

Appeal from a decision denying petition for equitable adjudication of desert land entry I-5507.

Affirmed.

1. Desert Land Entry: Water Supply--Desert Land Entry: Distribution System--Equitable Adjudication: Substantial Compliance

To obtain equitable adjudication pursuant to 43 CFR 1871.1-1, a desert land entryman is required to show substantial compliance with requirements for providing an adequate water supply and distribution system for his desert land entry. Failure to show substantial compliance with reclamation requirements requires rejection of a petition for equitable adjudication of the entry.

2. Desert Land Entry: Water Supply--Desert Land Entry: Distribution System--Equitable Adjudication: Substantial Compliance

Failure to show that substantial compliance with reclamation requirements of the Desert Land Entry Act was prevented by accident, mistake, or some circumstance beyond the control of the entryman requires rejection of a petition for equitable adjudication and cancellation of the entry.

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

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On July 5, 1972, James M. Mills filed desert land entry application I-5507 for 320 acres in secs. 25 and 26, T. 6 S., R. 4 E., Boise Meridian, Idaho, classified suitable for entry as desert land under the Act of March 3, 1877 (Act), as amended, 43 U.S.C. | 321 (1982). On July 11, 1975, the entry was allowed, subject to final proof that approximately 300 acres of the entry had been substantially reclaimed, irrigated and cultivated.

The notice of allowance of entry recited it was "[a]lso subject to the condition that at the time of final proof additional evidence may be required to show how the common water delivery system, upon which the allowance of this entry is premised, is both operated and maintained."

On May 30, 1979, Mills filed a request for extension of time in which to prove he had complied with the requirements of the Act concerning irrigation of his entry. In his request for extension he suggested that he could satisfy his irrigation plan for the entry with a system capable of producing 200 miner's inches of water on the entry (Letter dated May 18, 1979, Mills to Matthews). This suggestion contradicted the plan of irrigation earlier filed by Mills with his entry application, which showed 300 acres would be irrigated, and that each irrigated acre required one inch of water per acre (Application at 5; Plan of Irrigation).

On October 2, 1979, an extension of time to present final proof of irrigation of the desert entry was allowed. On August 26, 1980, the final proof officer received evidence concerning the completion of reclamation on Mills' desert entry. The evidence produced indicated that Mills had failed to develop a permanent and adequate source of water to irrigate the entry, and on July 6, 1982, a contest seeking its cancellation was commenced by the Department. A description of subsequent proceedings and a detailed summary of the evidence concerning Mills' reclamation work appears in United States v. James M. Mills (Mills I), 91 IBLA 370 (1986) and United States v. James M. Mills (On Reconsideration) (Mills II), 94 IBLA 59 (1986).

Both cited decisions affirmed the Bureau of Land Management's (BLM) determination that Mills had failed to irrigate his entry as required by law and his plan of reclamation. The facts concerning Mills development of his irrigation system, set out at Mills I, 91 IBLA at 371-73, lead to the conclusion that the distribution system constructed by Mills was inadequate to supply water to both the entry and an existing farm on patented land owned by Mills adjacent to the entry. Id. at 376.

The Administrative Law Judge who conducted the contest hearing concluded that Mills had attempted unsuccessfully to stretch an existing distribution system in use on his other farm so as to serve the entry as well. Nonetheless, the Administrative Law Judge concluded that, after the time allowed by the Act for proving that the entry had been adequately watered had gone past, Mills did increase the capacity of the canal system which served his lands and also increased the capacity of the distribution system located on his deeded land (which comprised about 500 acres) by installing an additional pump. Mills I, 91 IBLA at 373. These findings prompted the Board to note that consideration could be given to seeking equitable adjudication pursuant to 43 CFR 1871.1-1, since Mills' arguments suggested that he may have reclaimed the entry after the time allowed by law had gone by. Mills, 91 IBLA at 377, Mills II, 94 IBLA at 62.

On December 10, 1986, Mills sought equitable adjudication pursuant to 43 CFR 1871.1-1. He petitioned BLM for issuance of patent, arguing that he had, in 1983, following presentation of his final proof of reclamation, installed additional pumps which improved the capacity of both his canal and

his distribution system. Except for conclusions about the system stated in the petition, Mills offered no evidence concerning the improved capacity of the canal or distribution system tending to show that he had provided a system capable of providing a permanent supply of water to the desert entry in secs. 25 and 26. On March 9, 1987, BLM denied Mills' petition for equitable adjudication, finding that "[t]he record shows a lack of water to meet the licensed rights of the Basin Mutual Canal Irrigation system and that of Mills' DLE [desert land entry]" (Decision at 3).

Mills has appealed this decision, bringing the question of his reclamation of the desert land he entered in secs. 25 and 26 before us for the third time. He now argues that BLM has refused to consider the admittedly late improvements made to his system after his final proof was taken. His statement of reasons (SOR) concludes that "BLM held Mills to a standard of strict compliance prior to first proof, without considering the equitable principles involved in 43 CFR 1871.1-1" (SOR at 4). He then repeats an argument made earlier in Mills I and Mills II to the effect that the irrigation system in place on his deeded lands is adequate to meet his plan of irrigation for the desert entry as well, because it is capable of supplying five-eighths of an inch of water for the tillable land in the entry (SOR at 5). Mills grounds this assumption on the premise that "BLM has never denied that five-eighths of a miner's inch per acre would be adequate for irrigation of both the private land and the DLE" (SOR at 5).

Equitable adjudication in the Department of the Interior is a practice derived from statutory authority, having a long history and precise application. The current statute, 43 U.S.C. | 1161 (1982), provides that:

The Secretary of the Interior, or such officer as he may designate, is authorized to decide upon principles of equity and justice, as recognized in courts of equity, and in accordance with regulations to be approved by the Secretary of the Interior, consistently with such principles, all cases of suspended entries of public lands and of suspended preemption land claims, and to adjudge in what cases patents shall issue upon the same.

This statute, derived from R.S. | 2450, is properly applied, together with its implementing regulations, in patent applications brought under the Act. See, e.g., Joseph Himmelsbach, 7 L.D. 247 (1888); George F. Stearns, 8 L.D. 573 (1889); George W. Mapes, 9 L.D. 631 (1889).

The application of Interior's equitable adjudication statute was considered by the Supreme Court in Hawley v. Diller, 178 U.S. 476 (1900), where the Court explained that the purpose of this legislation is to supplement the ordinary authority exercised by the Secretary's delegates

by authorizing them to apply the principles of equity, for the purpose of saving from rejection and cancellation a class of entries deemed meritorious by Congress, but which could not be sustained and carried to patent under existing land laws. * * * legislation was necessary to save such entries from rejection and cancellation when otherwise meritorious.

Id. at 493.

To be eligible for equitable adjudication it is necessary that an entry have been allowed: rejected applications which have not progressed to actual entry cannot be considered for equitable adjudication. James C. Forsling, 56 I.D. 281 (1938). Mills meets this threshold requirement, his entry having been allowed by a notice given on July 11, 1975.

[1] Prior desert entry cases receiving equitable adjudication have required that the entryman prove he substantially complied with the requirements of the Act, but that some circumstance beyond his control prevented exact compliance with the law. For example, in Joseph Himmelsbach, *supra*, where payment was not tendered and proof of reclamation was not made until four years after the statutory period had elapsed, Secretary Vilas nonetheless found that equitable adjudication of the entry should be conducted to determine whether there had been substantial compliance by the entryman with the requirements of law. Id. at 248.

Rules referred to in the Himmelsbach case preceded 43 CFR 1871.1-1. Published at 6 L.D. 799 (1888), they established the principle that patent might be obtained by an entryman through equitable adjudication in cases where reclamation was not timely accomplished, but was completed late, "and the failure to do so in time was the result of ignorance, accident or mistake, or of obstacles which [the entryman] could not control." 6 L.D. at 800. This principle became firmly embedded in the law. 43 CFR 1871.1-1.

Decisions dealing with desert entries entitled to equitable adjudication establish that substantial compliance is achieved when the requisite reclamation is completed, but nonetheless some formal deficiency exists. For example, in George W. Mapes, *supra*, late compliance was excused because of sickness. Equitable adjudication was allowed when irrigation was accomplished in the fourth year in Joseph Himmelsbach, *supra*. In the case of George F. Stearns, *supra*, First Assistant Secretary Chandler allowed Stearns a hearing for the purpose of giving additional evidence to show that he had reclaimed a desert entry where he had offered proof of successful reclamation three months late. Reclamation becomes an accomplished fact where an adequate supply of water has been brought upon the entry, so as to render it available for distribution when needed. Claude E. Crumb, 62 I.D. 99 (1955); Brandon v. Costly, 34 L.D. 488 (1908).

In the decision rejecting Mills' petition for equitable adjudication, BLM found there was a "lack of water" and that "Mills' delivery system could not supply both his deeded land and the DLE" (Decision at 3). This was not a finding that Mills was late and could never overcome that circumstance, as Mills seems to argue before us, but a finding that Mills had not proved reclamation of his entry. Nor does this mean that there had been no "irrigation" of the land by Mills. "Irrigation," as that term is used by the desert land Act, however, refers only to the application of water to land. Claude E. Crumb, *supra*, at 62 I.D. 103. More than the fact of irrigation is required to establish that reclamation had taken place as required by the Act. See 43 CFR 2521.6.

To further support his arguments on appeal, Mills has furnished additional data. On October 23, 1987, a report dated October 13, 1987, signed by Sherl L. Chapman, concerning Mills' water license for the entry was

furnished, and on June 23, 1988, a copy of a water license for the entry was filed with the Board. The Chapman report states the amount of water diverted from the Snake River into the Basin Mutual Canal Company's main canal used by Mills. No measurement, however, is reported of the volume of water diverted from the main canal to the Company's secondary canal, which provides water to Mills' deeded lands. This volume is estimated by the report, the purpose of which is to obtain a water license from the State of Idaho for use on the desert entry in secs. 25 and 26. The report concludes:

The capacity of the canal is more than adequate to provide sufficient water for [Mills' deeded lands and desert entry] as are the two booster pumps pumping water from the main canal into the second canal. The small reservoir, just above the final point of diversion, provides storage to smooth out fluctuations in canal flow and provides additional water during periods of maximum use. Therefore it is believed that Mr. Mills has satisfied the require-ments for both water licenses and should be given the amount requested.

(Chapman report at 4).

In a brief filed with us simultaneously with the water license, Mills argues that the license and the Chapman report, taken together, show that he is entitled to equitable adjudication of his entry. He argues:

Condition No. 4 of the license specifies that the maximum combined rate of diversion under Water Right No. 02-7132, which is covered by this license [for the desert entry], and under Right No. 02-7076, which includes the water right for Mr. Mills' adja- cent private land, shall not exceed 31.71 cfs. A significant element of this condition of the license is that the Department of Water Resources has determined that the system has a capacity of 31.71 cfs, which converts to 1,585.5 miners inches. As stated at page 5 of the Statement of Reasons, the BLM conceded on the original appeal that a pumping capacity of 1,560 miners inches would be adequate for irrigation of the irrigable lands within the desert land entry and Mr. Mills' private land. (Emphasis supplied).

(Brief dated June 20, 1988, at 2).

The argument emphasized in the quotation above is similar to the posi- tion taken in Mills I, that when BLM allowed Mills an extension of time it also accepted the proposition that less water was needed to satisfy recla- mation requirements. It goes somewhat further than his prior arguments, however, since it suggests that five eighths of an inch of water is all that is needed on either tract. Despite the reassertion of this argument, no such concession by BLM has ever been shown, nor has Mills demonstrated that a lesser amount of water would satisfy the needs of the entry.

Mills I, 91 IBLA at 374; Mills II, 94 IBLA at 62.

The Government position concerning Mill's reclamation efforts on his entry was defined by an exchange at the contest hearing between the

Administrative Law Judge and counsel for BLM, when the Judge asked "[i]f there was no problem with the capacity of the Basin Mutual Canal and there was no problem with [Mills'] pumping facilities then you would have no * * *," and counsel interrupted "[w]e would have no problem" (Tr. 10). As this exchange indicates, reclamation requires more than irrigation of desert land. It requires that the water applied to an entry be legally and physically available to the entry. Legal availability is determined by a water right. See 43 CFR 2521.2(d). Physical availability is determined by a water supply. See 43 CFR 2521.6(e). BLM's consistent position concerning this entry has been that because Mills failed to improve the canal's capacity and failed to improve his distribution pumping capacity there was an inadequate water supply for his entry despite the fact he had a water right to apply water to his entry. In this analysis, there were two deficiencies in Mills' final proof: canal capacity and distribution capacity.

To circumvent this dual objection to his proofs, Mills now argues that canal capacity was increased in 1984 (4 years after final proof) so that there is now some water available to the entry after the canal's prior commitment to the demands of Mills' patented land is filled. But, even granting some increase in capacity has been achieved, there is not shown to be enough water to provide 300 more miners' inches of water to the entry, so as to conform to the plan of irrigation proposed by Mills.

Assuming that the Chapman report of canal capacity is correct, the most the canal could carry is 1,585.5 miners inches of water, or an increase of 230 miners inches, at least 70 inches short of the amount promised by Mills' plan of reclamation. What this calculation fails to address, however, is that even in 1984 there had been no increase in the pumping capacity of Mills' distribution system. At final proof there were two 100 horsepower pumps for distribution with a rated capacity of 1,500 gallons per minute apiece, or a total of 3,000 gallons per minute or 333.33 miners inches. Since the patented lands required 500 miners inches of this water, the distribution system was inadequate to fully supply the deeded land. There was nothing left for the entry. While a new 30 horsepower pump was added to the system, as the Administrative Law Judge found, this pump was a pressure booster and did not increase water production. See Chapman report, quoted above, at 4.

Measurements made by Chapman in 1987 indicate a total output of 4,733 gallons per minute. While this is substantially in excess of the rated maximum capacity of the two pumps, assuming that such production is possible leaves only 37 miners inches beyond the 500 inches of water already allocated to the patented lands. Taking his proof at face value, therefore, Mills has failed to show that he has reclaimed his entry in conformity to his plan. On the record before us, assuming the correctness of the assertions presented by Mills' petition for equitable adjudication, there is a failure to show reclamation through an adequate delivery system devoted to that purpose. United States v. Swallow, 74 I.D. 1 (1967); Claude E. Crumb, supra; Brandon v. Costly, supra.

[2] Central to a decision to allow equitable adjudication, moreover, is the requirement that the entryman demonstrate a reason for his failure to make timely proof, which explains why he did not timely complete the

requirements of the law. There is no such explanation offered in this case. Although one extension was allowed to Mills, no request for another was ever made, nor has he suggested that any reason exists for his apparent failure to make timely reclamation according to his plan, as he was required to do. His petition should be rejected for this reason alone. His petition suggests that non-compliance should be excused simply because there was no "bad faith" involved in the alleged late completion of reclamation and because there has been no other claimant for the lands. The cases dealing with equitable adjudication do not support this rationale. As Secretary Vilas pointed out in Joseph Himmelsbach, *supra*, the existence of an adverse claim eliminates the possibility for equitable adjudication; otherwise, to obtain such consideration, a claimant must show his failure was either "the result of ignorance, accident, or mistake" or else demonstrate the existence of "obstacles which he could not control." *Id.* No such showing has been made here. The present rule, 43 CFR 1871.1, codifies prior case law, making proof of "sufficient reason" for delay a necessary prerequisite for allowance of equitable adjudication. 43 CFR 1871.1(a).

Mills attempts to bridge the gap between the requirements of the law and his performance by shifting the focus of attention to whether a lesser amount of water, five-eighths of an inch instead of an inch, might not do. We have rejected this argument twice before. It cannot conceal the fact that there was never a physically adequate water supply developed for the entry so as to reclaim it. Nor can we ignore the fact that there is no equitable basis for the exercise of Secretarial discretion so as to permit us to grant equitable adjudication of this matter where no reason has been offered to explain Mills' failure to timely reclaim.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision denying equitable adjudication is affirmed and the desert entry is ordered cancelled on the records of the Department.

Franklin D. Arness
Administrative Judge

I concur:

James L. Burski
Administrative Judge