

INTERIOR BOARD OF LAND APPEALS

Jose G. Gonzalez

138 IBLA 199 (February 20, 1997)

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JOSE G. GONZALEZ

IBLA 94-376

Decided February 20, 1997

Appeal from a decision of the California State Office, Bureau of Land Management, rejecting desert land application CACA-33005.

Affirmed

1. Desert Land Entry: Applications--Desert Land Entry: Cultivation and Reclamation--Desert Land Entry: Water Supply

An application for desert land entry that proposed to grow prickly pear cactus without a system of irrigation from a water source on the land sought to be entered was properly rejected.

APPEARANCES: Jose G. Gonzalez, Rialto, California, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Jose G. Gonzalez has appealed from a February 7, 1994, decision of the California State Office, Bureau of Land Management (BLM), rejecting desert land entry application CACA-33005.

On August 12, 1993, Gonzalez sought entry to 200 acres in sec. 34, T. 2 S., R. 5 E., San Bernardino Meridian, California, for cultivation of prickly pear cactus. He did not propose to irrigate this crop, stating that "the area is not serviced by any water source" and that he was applying "for waiver of all irrigation requirements." He explained that waiver of irrigation was proper because: "Prickly Pear Cactus needs very little water. In fact the only water needed is provided by yearly rain fall."

In rejecting this application, BLM found that Gonzalez did not qualify for waiver of irrigation requirements under 43 CFR 2524.6, because the land he proposed for entry was not part of a reclamation project, a necessary prerequisite for such a waiver. See 43 CFR 2524.1(b). BLM also determined that prickly pear cactus was not a crop that requires irrigation and did not, therefore, qualify as an agricultural crop within the meaning of section 2 of the Act of March 3, 1877 (Desert Land Act), as amended, 43 U.S.C. § 322 (1994), which defines desert lands as those "which will not, without irrigation, produce some agricultural crop."

Gonzalez timely appealed the decision. On page 4 of his statement of reasons for appeal (SOR), he concedes that he is not eligible for waiver of the irrigation requirements of the Desert Land Act, and agrees that the BLM decision was correct on this issue. Nonetheless, he states that although he was unable to obtain water from the Cochella Valley Water District, he will bring whatever water is needed for his proposal by truck from his home in Rialto, California, where he is served by a municipal water contract, or from the home of a friend in Desert Hot Springs who has agreed to fill his portable water tank for the purposes outlined in his application. He states that by "carting the water to the property I believe that I have met the legal requirement of irrigation" (SOR at 1). He also argues that prickly pear cactus is an agricultural crop within the meaning of the statute quoted above because it produces an edible fruit capable of cultivation and marketing for human consumption. Admitting that the plant does not require irrigation, he suggests that cultivation of fruit of a marketable quality requires some irrigation, which he will supply at night from his portable tank (SOR at 2).

[1] Irrigation is a necessary prerequisite for entry of desert lands of the United States by one who proposes to reclaim them "by conducting water upon the same." 43 U.S.C. § 321 (1994); 43 CFR 2521.2(d); United States v. Swallow, 74 I.D. 1, 4 (1967). An applicant for entry to desert land must show he has a "permanent use of sufficient water to irrigate and reclaim" the sought-after land; this showing is a "vital prerequisite to approval of a desert-land entry application." Wesley A. Painter, 98 IBLA 69, 71 (1987). While Gonzalez has, on appeal, modified his position, as stated in his application, that no "water source" is needed for his proposed activity on the desert land he proposes to enter, he makes it clear that no permanent use of water is planned for the land at issue. His proposal to occasionally water his cactus plants at night from a portable truck tank filled at municipal water taps does not describe an adequate permanent water source that qualifies his application to enter desert lands within the meaning of the Desert Land Act and implementing regulations. See Wesley A. Painter, *supra*, 98 IBLA at 72, and cases cited therein.

Gonzalez has, on appeal, also changed his position concerning the need to water his cactus plants. While he now suggests that the quality of the fruit produced by the plants may be improved by irrigation sometime in the growing cycle, exactly why, how, and when this operation would be accomplished is not described, except that it would be nocturnal. As part of his application to BLM, Gonzalez introduced an article concerning possible commercial uses of cactus: Robert Johnson, Thorny Question: Will the Prickly Pear Be Kiwi of the '90s? Wall St. J., Jan. 26, 1993. While the article indicates there have been some attempts to cultivate and market prickly pear cactus, it suggests that future commercial uses are problematic, and concludes that acceptance of the cactus fruit by business and the public has not been established. Although Gonzalez argues otherwise at some length, this is not a sufficient showing to establish a new agricultural application for a plant the Journal article says "is dismissed as a mere novelty by the Department of Agriculture."

BLM found that the prickly pear cactus could not qualify the land selected by Gonzalez for entry, because it is "an arid land species which can be grown without benefit of irrigation." This finding agrees with the description of the plant furnished by Gonzalez in his application, and with supporting analysis furnished by him. On the record before us, it appears that the prickly pear cactus is similar to the century plant and pinion pine tree considered and rejected by the Board as a basis for desert entry in Patricia K. Scher, 59 IBLA 276, 279 (1981). Like those plants, the prickly pear cactus is an arid land species that Gonzalez has not shown to have the necessary qualities to qualify his application for desert land entry under the Desert Land Act. The application made by Gonzalez was, therefore, properly rejected by BLM as insufficient on its face to support desert land entry.

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. Amess
Administrative Judge

I concur:

John H. Kelly
Administrative Judge