguments, but it remanded the cases to BLM for further review, with instructions that it provide a "reasoned basis" for its rejection of appellants' applications. Moreover, the Board in Zwang observed only that the jojoba plant "had not been accepted" as a proper crop for justifying desert land entries. Clearly, the intent of Zwang was not to forever preclude acceptance of the jojoba plant as a qualifying crop; rather, it was to indicate that as of that time (1981) the economic feasibility of its commercial cultivation had not been established.

In the instant case, appellant submitted documentation in support of his contention that the jojoba plant is commercially cultivated. Specifically, appellant includes a page from an unidentified source which states that at the end of 1983, a Jojoba Growers Association survey reported more than 41,000 acres of jojoba were under cultivation, a 60 percent increase over the 25,000 acres accounted for in a 1982 survey. Those 41,000 acres of jojoba were predicted to yield nearly one million gallons of jojoba oil by 1987. Other documents submitted by appellant tend to support his argument that the jojoba plant may be cultivated profitably.

Should appellant submit a new and complete desert land entry application, any decision by BLM to reject such application on the basis that cultivation of the jojoba plant does not meet the requirements of 43 CFR Part 2520 should be supported by a consideration of materials offered by appellant which indicate a contrary conclusion. See Roger K. Ogden, 77 IBLA 4, 90 I.D. 481 (1983).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's decision herein is affirmed as modified.

Bruce R. Harris
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Will A. Irwin
Administrative Judge.

