

HARRY GRAY BROWNE
FRANKLYN D. JEANS
CARL W. RIMBEY

IBLA 89-576, 89-577, 89-578

Decided November 13, 1991

Appeals from decisions of the Nevada State Office, Bureau of Land Management, denying requests for extensions of time in which to submit final proof for desert land entries N-23251 and N-34916, and cancelling desert land entries N-23251, N-23252, and N-34916 for failure to show permanent sources of water.

Affirmed.

1. Desert Land Entry: Cancellation--Desert Land Entry: Final Proof--
Desert Land Entry: Water Right--Desert Land Entry: Water Supply

BLM properly cancels a desert land entry where the entryman has voluntarily granted an option to acquire the water rights submitted as the source of water for his entry and has presented no evidence of some other permanent source of water for the entry. Cancellation of the entry is appropriate even though the option has not been exercised and the events which render the option operative have not occurred.

APPEARANCES: R. Craig Howard, Esq., Reno, Nevada, for appellants.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Harry Gray Browne, Franklyn D. Jeans, and Carl W. Rimbey have appealed from separate June 23, 1989, decisions of the Nevada State Office, Bureau of Land Management (BLM), cancelling desert land entries N-23251, N-23252, and N-34916, respectively. The decisions also denied Browne's and Rimbey's requests for extensions of time in which to submit final proof for their entries. Because the issues raised are identical, we have consolidated the three appeals.

Bruce C. Ferrel filed desert land entry (DLE) application N-23251 on March 30, 1979, for approximately 320 acres located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 22, and the NW $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 27, T. 26 N., R. 18 E., Mount Diablo Meridian, Washoe County, Nevada. On August 31, 1983, BLM classified those lands as suitable for desert land entry, and by decision dated August 20,

1984, BLM allowed DLE N-23251. On December 1, 1986, BLM approved the assignment of the entry from Bruce C. Ferrel to Browne.

On March 30, 1979, Claude E. Ferrel submitted DLE N-23252 for 320 acres in secs. 25 and 26, T. 26 N., R. 18 E., Mount Diablo Meridian, Washoe County, Nevada. On August 31, 1983, BLM classified 120 acres of those lands as suitable for desert land entry, and by decision dated August 20, 1984, BLM allowed DLE N-23252 insofar as it included the 120 acres located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 25 and the N $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 26, T. 26 N., R. 18 E., Mount Diablo Meridian, Washoe County, Nevada. 1/ Claude E. Ferrel assigned DLE N-23252 to Jeans, and BLM approved the assignment on December 1, 1986.

IBLA 89-576, etc.

121 IBLA 218

On December 1, 1981, Lolita L. Ferrel filed DLE N-34916 for 320 acres situated in secs. 26 and 27, T. 26 N., R. 18 E., Mount Diablo Meridian, Washoe County, Nevada. BLM classified 80 acres of those lands as suitable for desert land entry on August 31, 1983, and by decision dated August 20, 1984, BLM allowed DLE N-34916 as to the 80 acres located in the N $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 27, T. 26 N., R. 18 E., Mount Diablo Meridian, Washoe County, Nevada. 2/ On December 1, 1986, BLM approved Lolita L. Ferrel's assignment of DLE N-34916 to Rimbey.

The original applicants were advised by letters dated November 17, 1986, that final proof for the entry must be made on or before August 20, 1988. By separate letters dated June 22, 1988, BLM reminded Browne, Jeans, and Rimbey that final proof of reclamation and cultivation of their entries was due by August 20, 1988, and explained the final proof procedures and requirements. In response, Jeans submitted a letter on August 11, 1988, stating that he wanted to make final proof on his entry N-23252.

By letters dated August 16, 1988, Browne and Rimbey each requested a 3-year extension of time for making final proof pursuant to 43 U.S.C. § 333 (1988). In substantially similar requests, Browne and Rimbey explained that, although parts of their entries were currently irrigated and cultivated to alfalfa, 3/ a substantial portion of the balance of the entries had only been cleared but not irrigated or cultivated. They asserted that they had been unable to obtain capital to complete improvements on their entries due to the chilling effect of a moratorium placed on certain aspects of water development in the Honey Lake Valley by the Nevada State Engineer while the Geological Survey conducted a study of the Honey Lake Valley ground water basin in an attempt to resolve disputes between the States of Nevada and California over the use of those waters.

1/ By decision dated Aug. 24, 1984, BLM rejected the application as to the remaining 200 acres.

2/ BLM rejected the application as to the remaining 240 acres in a decision dated Aug. 24, 1984.

3/ According to Browne, the northern portion of his entry, i.e., the S $\frac{1}{2}$ SW $\frac{1}{4}$ and the NW $\frac{1}{4}$ SW $\frac{1}{4}$, of sec. 22, T. 26 N., R. 18 E., Mount Diablo Meridian, was susceptible to final proof. Rimbey asserted that a strip along the northern portion of his entry, i.e., the N $\frac{1}{2}$ N $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 27, T. 26 N., R. 18 E., Mount Diablo Meridian, was susceptible to final proof.

By separate decisions dated January 23, 1989, captioned "Entry Held for Cancellation Additional Information Requested," BLM informed Browne and Rimbey that, in order to qualify for an extension, they each had to submit documentation demonstrating that they had taken adequate steps to prevent or overcome delays in the construction of their irrigation works. BLM specifically requested written evidence of their attempts to obtain financing to develop their entries, including the names of the financial institutions contacted, when the attempts were made, and written rejections received. BLM further advised Browne and Rimbey that it had learned the water permits attached to their entries (permit Nos. 49268 and 49375, respectively) were part of a water option and acquisition agreement between Northwest Nevada Resources Limited Partnership (Resources) ^{4/} and Washoe County. BLM stated that, because the option agreement appeared to negate the permits as permanent water sources for the entries, Browne and Rimbey must submit evidence of some other permanent source of water for irrigating their desert land entries. The decisions allowed them 30 days to respond and indicated that no response or failure to provide all the requested information would result in denial of the extension requests and cancellation of the entries.

By decision dated January 25, 1989, similarly captioned "Entry Held for Cancellation Additional Information Required," BLM responded to Jeans' letter stating his intent to make final proof. BLM informed Jeans that it had discovered that the water permit attached to his entry (permit No. 49377) was part of the water option and acquisition agreement between Resources and Washoe County, and that the option agreement appeared to negate the permit as a permanent water source for irrigating his desert land entry. BLM requested that Jeans submit evidence of some other permanent source of water for irrigating the entry within 30 days, and stated that, if Jeans did not respond or failed to provide all of the requested information, his entry would be cancelled.

In separate letters dated February 23, 1989, counsel, on behalf of Browne, Rimbey, and Jeans, responded to BLM's January 1989 decisions. In each letter, counsel discussed the option agreement and cited various contingencies which would render BLM's determination that the entrymen had conveyed the water sources for their entries both incorrect and premature. He indicated that, in order for the agreement to become operative, the Nevada State Engineer first had to approve an interbasin transfer of the water and noted that this approval had not yet been given. He further asserted that, assuming the transfer were approved, it was possible that not all of the optioned water supply would be subject to the transfer, that Washoe County might not exercise its option and even if it did, the County might allow a portion of the water to be used to irrigate the entries, and that water rights retained by Fish Springs Ranch ^{5/} might be mixed with other water and used for irrigation purposes.

^{4/} Browne and Jeans are the general partners of Resources which is a Nevada limited partnership.

^{5/} Fish Springs Ranch is a Nevada limited partnership, composed of Browne, Jeans, and Rimbey as the individual partners.

In the Browne and Rimbey responses, counsel also summarized the difficulty in obtaining capital. He stated that efforts had been made during 1985-87 to obtain loans from the PCA, Connecticut General Life Insurance Company, Travelers Insurance Company, and the Federal Land Bank, but that these efforts had been unsuccessful because of the general recession in the agriculture industry. He further indicated that attempts to obtain funds through unnamed private loans and equity markets had proved fruitless, suggesting that the moratorium on new water applications "had an upsetting effect on potential private lenders who worried about the future irrigation" for the Honey Lake Valley.

In its June 23, 1989, decisions, BLM noted that the water rights held by the permits submitted as the permanent sources of water for the entries had been included in the exclusive option agreement between Resources and Washoe County, and that the entrymen had failed to submit evidence of some other permanent source of water as required by BLM's January 1989 decisions. BLM discounted the entrymen's speculation that the option might never be exercised:

The premise behind the Desert Land Act [43 U.S.C. §§ 321-339 (1988)] is to permanently reclaim desert land into agricultural use. The Act requires that the entryman provide evidence of the right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portion of the land sought. To option off the water right permitted by the State Water Engineer's office specifically to be used for a desert land entry, whether the option is ever exercised or not, is in direct contradiction to the intent of the Desert Land Act. [Emphasis in original.]

Accordingly, BLM denied Browne's and Rimbey's requests for extensions of time to make final proof, 6/ rejected Jeans' notice of intent to make final proof, and cancelled all three entries.

Counsel for Browne, Jeans, and Rimbey has filed a separate statement of reasons (SOR) for appeal for each entryman. Therein, counsel argues with respect to each that the entry has both sufficient water rights and water supply to reclaim all of the irrigable land embraced in the entry and noted that Browne and Jeans are currently using irrigation to grow alfalfa on their entries. 7/ Counsel explains the basis for the appeals in paragraph 4 of each SOR:

The issue involves an option agreement which concerns the water right and water supply to the entry. The entry is located

6/ BLM also rejected Browne's and Rimbey's assumption that the chilling effect of the moratorium prevented them from obtaining financing, noting that the moratorium did not become effective until 1987, after more than one-half of the time allowed to develop the entries had passed.

7/ On appeal, Browne contends that his entry has been irrigated and cultivated to the extent necessary to file his final proof.

in Washoe County, Nevada and in 1988 Washoe County obtained an option to purchase the water rights. The option has not been exercised. The option itself is operative only in the event that the Division of Water Resources for the State of Nevada (DWR) allows an interbasin transfer of the water to the communities in the Truckee Meadows area. This DWR decision and the agreement is subject to numerous variables. The DWR decision may not transfer all the water rights optioned by Washoe County.

(SOR's at 1). Counsel contends that this option agreement has not presently terminated any of the entrymen's rights to a permanent water source.

On appeal, Browne and Jeans request that they be allowed to file their final proof or, alternatively, that the time for filing be extended for 1 year, *i.e.*, until August 19, 1990, by which time, they assert, the DWR will have ruled on the interbasin transfer, and the situation as to the water rights will be a known factor instead of speculation. §/ Rimbey similarly seeks a 1-year extension in which to file his final proof.

[1] The Desert Land Act, as amended, provides for the entry of up to 320 acres of desert land, defined as those lands "exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop," upon a declaration by the entryperson that he or she intends to reclaim the land by conducting water thereon, and for the patenting of the land to the entryperson upon the submission of satisfactory proof of reclamation within 4 years and appropriate payment. 43 U.S.C. §§ 321, 322, 329 (1988). The Act also requires that an entryperson spend yearly for 3 years from the date of entry not less than \$1 per acre of tract entered, for a total of at least \$3 per acre, in the necessary irrigation, reclamation, and cultivation of the land. 43 U.S.C. § 328 (1988); 43 CFR 2521.5. Within 4 years of entry, and after expending the full \$3 per acre, the entryperson must make satisfactory proof of reclamation and cultivation, and, upon payment of \$1 per acre, a patent will be issued for the land. 43 U.S.C. § 329 (1988); 43 CFR 2521.6, 2523.2. See Charlotte Peck, 116 IBLA 169, 171 (1990). Final proofs for the entries in question were due by August 20, 1988.

In order to satisfy the final proof showing as to water rights, the entrymen must demonstrate entitlement to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portions of the land sought. 43 CFR 2521.6(h). See James M. Mills, 108 IBLA 155, 160 (1989). There is no dispute that, at one point, Browne, Jeans, and Rimbey did hold sufficient water rights to irrigate the entries. See October 30, 1986, letter from the State of Nevada DWR (informing BLM that it had granted active and usable irrigation water permits covering the entries in question). These permits, however, were included in the April 12, 1988, option

§/ We note that, although Aug. 19, 1990, has passed, appellants have not sought to supplement the record with the DWR's ruling on the interbasin transfer which they anticipated in early 1990.

agreement between Resources and Washoe County that granted the County the exclusive right to acquire the water attached to the permits. We find that, by their own voluntary action in agreeing to convey their water rights to the County, the entrymen have rendered it impossible for them to demonstrate that, as of August 20, 1988, they continued to possess those rights to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portions of the land sought, as required by 43 CFR 2521.6(h)(1).

That the option has not yet been, and may never be, exercised does not change this result. By granting the option, the entrymen have relinquished control over the future use of the water attached to their permits and can no longer show that they will have permanent use of sufficient water: the use of the water now depends on political and economic decisions by the State of Nevada and the County. Additionally, as noted by BLM, the purpose of the Desert Land Act is to permanently reclaim desert land into agricultural use. Agreeing to sell off the water necessary to irrigate their entries opens the door to speculation that they do not intend to permanently cultivate the land sought. Since the entrymen have presented no evidence of some other permanent source of sufficient water to irrigate and reclaim the entries, their entries were properly cancelled.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Gail M. Frazier
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge