

NATHAN F. GARDINER

IBLA 88-191

Decided may 24, 1990

Appeal from a decision of the Burley, Idaho, District Office, Bureau of Land Management, rejecting application for desert land entry I-25433.

Affirmed.

1. Desert Land Entry: Applications--Desert Land Entry: Cultivation and Reclamation--Desert Land Entry: Lands Subject To

BLM properly rejects a desert land entry application where, at the time the application was filed, the land sought had already been effectually reclaimed by conducting water to the land in sufficient quantity so as to render it available for irrigation of the land; where, at some time in the past, one-eighth of the land had been cultivated using that irrigation system; and where the entryman fails to establish that the land has reverted to an unreclaimed state by deterioration of that system.

APPEARANCES: Nathan F. Gardiner, pro se.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Nathan F. Gardiner (appellant) has appealed from a decision of the Burley, Idaho, District Office, Bureau of Land Management (BLM), dated December 18, 1987, rejecting his application for a desert land entry I-25433.

On November 27, 1987, appellant filed his desert land entry application with BLM for 320 acres of land described as S $\frac{1}{2}$  NE $\frac{1}{4}$ , N $\frac{1}{2}$  SE $\frac{1}{4}$  sec. 33, and S $\frac{1}{2}$  NW $\frac{1}{4}$ , N $\frac{1}{2}$  SW $\frac{1}{4}$  sec. 34, T. 13 S., R. 27 E., Boise Meridian, Idaho. The application was filed pursuant to section 1 of the Act of March 3, 1877, as amended, 43 U.S.C. § 321 (1982) (the Desert Land Act). In his application, appellant stated that he intended to irrigate all of the land by means of an existing well and pump and the construction of a sprinkler system and to cultivate that land for the production of barley and alfalfa.

In his December 1987 decision, the District Manager rejected appellant's desert land entry application because the land had already been "effectually reclaimed" and was no longer desert in character. BLM ruled accordingly that the land was not subject to desert land entry under 43 CFR 2520.0-8(a)(3). In support of his conclusion that the land had been effectually reclaimed, the District Manager stated that the land had originally been included in desert land entry application Idaho 05070:

This entry was allowed on October 15, 1964 and final proof of irrigation and development was approved on July 3, 1968. This entry was cancelled on December 10, 1973 for legal reasons. [S]ince December 15, 1981, the \* \* \* lands have been irrigated and farmed under agricultural lease I-18230. That portion of the lease encompassing the subject lands was terminated on May 15, 1987. [1/]

In his statement of reasons (SOR), appellant contends that BLM improperly rejected his desert land entry application because, although the subject land had been irrigated and farmed and, thus, may have been effectually reclaimed at one time, it was not so reclaimed at the time his application was filed. Appellant asserts that the subject land was neither reclaimed nor producing crops at the time his application was filed. Finally, he states that rejection of his desert land entry application violates Congress' intent in enacting the Desert Land Act, which was to promote the reclamation of desert land to a productive agricultural state.

[1] Section 1 of the Desert Land Act provides both for entry of up to one-half section of "desert land" upon a declaration by the entryman that he intends to "reclaim \* \* \* [the] land \* \* \* by conducting water upon the same, within the period of three years thereafter," and for patenting of the land to the entryman upon the submission of satisfactory proof of "reclamation" and suitable payment. 2/

The present rule is that "[l]and that has been effectually reclaimed is not subject to desert land entry." 43 CFR 2520.0-8(a)(3). Appellant argues that the determination of whether land has been effectually reclaimed should be made as of the time a desert land entry application is filed. We agree. This rule and its precedents in Departmental case law were meant to preclude the initiation of a desert land entry where land has already been reclaimed. Accordingly, it is necessary to determine whether, at the time of initiation of a desert land entry, the land is then reclaimed. Because such an entry is not initiated by settlement but rather by the filing of an application (*Selway v. Flynn*, 6 L.D. 541, 543 (1888)), such determination must be made as of the time of the filing of a desert land entry application.

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1/ It appears that the actual date of termination was May 12, 1987.

2/ "Desert lands" are defined in section 2 of the Desert Land Act, 43 U.S.C. § 322 (1982), as "[a]ll lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop."

Moreover, under the case law discussed below, the preclusion of desert land entries on land which has already been reclaimed is derived from the statutory language limiting desert land entries to "desert land." 43 U.S.C. § 321 (1982). As these cases instruct, lands which have been reclaimed to the point that they are no longer in a desert state are no longer subject to desert land entry. It is well established that the "occasion on which the desert character of the land is to be ascertained is at the time of filing the declaration." United States v. Mackintosh, 85 F. 333, 336 (8th Cir. 1898)). The filing of the "declaration" now occurs at the time the desert land entry application is filed. We conclude that the time of filing the entry is also the occasion for determining whether land has already been reclaimed.

Virtually since enactment of the Desert Land Act, the Department has concluded that land that has already been reclaimed is not subject to desert land entry. That interpretation finds its earliest pronouncement in Rivers v. Burbank, 9 Copp's Land-Owner 238 (1883). As explained in Rivers, the basis for this conclusion is that land which has been reclaimed from its desert state is no longer "desert land" subject to entry under section 1 of the Desert Land Act. <sup>3/</sup>

In Campbell v. Sutter, 16 L.D. 40, 41 (1893), the First Assistant Secretary, in declaring certain lands to have been "effectually reclaimed," stated that the rule in Rivers was that "lands that have been reclaimed from a desert state, and are now producing crops by means of irrigating ditches, etc., are not subject to entry under the desert land law" (emphasis supplied). He then reviewed the situation in that case: "The evidence shows that at the time of the hearing there was water running in the [irrigating] ditch, and that the year previous, vegetables and a crop of alfalfa had been raised upon a portion of the land, which was watered by

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<sup>3/</sup> Rivers v. Burbank, *supra*, involved a desert land entry made shortly after passage of the Desert Land Act. The Secretary concluded in that case that the land had been reclaimed at the time of desert land entry and, accordingly, held that the land was not then subject to such entry, because the evidence established that a large ditch capable of irrigating nearly the whole of a large tract (of which the tract in question was a part) had been constructed, and a portion of this large tract--including the tract in question--had been reclaimed from its desert state and cultivated to various crops. The Secretary stated:

"It thus appears [from evidence of reclamation] that the land in question was in no sense 'desert land' at the date of the said act of March 3, 1877, nor had it been for upwards of 13 years anterior thereto. Hence, [it was] \* \* \* not subject to entry as such under said act, for it presupposes that such is the character of all lands for which a declaratory statement may be filed by virtue thereof."

Not long afterwards, the rule in Rivers was applied in Taylor v. Rogers, 14 L.D. 194 (1892), in which the First Assistant Secretary concluded that land which had already been "reclaimed" was not subject to desert land entry, but did not discuss what rendered the land "reclaimed." See also Fisher v. Ballinger, 36 App. D.C. 511 (D.C. Cir. 1911) (reprinted in 40 L.D. 294, 297-98 (1911)); Perry Bickford, 7 L.D. 374, 377 (1888).

the ditch." Id. at 42. Citing Campbell, appellant argues that the lands he applied for should not be considered effectually reclaimed because, at the time he filed his application, they were not producing crops and the lands were not reclaimed from a desert state, in that there was no means for rendering water available for distribution for irrigation and cultivation.

As developed below, there is no doubt that the land appellant applied for was not in cultivation on the date he filed his application. However, the record does not support his assertion that it was not reclaimed from a desert state, as there was, in fact, a means for rendering water available still in place at that time.

If appellant's interpretation of Campbell were correct, he would prevail, as the absence of cultivation, by itself, would bar consideration of the lands as effectually reclaimed. However, neither Rivers nor Campbell stands for a general rule that land will not be considered effectually reclaimed unless it is both producing crops and has been reclaimed from a desert state at the time of filing the desert land entry application. Rather, in those cases, the fact that the land was producing crops and that there was water in the irrigation ditch, taken together, indicated that the land had already been reclaimed. The Secretary in Rivers did not rule out considering land effectually reclaimed even where it is not producing crops or where there is no water actually in place on the lands. Indeed, since Rivers, land has been adjudicated to have been effectually reclaimed even in the absence of production of crops or water in ditches, where a water supply system had been constructed prior to application and remained in place.

Prior to March 1891, the Desert Land Act required only that a tract of desert land be reclaimed "by conducting water upon the same." 19 Stat. 377 (1877); see, e.g., John H. Kirk, 15 L.D. 535 (1892); Charles H. Schick, 5 L.D. 151, 152 (1886). Thus, in United States v. Mackintosh, supra at 337, the court held:

It was the manifest purpose of congress to hold out to the citizens of the United States an inducement to reclaim the waste and desert lands of the public domain, and thus render them subservient to the uses of husbandry by process of irrigation. This was to be accomplished by such a system of ditches as would carry to the subdivisions of the land, capable of being reached by the surface flow, a supply of water such as, when let out of the ditches by draw gates or smaller ditches, might spread over the accessible parts, and stimulate vegetable life. If the main ditches were thus constructed, with the acquired adequate supply of water to irrigate the lands for the purpose of cultivation in the ordinary method of carrying it out over the surface of the ground, we think the reclamation contemplated by the statute was accomplished, without showing that this appropriation was followed by actual use and cultivation." [Emphasis supplied.]

In so ruling, the court noted that its interpretation was supported by Departmental construction of the statute. In particular, the court relied on a Feb. 9, 1885, letter to the Commissioner, General Land Office (3 L.D.

385, 386 (1885)), in which the Secretary stated that "[t]he raising of an agricultural crop may be evidence of reclamation, but it is not the only evidence that ought to be received and ought not at any time to dispense with actual proof as to the character of the ditch, quantity of water, etc., owned by the claimant." The court also cited Dickinson v. Auerbach, 18 L.D. 16, 19 (1894), in which the First Assistant Secretary stated that reclamation is "accomplished when the water, in sufficient volume, has been brought on the land, and so disposed as to render it available for distribution when needed." <sup>4/</sup>

However, on March 3, 1891, Congress, while leaving intact the pro-vision in section 1 of the Desert Land Act that land would be patented upon the making of satisfactory proof of reclamation and suitable payment, amended that Act by adding, as part of section 5 of the Act, the require-ment that the entryman submit "proof \* \* \* of the cultivation of one-eighth of the land." 26 Stat. 1097 (1891). It is clear from this that Congress intended that the requirement to submit proof of cultivation was a necessary complement to the requirement to submit satisfactory proof of reclamation. Indeed, as explained in Brandon v. Costley, 34 L.D. 488, 498 n.3 (1906), the requirement to submit proof of cultivation ensured that the entryman had actually, rather than merely constructively, reclaimed the land:

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.

However, while, after passage of the Act of March 3, 1891, proof of cultivation was required, there is nothing in the Desert Land Act or its implementing regulations which has ever required that a claimant be engaged in the actual production of agricultural crops in order to be considered entitled to a patent under the statute. Indeed, the Department has held that, while production of crops is clearly indicative of cultivation, it is not itself required. See Claude E. Crumb, 62 I.D. 99, 103-06 (1955); see also William S. Archibald, 75 IBLA 236, 238 (1983); Mable M. Farlow (On Reconsideration), 39 IBLA 15, 22, 86 I.D. 22, 25 (1979); United States v. Knowlton, A-30912 (May 21, 1968), at 6; United States v. Mauldin, A-30446 (Jan. 6, 1966), at 6; but see Charles Edmund Bemis, 48 L.D. 605, 607 (1922). "Cultivation" is defined in Departmental regulations as the "operation,

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<sup>4/</sup> The decision in Campbell, in which there was not only a water delivery system in existence, but also actual cultivation of crops, simply followed this rule. In concluding that the land involved therein had been "sufficiently reclaimed from a desert state to render it not subject to entry under the desert land laws," the First Assistant Secretary expressly relied on the fact that the irrigation system had been developed to such a point that it afforded the land water of sufficient quantity to grow agricultural crops. 16 L.D. at 42. The fact that crop production had occurred was, of course, another strong indication that reclamation had occurred. See also Orin P. McDonald, 13 L.D. 30 (1891).

practice, or act of tillage or preparation of land for seed, and keeping the ground in a state favorable for the growth of crops." 43 CFR 2520.0-5(a)(2). No mention is made of actually having crops in place.

Appellant would have us extrapolate the statement in Campbell, purportedly reporting the rule in Rivers, to all future cases such that land will be considered effectually reclaimed only where it is "now producing crops" (16 L.D. at 41), that is, producing crops at the time of filing the entry. We hold, to the contrary, that because such production is not required to establish entitlement under the Desert Land Act, it will similarly not be required in terms of deciding whether land has been effectually reclaimed at the time a desert land entry application is filed. Appellant seeks to equate cultivation with production of a crop, stating that the word "cultivate," as used in George W. Wilkinson, A-29315 (May 2, 1963), "is consistent with the rule laid down in Rivers [16 L.D. at 41] which requires that the lands 'are now producing crops by means of irrigating ditches, etc.'" (Emphasis omitted). However, as we have held and as appellant himself points out, cultivation consists only of those steps leading to the production, and not the actual production of crops.

While the existence of crops at the time of application is not necessary to conclude that land has been effectually reclaimed, it would be wrong to suggest that, in the case of desert land entries initiated after March 3, 1891, land will not be considered effectually reclaimed where one-eighth of the land has never been cultivated. Rather, we conclude that, because the Act of March 3, 1891, made proof of such cultivation a necessary complement to proof of reclamation, land will not be considered effectually reclaimed unless one-eighth of it has at some time been cultivated. 5/

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5/ Consistent with this holding, in 1963 in George W. Wilkinson, supra, the Assistant Solicitor concluded that reclamation which entitles a desert land entryman to a patent is the same reclamation that will render land not subject to desert land entry. Accordingly, he held that land will be considered effectually reclaimed "[i]f all has been accomplished upon the land that would be required for final proof of a desert land entry." Id. at 3. He stated that the basic requirements for reclamation of land are "to bring a sufficient quantity of water upon it to irrigate it and to cultivate one-eighth of its surface." Id. at 4 (emphasis supplied). Utilizing this standard, the Assistant Solicitor concluded that the land involved in that case had been effectually reclaimed prior to entry: "Wilkinson's application indicated that 72 acres, or approximately one-fourth, of the land sought are irrigable. Other evidence contained in the record tends to show that he has cultivated and harvested hay on all of the irrigable portion for an unstated number of years, which cultivation has been accomplished through irrigation." Id.

However, in Mary Helen Conlan, A-29398 (July 23, 1963), the Assistant Solicitor attempted to disavow his holding in Wilkinson that reclamation which will render land not subject to desert land entry requires not only bringing a sufficient quantity of water on the land but cultivation of one-eighth of the land. He stated that:

"Although the reclamation of desert land is most fully demonstrated by irrigation of the land and the cultivation of crops, reclamation may be

To summarize, BLM properly rejects a desert land entry application because the land sought is not subject to desert land entry where the land has, at some time prior to the filing of the application, been reclaimed by conducting water to the land in sufficient quantity so as to render it available for irrigation of the land, and where one-eighth of the land has, at some time in the past, been cultivated using that irrigation system. Further, as developed below, the irrigation system must be in existence at the time of filing the application, so that the land has not reverted to a desert state.

We turn to the facts in the instant case. In addition to the case-file supplied by BLM in the course of transmitting appellant's appeal from the District Manager's December 1987 decision, we rely for our knowledge of the facts on three additional casefiles submitted by BLM at our request, and of which we take official notice. These casefiles concern a desert land entry of Betty L. Bishop (Idaho 05070), a trespass action initiated against Willard Yates (ID-020-1176) and an agricultural lease issued to Willard and Katherine Yates (I-18230).

The subject land was encompassed in a prior desert land entry (Idaho 05070) originally made by Phebe F. Biggers on April 23, 1954, as amended on May 21, 1954. On June 4, 1964, Biggers submitted an amended desert land entry application along with a plan for irrigating the subject land from a well which she had drilled in the northeast corner of the SE $\frac{1}{4}$  NW $\frac{1}{4}$  sec. 34, T. 13 S., R. 27 E., Boise Meridian, Idaho, and with respect to which she had a State permit (G-24883) authorizing the diversion of water. In that plan, Biggers proposed flood irrigating the land, which slopes east-to-west, by means of ditches constructed from the well along the eastern and northern boundaries of the subject land and dividing each 40-acre subdivision. BLM allowed the entry on October 15, 1964.

By decision dated June 7, 1966, BLM subsequently approved assignment of the entry to Betty L. Bishop. Thereafter, on October 31, 1967, Bishop leased the subject and additional land to Willard and Katherine

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fn. 5 (continued)

found to have taken place without irrigation or cultivation having been performed. The word 'reclamation,' as used in the desert land law, means the conducting of water upon the land in such a manner and in such quantity that it is available for irrigation."

Id. at 2. The Assistant Solicitor in Conlan clearly sought to return to the definition of "reclamation" adopted prior to amendment of the Desert Land Act on Mar. 3, 1891, and since perpetuated. See 43 CFR 2520.0-5(a)(1). As stated above, we think that, since Congress amended the Desert Land Act to require that proof of cultivation is a necessary complement to proof of reclamation, the Department is, likewise, bound to require such proof. Accordingly, we view the holding in Conlan as an aberration in the law which we will not follow. So doing benefits appellant, as following the standard in Conlan would allow BLM to declare the lands he applied for as effectually reclaimed without the need to consider whether they had ever been cultivated.

Yates, who owned land adjacent to the subject land, for a term ending on December 31, 1970. The lease required the Yates to undertake certain obligations regarding development of the land, in return for which they would be paid by Bishop. Bishop was required to construct the necessary ditches for irrigating the land on or before April 15, 1968, and to irri-gate at least 40 acres of the land prior to May 15, 1968.

On July 2, 1968, BLM conducted a field examination of Bishop's desert land entry. The next day BLM received final proof from Bishop. This proof stated that all of the subject land had been cleared and 60 acres had been levelled in 1966 and that, in 1968, a one-half mile earthen ditch had been constructed and 56 acres of barley had been planted. In an undated "Field Data Report," the District Manager stated:

In making the field examination the land examiner found a crop had been planted and irrigated, but no crop has ever been harvested from the land. Only the bare minimum acreage has been plowed, worked, and planted \* \* \* . The irrigation system is fully developed to deliver water to all of the irrigable land. \* \* \* . [T]here appears from the proof to be sufficient water to irrigate all of the land. [T]he [entryman seems] to have met the minimum requirements of the law. [Emphasis supplied.]

Before any action on the final proof was taken, concern arose in part as to whether Bishop and her assignor, Biggers, had made and main-tained the entry in good faith. On June 26, 1970, BLM issued a contest complaint challenging Bishop's desert land entry. The complaint charged in part that the entry had not been maintained in good faith in that Biggers had had no intent to reclaim, irrigate, and cultivate the land for her own use at the time her entry was allowed. After a hearing, Administrative Law Judge Dent D. Dalby, by decision dated October 12, 1972, cancelled the entry, concluding that the entry had not been maintained in good faith because Biggers had effectively abandoned the entry prior to its allowance.

The contest complaint had also raised the question of whether Biggers and Bishop had complied with the desert land law with respect to reclamation, irrigation, and cultivation of the subject land, but Judge Dalby did not rule on this matter. Judge Dalby's October 1972 decision was affirmed by the Board on appeal by decision dated December 10, 1973. Chester I. Bishop, 14 IBLA 62 (1973).

Thereafter, on April 29, 1975, the Director, Department of Water Resources, State of Idaho, signed a water right license (No. 24883/ 43-2409). That license confirmed Bishop`s right to use water from a ground water source located in the subject lands for irrigation of those lands.

On December 20, 1976, BLM issued a trespass notice to Willard Yates for the unauthorized farming of the subject and additional lands. In a December 22, 1976, field report, a BLM range technician reported that Yates had "harvested approximately 192 acres of hay that [were] flood irrigated" from a well situated in the northeast corner of the SE¼ NW¼

sec. 34, T. 13 S., R. 27 E., Boise Meridian, Idaho, which well was connected to a concrete ditch running south from the well. The trespass action was eventually settled by BLM and Yates in June 1980. Disposition of the trespass action was followed by issuance of a 10-year agricultural lease (I-18230) to Willard and Katherine Yates, effective May 1, 1982. That lease, which encompassed 520.35 acres, including the subject land, provided for use of the land for farming. The lands covered by the Yates' lease were irrigated by means of a well and pump which was operated with power obtained from the Raft River Electric Cooperative (Raft River) (Memorandum from Chief State Appraiser, Idaho, BLM, to District Manager, dated December 7, 1981). It thus appears that the subject lands were cultivated by Willard Yates during this time. BLM cancelled the lease as it affected these lands in 1987.

The irrigation system used by these previous interest holders was still in place and functional when appellant filed his application. In his desert land entry application, appellant reports that, in addition to the existing well and pump, there is a "cement ditch along the east edge of the parcel."

After reviewing this evidence, we are unable to conclude that the record supports the statement in the District Manager's December 1987 decision that "[s]ince December 15, 1981, the [subject] \* \* \* lands have been irrigated and farmed under agricultural lease I-18230." Rather, a June 1, 1987, land report indicates that Willard Yates ceased farming the land sometime prior to that report. <sup>6/</sup> In addition, appellant has submitted evidence that Willard Yates stopped pumping water from the well and, thus, presumably stopped irrigating and farming the subject land in 1984. Appellant submits a January 13, 1988, letter from Raft River which states that "pump service \* \* \* in the name of Willard Yates was last used for irrigation in 1984. This pump was not turned on in the years 1985, 1986, or 1987." Evidence in the agricultural lease casefile indicates that BLM confirmed this fact subsequent to the District Manager's December 1987 decision. Finally, it appears that no irrigation or farming of the land

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<sup>6/</sup> An Apr. 22, 1987, report of a meeting between representatives of BLM and various members of the Yates family discloses that the Yates had agreed to separate the leased lands into two "farmable units," one of which (the southernmost 200 acres) would be worked by Kirtland Yates, who had been added as a named lessee under the lease on Feb. 24, 1983, and the other (the northernmost 320 acres covering the subject lands) would be worked by Willard Yates. The report noted that Katherine Yates acknowledged that "due to [Yates'] failing health and the poor farm economy, they could not afford to farm the 320 acres." The parties agreed that this portion of the lease would be terminated for nonpayment of rent and that Kirtland Yates, who had sought an extension of the remainder of the lease, would rehabilitate this land. In a June 1, 1987, land report, a BLM realty specialist states, with respect to the subject land, that "[d]ue to failing health, [Yates] had been unable to farm the land in recent years and had failed to pay the annual rental \* \* \* for [two] consecutive years." BLM thereafter terminated the lease with respect to the subject land by decision dated May 12, 1987.

has occurred since termination of the agricultural lease as to the subject land in May 1987. Rather, Yates was required simply to seed the land and, according to the record, has initiated that process.

However, while we cannot conclude that the subject land has been continuously irrigated and farmed from December 15, 1981, until the date of the District Manager's December 1987 decision, the evidence nonetheless establishes that it has been irrigated, that at least one-eighth has been cultivated, and that the irrigation system remained in place as of the date of appellant's application such that the lands had not reverted to a desert state. This is adequate to support a finding that the land was effectually reclaimed.

In his December 1987 decision, the District Manager reports that "final proof of irrigation and development was approved on July 3, 1968." While this is not true, nevertheless, the record establishes that the District Manager concluded, after receipt of final proof from the prior desert land entryman, that the minimum requirements of the desert land law had probably been satisfied. This indicates that BLM, at that time, considered the entryman to have adequately reclaimed the land by making water of sufficient quantity available to irrigate the land and to have cultivated one-eighth of the land by means of that irrigation. See 43 CFR 2226.1-5 (1968). While the prior entry was eventually cancelled, the Department's cancellation was not premised on a finding that the entryman had failed to adequately reclaim the land, but rather that the entry had not been maintained in good faith.

Moreover, the record contains a March 29, 1977, appraisal report which was prepared in order to assess damages as a result of the Yates trespass. That report further establishes, at pages 10-11, that the subject land had earlier been irrigated and farmed:

The subject property is a rectangular shaped field, one mile long and one-half mile wide, containing 320 acres. The subject lands were developed by removing the native sagebrush vegetative cover and cropping approximately 180.75 acres of alfalfa during the life of the entry. The subject entry was cancelled on December 10, 1973. However, Willard Yates continued farming the subject lands and harvested an estimated three and one-half tons of alfalfa per acre per year from the subject lands in 1974, 1975 and 1976.

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The area included in the subject property has a gradual slope to the south and west. A large irrigation well was drilled in the NE<sup>1</sup>/<sub>4</sub> SE<sup>1</sup>/<sub>4</sub> NW<sup>1</sup>/<sub>4</sub> section 34. The well is located on the high point of the irrigable land so that flow to all parts of the entry could be obtained by gravity. The well is equipped with an electric 250 HP motor and a verti-line pump, model number 14RH, serial number D-8522, which produces 2925 GPM of water at 1770 RPM. A concrete lined irrigation ditch, one-half mile long, extends north to south

along the east boundary of the subject entry. Siphon tubes were utilized to transfer water from the concrete lined ditch to the corrugates that extend to the west supplying water to the alfalfa crop. The alfalfa field extends approximately 1700 feet south of the well.

Irrigation water was pumped into an open lead ditch bordering the north boundary of the subject property. Diversion ditches were constructed between each 40 acre tract to carry water from the lead ditch in a southerly direction across the lands. Earthen check dams or checks were constructed in the diversion ditches to redistribute the flow of water into the corrugates which spread the water to the west to lower diversion ditches.

See also Memorandum to the Chief State Appraiser from Kenneth E. Irons, dated February 3, 1977.

All of this evidence establishes that, at the time appellant's desert land entry application was filed on November 27, 1987, the subject land had already been reclaimed by construction of an irrigation system which was available to supply sufficient water to the land for cultivation and which had, at one time, been used to cultivate at least one-eighth of the land.

Appellant's principal contention is based on the notion of land reverting to an unreclaimed state. Thus, he argues that, while the subject land may have been reclaimed at one time, it was no longer reclaimed at the time he filed his desert land entry application. He bases this contention on the fact that irrigation and farming of the land ceased in 1984 and the land was then seeded with non-agricultural plants.

It is, of course, true that land which has, at one time, been reclaimed may yet revert to an unreclaimed state through deterioration of the irrigation system. See Mary Helen Conlan, supra at 2-3. Where this occurs, land may not be considered effectually reclaimed at the time a new desert land entry application is filed and, thus, such application will not be deemed barred. In other words, land will not be considered not subject to desert land entry simply because at one time in the past it would have been regarded as reclaimed, but is not presently reclaimed.

The fact that irrigation and farming ceased, however, does not automatically mean that the existing irrigation system was not available to supply a sufficient quantity of water to the land at the time appellant's application was filed. The record supports the conclusion that the well and pump are in place and operable. Indeed, appellant's application indicates that he intends to rely on that well and pump to supply water to his farming operations. In addition, the application states that the main irrigation ditch is also in place. There is no suggestion that it has deteriorated. Finally, the March 1977 Appraisal Report indicates that, not long ago, the subsidiary ditches were also in place.

Appellant argues that the condition of the old irrigation system is irrelevant because he does not desire to rely on the old method of irrigation:

I don't think [it is] necessary to consider the present quality or quantity of any ditches which may be on the land in question. It is sufficient to say that any irrigation which may have been done on the property prior to my application being filed would have been done by flood irrigation. The reason why I make the above statements is because from my point of view there are no means for rendering water "available for distribution when needed for irrigation and cultivation." 43 C.F.R. § 2520.0-5(a)(1). Since my plan for irrigation, as can be seen from my desert-land application, involves a sprinkler system with main lines and sprinkler pipes, any ditches which can still possibly carry water are useless to me. [Emphasis added.]

(SOR at 7).

Nowhere does appellant provide any evidence that the existing irrigation system, which relied on ditches, was not, at the time his application was filed, physically available to carry water in sufficient quantity to the land and, thus, to support the cultivation of that land. See United States v. Mauldin, *supra* at 6. Thus, the present case involves a situation where the means of irrigation, while available, were idle at the time appellant filed his desert land entry application. This was not sufficient to render the land unreclaimed at that time. 7/ Mary Helen Conlan, *supra* at 3.

Moreover, the adequacy of this irrigation system has been proven by the cultivation of one-eighth of the land included in appellant's desert land entry by the prior desert land entryman and the subsequent agricultural lessee. In these circumstances, it is irrelevant that the land was not being cultivated at the time appellant's application was filed or that appellant may wish to use a different method of delivering water to the claim. The requirement of cultivation, as noted *supra*, is intended in part to confirm that the land has been adequately reclaimed. Past cultivation is sufficient for this purpose. See United States v. Mauldin, *supra* at 6-7.

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7/ Nor is it significant, for purposes of determining whether the subject land was reclaimed at the time appellant's application was filed, that the land was, starting in the fall of 1987, to be seeded with what, according to appellant, are non-agricultural plants. Aside from the fact that most of the seeding was to take place after the filing of appellant's application, such seeding is merely indicative of the fact that the land would no longer be cultivated at the time the application was filed. As we here conclude, in order for land to be considered reclaimed and thus not subject to desert land entry, it is only necessary that water have been conducted to the land in sufficient quantity so as to be available for irrigation and one-eighth of the land have, at one time, been reduced to cultivation by means of that irrigation system. That is the situation here. The fact that the land did not contain crops at the time appellant's application was filed does not detract from the fact that the land was already reclaimed. The evidence establishes that the land could once again be brought under cultivation simply by reactivating the existing irrigation system. That fact establishes that the land has already been reclaimed, and appellant has not established otherwise.

The evidence establishes that the subject land was effectually reclaimed at the time appellant's desert land entry application was filed, as the irrigation system was then available to supply water to the land in sufficient quantity to support the growing of crops and had at one time been proven to be adequate for that purpose by the cultivation of one-eighth of the land. The aim of converting the land from a desert to a productive agricultural state had already been accomplished. Indeed, the only apparent purpose that would have been served by allowing appellant out onto the land under another desert land entry would have been to afford him the opportunity to alter the existing irrigation system by installing pipes rather than ditches and to resume cultivating and producing crops from the land. Accordingly, we conclude that rejection of appellant's desert land entry was consistent with the Desert Land Act.

Therefore, 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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David L. Hughes  
Administrative Judge

I concur:

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Charles B. Cates, Director  
Ex Officio Member