

STATE OF ALASKA
KENNETH D. MAKEPEACE

IBLA 70-86

Decided May 22, 1972

Appeal from a decision (AA 706) by Office of Appeals and Hearings, Bureau of Land Management, denying state selection application to the extent of land embraced in homestead application.

Reversed and remanded.

Alaska: Land Grants and Selections: Applications -- Applications and Entries: Filing
-- Applications and Entries: Generally -- Public Records -- State Selections

A homestead application must be rejected when filed at a time when the Master Title Plat in the local Bureau of Land Management office shows prima facie that the lands are embraced in a state selection application and the serial register sheet, referred to on the plat, shows that tentative approval has been given to the state selection for those lands.

APPEARANCES: William A. Sacher for the appellant; Joseph P. Palmer for the appellee.

OPINION BY MR. FISHMAN

The State of Alaska has appealed from a decision of the Office of Appeals and Hearings, Bureau of Land Management, dated August 29, 1969, which reversed a decision of the Anchorage district and land office, dated February 15, 1967, rejecting the second homestead entry application (AA 706) of Kenneth D. Makepeace for the S 1/2 SW 1/4 sec. 23, and the N 1/2 NW 1/4 sec. 26, T. 7 N., R. 12 W., S.M. filed on February 2, 1967.

The stated reason in the land office decision for rejecting the homestead application was that the land office records " * * * show the lands to be included in the state selection application, Anchorage 050580. The regulations in 43 CFR 2222.9-5(b)(1970), provide that the filing of the state selection application segregates the land from all further appropriation based upon application or settlement and location."

Mr. Makepeace appealed from the rejection of his homestead application to the Director, Bureau of Land Management, contending the land office was in error because: (1) state selection A-050580

was premature; 2) state selection A-050580 did not include the lands in his application for a second homestead entry; (3) the State of Alaska, in other cases, had stated that the State's filing is not intended to attach where a valid entry is relinquished and subsequently filed upon; (4) the state selection was filed on November 17, 1959, and amended on August 16, 1962, when the lands in question could not validly be selected, as they were withdrawn from all forms of appropriation because they were embraced in a prior existing homestead entry, A-047600, which lands were not restored to the historical index in the land office until January 20, 1965 ^{1/}; (5) the state selection expressly excluded the lands described in his application in that it "excluded any prior valid rights, claims or patented lands," and at the time of selection the lands in issue were in the existing prior valid homestead entry A-047600; and (6) on the date his homestead entry application was filed, February 2, 1967, the lands were in the public domain available for homestead entry and not segregated by state selection application A-050580.

The record shows that on November 17, 1959, the State of Alaska filed selection application Anchorage 050580, under the Act of July 28, 1956, 70 Stat. 709, 711, 712, as supplemented by the Alaska Statehood Act of July 7, 1958, 72 Stat. 339-343; 48 U.S.C., Chap. 2, at pp. 11719, 11720 (1970).

^{1/} The record discloses the homestead entry was closed on January 20, 1965, and noted on the historical index on January 26, 1965.

The original selection application did not expressly describe the S 1/2 SW 1/4 sec. 23, and the N 1/2 NW 1/4 sec. 26, T. 7 N., R. 12 W., S.M. Nor were these lands expressly described in the amended application filed on August 16, 1962, which described other lands in the aforesaid township. The following month the amendment was corrected to embrace the entire township, excluding "any prior valid rights, claims or patented lands."

The Office of Appeals and Hearings, acting for the Director, Bureau of Land Management, held that "since there was a valid existing right attached to the subject land at the time [of filing the selection application], i.e., the allowed homestead entry, Anchorage 047600, this land was omitted from the selection by the language in the State's amendment application." The decision further held that the State had not filed a new application nor amended the original application to include the lands in issue after they became available for selection, i.e. after the cancellation of the previous homestead entry was noted on the historical index in the land office on January 20, 1965, and it did not appear that such a new or amended application for selection had been filed by the State up to that time.

The decision referred to a letter of July 30, 1963, by the Director, Alaska Department of Natural Resources, addressed to the Bureau's State Director, regarding the State of Alaska blanket selections covering all available lands in a given area. The letter was

concerned with the phrase "excluding any prior valid rights, claims or patented lands" and the segregative effect of such blanket selections, which stated:

On those selections the State has heretofore blanketed and which are now pending the State's filing is not intended to attach in cases where a valid entry is relinquished and subsequently filed upon.

With respect to a letter dated March 1, 1966, by the Director, Alaska Department of Natural Resources, which specifically retracted the 1963 letter, the Office of Appeals and Hearings held that the 1963 letter left no question as to the State's intention to exclude those lands from state selection A-050580 or its 1962 amendment, and further held that the 1966 letter could not retroactively change the wording or the intent of the State's amended selection application. 2/

The Office of Appeals and Hearings observed there was publication of the proposed selection of the lands by the State shortly after the filing of the amended application. It held, since the

2/ The Office of Appeals and Hearings correctly held that the 1966 letter could not change the state's application on a retroactive basis. As shown, infra, it possibly could operate prospectively as an amendment as of the date of its filing.

lands in issue were expressly excluded from the amended selection application by reason of its inclusion in a valid entry, the publication of the notice while the entry was still valid could have no effect. After summarizing the administrative and judicial history of the Kalerak case, ^{3/} it found the case at bar distinctly different factually from Kalerak in that the State never had selected the lands in issue.

The decision went on to distinguish the case at hand from John Gonzales ^{4/}, A-30604 (September 26, 1968), pointing out that in Gonzales, notices of publication were published by the State after the lands became available for appropriation which notices were considered as reassertions of the State's selection which effectively segregated the land from further appropriation by application or settlement. The Bureau's decision held in the instant case there have been no notices published in connection with the lands subsequent to their restoration to the public domain, and, accordingly, any right or interest the State might have intended to claim was not reasserted or reaffirmed by the publication of notice.

^{3/} The State of Alaska, Andrew J. Kalerak, Jr., 73 I.D. 1 (1966); reversed in Kalerak v. Udall, Civil No. A-35-66 (D. Alaska 1966); reversed in Udall v. Kalerak, 396 F.2d 746 (9th Cir. 1968), cert. denied, 393 U.S. 1118 (1969).

^{4/} Gonzales has a suit pending in the United States District Court of the District of Alaska, Civil No. A-128-68.

The Bureau also noted that subsequent to the notation of the cancellation on the land office records of homestead entry, Anchorage 047600, and without any request on the part of the State, the Anchorage land office decision of October 25, 1966, declared the lands in issue, among other lands, all described by legal description, as being proper for selection, and tentatively approved the selection of these lands under the selection application, Anchorage 050580. It held that there is no evidence in the record showing that the State was requested to, or had published, notices in accordance with that decision pointing out that the action taken by the land office in this regard was apparently in accordance with the Department's regulation 43 CFR 2222.9-4(d)(1967), now 43 CFR 2627.3(d)(1972). It observed that the Department has held that the tentative approval by the land office of a State selection serves to pass equitable title to the selected lands to the State, citing Charles Schraier, Robert Schulein et al., A-30814, A-30816 (November 21, 1967). It found that this ruling would prevail only where, prior to the tentative approval by the land office, the State had in fact made a proper selection of the lands involved, and it held that such was not the case here.

The Bureau's decision further held that even had the original or amended selection applications included the land in issue, they could have no segregative effect with respect thereto and should have been rejected as to such land. It explained that at the time the applications

were filed the lands were embraced in a valid existing homestead entry not subject to selection by the State, because they were not vacant, unappropriated and unreserved public lands within the purview of section 6(b) of the Alaska Statehood Act, supra, and the regulations thereunder, 43 CFR 2222.9-4(a)(1967), now 43 CFR 2627.3(a)(1972).

We need not decide whether the letter of March 1, 1966, from the State operated as an amendment to the State's selection application. The decision of the Bureau found that because the 1966 letter could not have retroactive effect, it has not effect. As of the time the letter of March 1, 1966, was filed, the lands in issue were not withdrawn or appropriated and there was no record notation precluding the State's application. 5/ Therefore, if indeed the letter constituted an amendment of the application, Udall v. Kalerak, 396 F.2d 746, 748 (9th Cir. 1968) supports our conclusion that the letter of March 1, 1966, could operate as an amendment:

In view of Alaska's intent in this regard, and the lack of prejudice to plaintiffs inasmuch as they had notice of Alaska's claim to all such lands before they tendered their claims, the Secretary did not abuse his discretion in accepting

5/ Makepeace's application was filed February 3, 1967, and stated that residence had not been established on the land.

the amendments as a timely reassertion of Alaska's original application. ^{6/}

[footnote omitted.]

It is noteworthy that the Office of Appeals and Hearings in essence considered that the lands in issue were not subject to application by the State of Alaska while they were affected by a notation of the existence of homestead entry, Anchorage 047600.

We agree with that conclusion. See State of Arizona, 55 I.D. 245, 246 (1935); Keating et al. v. Doll, 48 L.D. 199 (1921); Youngblood v. State of New Mexico, 46 L.D. 109 (1917) Cf. Hastings and Dakota RR. Company v. Whitney, 132 U.S. 357, 360-364 (1889); Joyce A. Cabot, Allen B. Cabot, Walter G. Davis et al., 63 I.D. 122 (1956); R. B. Whitaker, Mrs. Jacqueline Anderson, 63 I.D. 124 (1956); State of Arizona, 55 L.D. 249 (1935).

California and Oregon Land Co. v. Hulen and Hunnicutt, 46 L.D. 55, 57 (1917), holds:

* * * [t]he orderly administration of the land laws forbids any departure

by the Department from the salutary rule that

^{6/} Although, concededly, the case at bar differs from Kalerak, in that in the former the first manifestation of interest in the lands in issue was the letter of March 1, 1966, this is not seemed to be a significant line of demarcation. For the purposes of this decision, the letter of March 1, 1966 need not be construed as a revival of any preexisting application.

land segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of the local land office. * * *

See Earl Crecelouis Hall, 58 I.D. 557, 560 (1943); Cf. Stewart v. Peterson, 28 L.D. 515, 519 (1899).

As pointed out in Cabot, *supra*, at 123, whether the outstanding record appropriation is void or voidable is immaterial. If such appropriation is outstanding on the tract books, the land is not subject to further appropriation, citing Martin Judge, 49 L.D. 171 (1922). See Sarah Ann Christie, 3 IBLA 7 (July 6, 1971); George E. Conley, 1 IBLA 227 (January 13, 1971).

It is true that in Kalerak v. Udall, Civil A-35-66 U.S.D.C. Alaska, October 20, 1966, the United States District Court found that the application of the State of Alaska, filed while the lands were withdrawn, " * * * was a nullity * * *" and that " * * * [t]he so-called amendments, or additional selections during the 90-day period [restoration preference right period for the State to file selections], which did not embrace the lands selected on January 8, 1963 [at which time the lands were withdrawn], did not serve to validate the prior void selection."

The district court did not address itself specifically to the Cabot doctrine spelled out above, but implicitly it did not regard that doctrine as having any force.

However, the United States Court of Appeals for the 9th Circuit decision in Kalerak, at 396 F.2d 748, reversed the district court decision on the issue of the amendments and stated:

We need not decide whether the district court erred in declining to accept the Secretary's alternative ruling that Alaska's original application, even if defective, accomplished a segregation of lands which prevented plaintiffs from acquiring rights therein while the segregation remained in effect.

We adhere to the Cabot doctrine that an entry outstanding on the proper records of the land office, even though the entry may be void or voidable precludes the appropriation of the land until it is canceled on such records. We now proceed to consider the impact of the land office records as of the date the appellee filed his homestead application, i.e., February 2, 1967.

We do not have definitive data as of February 2, 1967. However, the "Master Title Plat" dated March 17, 1967, covering "Land and General

Titles" for the township in issue bears a notation "SS. A 050580. Amend, 8/16/1962 to include entire Tp. subject to valid rights, claims or patented lands."

This notation, standing alone, would seem to have segregated the lands in issue from the filing of the appellee's homestead application. However, the historical index for the township shows that the lands in issue had been embraced in homestead entry, A 047600, from June 24, 1959, and its termination was posted on the records on January 26, 1965. Thus reading the two records in pari materia, it would seem that the 1962 application of the State did not affect the lands in issue, since the lands in issue were appropriated by the record of the homestead entry and were not subject to application by the State. See Hodges v. Colcord, 193 U.S. 192, 194-196 (1904); California and Oregon Land Co. v. Hulén and Hunnicutt, supra.

Nor is the State's amendment of March 1, 1966, reflected on the master title plat or on the historical index, or even on the serial register sheet for the state selection application. However, that serial register sheet shows that on October 25, 1966, tentative approval of the state selection was given as to the lands in issue.

Thus, it appears that on February 2, 1967, the plat showed prima facie that the lands in issue were embraced in the state selection

application. It is true that the historical index shows a homestead entry affecting the lands in issue, but further reference to the serial register sheet of the state selection application, whose number was shown on the plat, would have demonstrated the appropriation of the land.

Either on the basis of the prima facie appropriation of the land shown by the plat or on the basis of the plat, historical index, and serial register sheet of the state selection application, the land office records reflected the appropriation of the lands in issue.

We believe that the proper filing of the homestead application cannot be predicated on a "pick and choose basis," i.e., an assertion by the appellee that he relied upon the plat and historical index to the exclusion of the state selection serial register sheet, particularly where the plat referred to the state selection application. Cf. Southwestern Petroleum Corp. v. Udall, 361 F.2d 650, 657 (10th Cir. 1966), affirming 71 I.D. 206 (1964).

In sum, the Bureau decision correctly applied the notation rule to preclude the filing of the state selection application when the land was affected by a homestead entry. As pointed out above, the rule is properly also applied to appellee's homestead application,

filed at a time when the records reflected the tentative approval of the outstanding state selection, regardless of whether that selection was valid, void, or voidable.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is reversed and the cases are remanded to the Bureau of Land Management for action consistent with this decision.

Frederick Fishman, Member

We concur:

Joan B. Thompson, Member

Douglas E. Henriques, Member

