

INTERIOR BOARD OF LAND APPEALS

Glen H. Wharton

125 IBLA 165 (January 28, 1993)

Title page added by:
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GLEN H. WHARTON

IBLA 92-323 Decided January 28, 1993

Appeal from a decision of the District Manager, Battle Mountain District, Nevada, Bureau of Land Management, rejecting desert land entry application N-52001.

Affirmed.

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

BLM properly rejects a desert land entry application where the applicant has failed to submit proof that he has acquired, is seeking to acquire, or is qualified under state law to acquire a right to permanent use of sufficient water to irrigate and reclaim all irrigable portions of the land sought. It is not sufficient that an applicant establish that he is relying on a state water permit application of his deceased father that he has not actively sought to have transferred to him and which has been denied.

APPEARANCES: Glen H. Wharton, Las Vegas, Nevada, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Glen H. Wharton has appealed from a decision of the District Manager, Battle Mountain District, Nevada, Bureau of Land Management (BLM), dated March 10, 1992, rejecting his desert land entry (DLE) application N-52001. Wharton filed a DLE application seeking 320 acres of land in Monitor Valley in south central Nevada on October 27, 1989. The land was described as the W $\frac{1}{2}$ SE $\frac{1}{4}$ and SW $\frac{1}{4}$ sec. 16 and the E $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 17, T. 9 N., R. 46 E., Mount Diablo Meridian, Nye County, Nevada. The application was filed pursuant to the Act of March 3, 1877, as amended, 43 U.S.C. §§ 321-323, 325, 327-329 (1988). Wharton stated that he intended to irrigate all of the irrigable portions of the land sought comprising 288 acres for the production of alfalfa and other purposes by means of water from a well that would be drilled on the land. He also petitioned the Department to classify the land as suitable for desert land entry.

To prove that he had proceeded as far as then possible to acquire the right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portions of the land sought, Wharton appended to his application an August 30, 1989, letter from Helen H. Wharton to the Division of

Water Resources (DWR), State of Nevada, stating that she wished to "transfer" a one-half share in State water permit application No. 45735 from her husband, Fred O. Wharton, to her son, Glen H. Wharton. She explained that the application had originally been submitted on June 2, 1982, in connection with DLE applications by her and her husband (N-36381 and N-36382), but that, following her husband's death, her son had filed a DLE application for the land originally sought by his father. She reportedly sought to obtain two State water permits, one in her name and one in her son's name, to be applied to their respective DLE applications.

Wharton's original application was dated August 20, 1989, more than 10 days prior to filing with BLM. In accordance with 43 CFR 2521.2(c), BLM found the application "not acceptable" by decision dated November 8, 1989. Therefore, on December 6, 1989, Wharton filed an identical DLE application for the same land, which was numbered N-52001. BLM took no immediate action on the application.

On January 31, 1991, Wharton submitted, without explanation, a quitclaim deed dated December 13, 1990, in which Lawrence H. Miller conveyed "Water rights application # 45735" to Wharton. There was no indication how Miller had acquired any interest in the application. Wharton had, however, stated in a September 9, 1989, statement attached to his second DLE application that the "water rights applied for by Helen H. and Fred O. Wharton, (application #45735) [were] inherited by Helen H. Wharton upon the death of Fred O. Wharton [and were] in the process of * * * transfer of Fred O. Wharton's half of the application (4.5 cfs [cubic feet per second]) to myself."

Thereafter, the Nevada State Office, BLM, provided DWR with a list of pending DLE applications which DWR then sought to match with pending State water permit applications. By letter dated December 6, 1991, DWR informed the State Office that it had no pending water permit application from Wharton in connection with DLE application N-52001. Pursuant to Information Bulletin No. NV-92-97, dated December 11, 1991, the State Office notified the District Manager that he could reject Wharton's DLE application because it was based on a State-approved appropriation of water for which there was no proof of a State permit application.

BLM subsequently learned on December 19, 1991, that State water permit application No. 45735, relied upon by Wharton, had been denied by the State Water Engineer on December 28, 1989. In light of this fact, the District Manager, by decision dated January 10, 1992, held Wharton's DLE application for rejection, requiring him to submit within 30 days "a copy of a new serialized application to appropriate the waters of the State of Nevada or other proof that there is an adequate water supply of suitable quality available to you for the irrigation of all the irrigable portions of the lands applied for." In the absence of adequate and timely compliance with that directive, the District Manager stated that Wharton's DLE application "will be rejected as incomplete."

Thereafter, Wharton notified BLM by telephone on February 10, 1992, that "the whole water right thing had been straightened out years ago"

and that "the Water Engineer [had written] assigning the right to Helen Wharton on 10/12/90 (45735)" (Conversation Record, dated Feb. 10, 1992). This was borne out by a subsequent submission by Wharton. On February 13, 1992, BLM received copies of letters from DWR dated July 31 and October 12, 1990. In the July letter, DWR notified Helen H. Wharton, in response to an August 1989 letter, of requirements needed to make an "assignment of water rights [under State permit No. 45735]" to her son. In the October letter, DWR stated that permit application No. 45735 "ha[d] been denied * * * following the rejection of Mr. Fred Wharton's D.L.E. Application." DWR also stated that it currently showed Helen H. Wharton as the owner of record of permit application No. 45735 and again listed requirements needed before an assignment to her son could be made. No evidence was submitted showing whether she ever took the necessary action to effect an assignment to her son. Finally, BLM confirmed in a February 21, 1992, telephone conversation with DWR, that "Glen Wharton does not have a [permit] application on file" (Conversation Record, dated Feb. 21, 1992).

In his March 1992 decision, the District Manager rejected Wharton's DLE application for failure to submit timely, in response to the January 1992 decision, proof that Wharton had or was seeking the right to an adequate supply of water of suitable quality sufficient to irrigate all of the irrigable portions of the land applied for. Wharton appealed from that decision. On appeal, he contends that BLM was responsible for his failure to submit proof he had sought the required water right because BLM failed to notify DWR that Wharton had filed his own DLE application and was pursuing water permit application No. 45735 in connection therewith.

[1] Under section 1 of the Act of March 3, 1877, as amended, 43 U.S.C. § 321 (1988), a person may apply for a DLE by declaring his intention to reclaim up to 320 acres of desert land by conducting water upon it. The statute further indicates that the applicant must have a "right" to the use of such water that is dependent on a "bona fide prior appropriation." 43 U.S.C. § 321 (1988). This has been interpreted by the Department to mean that, at the time of making application, an applicant must demonstrate that he

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 * * * has initiated and prosecuted, as far as then possible, appropriate steps looking to the acquisition of such a right, or, in States [such as Nevada] 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.

43 CFR 2521.2(d); Wesley A. Painter, 98 IBLA 69, 71 (1987). Where, at the time of making application, no such evidence is submitted, BLM may require (as it did here) the submission of additional evidence regarding a water right. 43 CFR 2521.2(d); Dale Christiansen, 82 IBLA 97, 99 (1984). Thereupon absent satisfactory proof, the entry will not be allowed and

the application will be rejected by BLM. 43 CFR 2521.2(d); Joe J. Pinson, 84 IBLA 96, 100, 91 I.D. 359, 361 (1984).

If the entry is allowed, the DLE applicant has 4 years to prove that he has spent at least \$3 per acre irrigating, reclaiming, and cultivating the land and also cultivated at least one-eighth of the land. 43 U.S.C. § 328 (1988). The applicant must then demonstrate that he still owns the required water right or has taken the necessary steps to perfect that right. 43 CFR 2521.6(h)(1). After submission of satisfactory proof to that effect and payment of \$1 per acre, the Secretary of the Interior is authorized to patent up to 320 acres of desert land to the DLE applicant. 43 U.S.C. § 329 (1988).

It is a fact that Wharton has not submitted any proof that he has already acquired by appropriation or otherwise the right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portion of the land sought by him under DLE application N-52001. Nor has he submitted any evidence that he is qualified under State law to secure the necessary water right. Rather, he has sought, since the filing of his DLE application, to rely on his father's permit No. 45735. He has failed to submit, either at the time he filed his DLE application in December 1989 or at any time thereafter, any evidence that he has, or even is actively seeking, an interest in that permit application. As DWR indicated in the October 1990 letter to Helen H. Wharton, DWR had not received a document completing the "chain of title" with respect to the permit application from Fred Wharton to Glen H. Wharton through Helen H. Wharton so that it could process a transfer to Glen H. Wharton. No such document has been provided to BLM. We must therefore conclude that appellant has not submitted satisfactory proof that he has initiated and prosecuted, as far as then possible, the appropriate steps looking to the acquisition of the required water right, as required by 43 CFR 2521.2(d). Rather, the evidence is that no "steps" have been taken by him. The situation is akin to that where a DLE applicant fails to submit proof that he has directly made application to the State for a water permit. Vernon Casper Hall, A-28511 (Mar. 14, 1961), at 2. In these circumstances, it does not matter whether BLM was responsible for DWR's denial of State water permit application No. 45735 because there is no evidence that an interest in the application has ever been actively sought to be transferred to Glen H. Wharton.

It might be argued that, but for the denial of the water permit application, he may have acquired an interest in the water application and used it to support his DLE application. On this theory, Wharton seeks to attribute responsibility for the denial of the water permit application to BLM by contending that BLM should have notified the State Water Engineer that Wharton had filed his own DLE application and intended to pursue the permit application in connection therewith. But he cannot justly complain that BLM was responsible for notifying the State Water Engineer that he had filed his own DLE application and intended to pursue the permit application in connection therewith. No statute or Departmental regulation imputed to BLM the responsibility to notify the State that appellant had filed his own DLE application. Nor can it be said that BLM was responsible for informing

the State regarding the status of the water permit application. The responsibility for a water permit application falls on the permit applicant or his successor-in-interest. As a result of the death of Fred O. Wharton, his wife was apparently the immediate successor-in-interest as to water permit application No. 45735. As such, Helen H. Wharton notified the State by letter dated August 30, 1989, that she intended to further transfer an interest in that application to her son Glen. Nonetheless, she evidently failed to take the necessary action to make the transfer since no proof that there was any such application is to be found in the record. Even so, DWR could have deferred action on the permit application in order to await further action by Helen Wharton. It did not, but instead denied the application in December 1989. Neither Helen H. Wharton's failure to transfer the application nor DWR's prompt denial of it are attributable to BLM. Further, even assuming Glen H. Wharton had or was actively seeking an interest in the permit application, the resulting denial of that application requires rejection of his DLE application. See Robert E. White, 82 IBLA 34, 36 (1984).

We therefore conclude that the District Manager properly rejected Glen H. Wharton's DLE application where he failed to submit, either along with the filing of that application or in response to the District Manager's January 1992 decision requiring him to do so, satisfactory proof that he had, was seeking, or was qualified under State law to secure the required water right. See Joe R. Carter, 83 IBLA 104, 105 (1984). Appellant is not precluded from filing another DLE application, which should be accompanied by the required proof. See Wesley A. Painter, *supra* at 73.

Accordingly, 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.

Franklin D. Arness
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge