Appeal from a decision of the Alaska State Office, Bureau of Land Management, declaring homestead entry A-052081 unacceptable in part because located on lands under power project withdrawals.

Affirmed as modified.

Alaska: Homesteads -- Withdrawals and Reservations: Effect of

The portion of a homestead settlement located on lands under power project withdrawals is null and void and such lands remain reserved from entry, location or other disposal under the public land laws until the withdrawal is vacated.

Homesteads (Ordinary): Lands Subject to -- Public Lands: Disposals of: Smallest Legal Subdivision Rule

While the Departmental practice is that a quarter quarter section, i.e. forty acres, is ordinarily the minimum unit of land for classification and disposal, the practice may be waived by the Secretary and homestead permitted for a smaller area, where the entryman relied upon erroneous information furnished by a State Office and he exercised reasonable care and good faith in locating his boundaries.

Equitable Adjudication: Substantial Compliance -- Homesteads (Ordinary): Habitable House

The equitable adjudication statute, 43 U.S.C. §§ 1161, et seq. (1970), is intended to vest discretion in the Secretary to grant patents or other relief, despite some lack of compliance with a statutory requirement, where there has been substantial good faith compliance with the requirements of the homestead law as a whole.

Equitable Adjudication: Substantial Compliance -- Homesteads (Ordinary): Habitable House

Although homestead residence was made and improvements were erroneously located on withdrawn lands, patent may still issue as to the nonwithdrawn portion under the doctrine of

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equitable adjudication, where the entryman relied upon erroneous information furnished by a State Office, he exercised reasonable care and good faith in seeking to determine the boundaries, and his residence and improvements are adjacent to the remaining land.

Alaska Native Claims Settlement Act -- Equitable Adjudication: Generally -- Withdrawals and Reservations: Effect of

The right of a homesteader to equitable adjudication is determined as of the date on which he has substantially complied with the homestead law, and this right is not affected by a subsequent withdrawal under the Alaska Native Claims Settlement Act, 43 U.S.C.A. § 1610 (1972).

APPEARANCES: Francis I. Hunt, pro se.

OPINION BY MR. GOSS

Francis I. Hunt has appealed from that portion of a decision of the Alaska State Office, Bureau of Land Management, dated August 31, 1971, declaring his homestead notice of location and final proof unacceptable for recordation and final proof rejected as to any lands withdrawn by Power Projects 2138 and 2215. \^\text{1} The Power Project withdrawals reserved:

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Every smallest legal subdivision, now unsurveyed, adjacent to the Copper and Chitina Rivers, any part, of which, when surveyed, will be below an altitude of 1000-foot, sea level datum.
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Appellant was erroneously informed in 1960 by the Land Office that his claim was open for settlement. On August 9, 1961, his claim was declared null and void as being located within lands withdrawn by Power Project 2215. On May 17, 1962, on the basis of a review of the record and a more accurate plotting of the settlement on the United States Geological Survey Quadrangle Valdez (C-2), Alaska, the Land Office decided that, except for a minute portion,

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\textit{\textsuperscript{1}} The project boundaries for each of the projects were identical. A preliminary permit (Project 2138) issued to Harvey Aluminum, Inc., on July 20, 1953, was subsequently surrendered, but prior to acceptance of surrender, Central Alaska Power Association, Inc., filed for a preliminary permit docketed as Power Project 2215. This permit expired on May 31, 1960. Appellant has not appealed that part of the State Office decision requiring him to file a new application for location of entry in order to conform to the survey plat filed April 15, 1971.
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the lands claimed by appellant were not within the area withdrawn by Power Projects 2138 and 2215.

Appellant filed his final proof in 1964. On June 5, 1964, he was informed that he had substantially complied with the residence and cultivation requirements for but one half of his 80 acre entry. He thereupon relinquished 40 acres of the entry on July 8, 1964. Following a field examination of appellant's claim, the examiner's report recommended that final certificate and patent be issued.

A survey request was made April 6, 1965, and the plat of survey was filed April 15, 1971. The legal description of appellant's 40-acre homestead tract is S 1/2 NW 1/4 NW 1/4, N 1/2 SW 1/4 NW 1/4 sec. 27, T. 2 S., R. 4 E., C.R.M., Alaska. After survey, the State Office found that the 1000-foot contour line cut across a small part of the north portion of the NW 1/4 NW 1/4 sec. 27. Appellant's house and other improvements are located in the S 1/2 NW 1/4 NW 1/4 sec. 27, although none are below the 1,000-foot sea level datum. According to the wording of the withdrawal, if any part of a legal subdivision is below the 1,000-foot sea level datum, then the whole subdivision is withdrawn. Appellant's home and improvements, therefore, lie within a withdrawn area. However, the record does not disclose whether the 1,000-foot contour was checked on the ground. If it has not been, it should be. This decision assumes that such has been done and that the 1,000-foot line definitely does cross the NW 1/4 NW 1/4 sec. 27.

It is a general rule that homesteads located upon lands withdrawn from entry are null and void. 43 CFR 2567.0-8; Roy Leonard Wilbur, et al., 61 I.D. 157 (1953). Lands withdrawn for power development remain reserved from entry, location or other disposal under the public land laws until the withdrawal is vacated.

Even if the power project withdrawals were vacated, appellant would be prevented from making entry on the lands where his improvements are located. In 1969 all lands in Alaska were withdrawn from appropriation and disposition under the public land laws (except locations for metalliferous minerals) pursuant to Public Land Order 4582 of January 17, 1969, 34 F.R. 1025 (January 23, 1969) and subsequent amendments. On December 18, 1971, Congress enacted the Alaska Native Claims Settlement Act, 43 U.S.C.A. §§ 1601-1624 (1972). The enactment of this legislation terminated the Public Land Order 4582 withdrawal, but § 11 of the Act (43 U.S.C.A. § 1610) withdrew designated lands from appropriation under the public land laws. The lands withdrawn included section 27, T. 2 S., R. 4 E.

The Alaska Native Claims Settlement Act withdrawals were specifically made subject to valid existing rights by section 11 of the Act, 43 U.S.C.A. § 1610 (1972). The Department has stated that a
determination of what are "valid existing rights" depends on the circumstances of each particular case but also that valid entries and valid applications for entry, selection or location which have been substantially completed at the date of the withdrawal may establish "valid existing rights." Solicitor's Opinion, 55 I.D. 205 (1935).

Did appellant have a valid existing right to any portion of his entry? The S 1/2 NW 1/4 NW 1/4 sec. 27 was at all times unavailable for entry under the homestead laws, and reliance upon erroneous information given to appellant by employees of the Land Office cannot operate to vest any right not authorized by law. 43 CFR 1810.3(c); William Henry Weaver, 8 IBLA ____ (1972). The remainder of the entry, the N 1/2 SW 1/4 NW 1/4 sec. 27, was not withdrawn by the power project withdrawals. The Departmental practice is that a quarter quarter section, i.e., forty acres, is ordinarily the minimum unit of land for classification and disposal under the public land laws. This practice may be waived whenever the Secretary deems that such would be advisable. See State of Arizona, 53 I.D. 149 (1930). Appellant has substantially complied with the homestead law, his only fault being a reliance upon erroneous information given by the State Office. He manifested reasonable care and good faith in seeking to determine the boundaries of his entry, and the residence and improvements are on adjoining land reasonably close to the nonwithdrawn entry. He would suffer substantial hardship if the minimum unit rule were applied. We find the facts herein sufficient to warrant a waiver of the minimum unit rule, and the rule is waived.

The final question is whether the doctrine of equitable adjudication under 43 U.S.C. § 1161 (1970) may be invoked to allow appellant to patent that part of the settlement not within the power projects withdrawal area, despite the fact that appellant's residence and improvements are located on withdrawn lands. 43 CFR 1871.1-1, construing the equitable adjudication statute, reads in part as follows:

§ 1871.1-1 Cases subject to equitable adjudication.

The cases subject to equitable adjudication by the Director, Bureau of Land Management, cover the following:

(a) Substantial compliance: All classes of entries in connection with which the law has been substantially complied with and legal notice given * * * and special cases deemed proper by the Director, Bureau of Land Management, where the error or informality is satisfactorily explained as being the result of ignorance, mistake, or some obstacle over which the party had no control, or any other sufficient reason not indicating bad faith, there being no lawful adverse claim.

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The Supreme Court in *Williams v. United States*, 138 U.S. 514, 529 (1891), recognized the power of the Secretary to do equity when confronted with unexpected situations:

> It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice.

In *Richard Dean Lance v. Udall*, Civil No. 1864-N, January 23, 1968, (D.C. Nev.) (Dictum), the intent of the equitable adjudication statute as to substantial compliance was discussed in detail:

> The *** decision holds the entryman to substantial compliance with all statutory requirements for perfecting a homestead entry. Under this interpretation of the equitable adjudication statutes (43 U.S.C. 1161, et seq.), there is no discernible difference between an equitable adjudication and a direct appeal, after hearing, from adverse findings and decision by a Hearing Examiner. It is our interpretation of the statutes that they are intended to vest discretion in the Secretary to grant patents or other relief where there has been less than substantial compliance with some statutory requirement, be it cultivation, residence, time for final proof or whatever, accompanied by substantial good faith compliance with the requirements as a whole. In *Hawley v. Diller*, 1899, 178 U.S. 476, 493, the Supreme Court said:

> As carried into the Revised Statutes the purpose of this legislation is, where the law has been substantially complied with, to authorize the confirmation of entries which otherwise the land officers would be compelled to reject because of errors or informalities which, if satisfactorily explained as arising from ignorance, accident or mistake, would, in the absence of an adverse claim, be excused by the courts, in administering the principles of equity and justice. The purpose of the legislation was not to limit or restrict the general or ordinary jurisdiction of the land officers. It was rather...
to supplement that jurisdiction by authorizing them to apply the principles of equity, for the purpose of saving from rejection and cancellation a class of entries deemed meritorious by Congress, but which could not be sustained and carried to patent under existing land laws. There was no necessity for legislation authorizing the rejection or cancellation of irregular entries, but legislation was necessary to save such entries from rejection and cancellation when otherwise meritorious.

* * * * *

* * * We are strongly of the opinion that when relief is authorized on principles of equity and justice, the agency should consider the advice given by the field employees and the extent of the entryman's good faith reliance thereon, and should weigh these with other factors in exercising the discretion granted.

* * * * *

The foregoing words have been written with the hope that the Secretary of the Interior will reconsider the decision of his Solicitor to the end that a broader Chancellor's foot may be utilized in the solution of this type of problem.

A number of early Departmental cases have held that where one through honest mistake builds his house partially or totally outside of -- although in close proximity to -- his homestead claim and in good faith resides there, such residence will be sufficient to satisfy the requirements of the law. Kendrick v. Doyle, 12 L.D. 67 (1891); Lewis C. Huling, 10 L.D. 83 (1890); Talkington's Heirs v. Hempfing, 2 L.D. 46 (1883). The courts have also been liberal in granting relief to homesteaders who in good faith attempt to comply with the homestead law. St. Paul, Minneapolis & Manitoba Railway Company v. Donohue, 210 U.S. 21, 33 (1908). The Supreme Court in Great Northern Ry. v. Hower, 236 U.S. 702 (1915) disapproved residence on a tract of land separate from the homestead because it was not contiguous thereto, and distinguished the above Land Department cases. The Departmental decisions were not criticized, and were approved by implication. It seems clear that equitable adjudication is available where, as here, there has been substantial compliance as above defined -- providing there is no prejudice to the rights of conflicting claimants. Concurring opinion, United States v. Russell G. Wells, 78 I.D. 163, 167 (1971) citing Signar John Jacobson, A-21064 (January 10, 1938); Gregory Schoen, 42 L.D. 540 (1913).

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As to whether the Alaska natives should be considered to be conflicting claimants, so that equitable adjudication may not be invoked, Section 22(b) of the Alaska Native Claims Settlement Act, supra, provides:

The Secretary is directed to promptly issue patents to all persons who have made a lawful entry on the public lands in compliance with the public land laws for the purpose of gaining title to homesteads, headquarters sites, trade and manufacturing sites, or small tract sites (43 U.S.C. 682), and who have fulfilled all requirements of the law requisite to obtaining a patent. Any person who has made a lawful entry prior to August 31, 1971, for any of the foregoing purposes shall be protected in his right of use and occupancy until all the requirements of law for a patent have been met even though the lands involved have been reserved or withdrawn in accordance with Public Land Order 4582, as amended, or the withdrawal provisions of Public Land Order 4582, as amended, or the withdrawal provisions of this Act: Provided, That occupancy must have been maintained in accordance with the appropriate public land law: Provided further, That any person who entered on public lands in violation of Public Land Order 4582, as amended, shall gain no rights.

Appellant filed this homestead application in 1960 and his final proof in 1964. In 1964, the examiner's report recommended that a patent be issued. Appellant should therefore be considered to have substantially complied with the law as of that time. Where there has been substantial compliance, an appellant's rights should not be cut off by one subsequent to the appellant. At an early date, the equitable adjudication statute was construed to give that protection. Mary E. Funk, 9 L.D. 215 (1889).

Further, under 43 U.S.C. § 1161 (1970), supra, the Secretary is empowered to apply the general principles of equity to protect one who has substantially complied with the law. Having established a right to the nonwithdrawn land prior to the 1969 withdrawal under Public Land Order 4582 and the 1971 Alaska Native Claims Settlement Act, supra, appellant is protected by the basic rule of equity that one who is prior in time, is prior in right. Murphy v. Sanford, 11 L.D. 123, 127 (1890).

Unless and until appellant's claim is denied, the land is segerated. Compare Gage v. Gunther, et al., 136 Cal. 338, 68 P. 710, 714 (1902):
Neither did the appellants become adverse claimants by virtue of their attempted entry of the land under the homestead and timberculture acts. The register and receiver refused to entertain their application to enter the land at that time, on the ground that it had then been segregated under the previous entry of Gage. Any claim of right on their part to enter the land was subordinate to that of Gage, and could not be entertained until his right had been finally determined by the department. The decision of the board of equitable adjudication that Gage was entitled to a patent of necessity determined that his entry had never lapsed, and, consequently, that there was no time at which the appellants could have become adverse claimants to the land.

Claimants under the 1971 Alaska Native Claims Settlement Act are, therefore, not deemed not to be "conflicting claimants." For decisions reaching a similar result, see Richard Lee Farrens, 7 IBLA 133 (1972) and the cases cited therein.

Since appellant has a "valid existing right" in the N 1/2 SW 1/4 NW 1/4 sec. 27, as to that land the Bureau should proceed, on the basis of the above discussion, to rule on the final proof submitted. The S 1/2 NW 1/4 NW 1/4 sec. 27 remains under the power project withdrawals. Recognizing the strength of the equities in favor of appellant in this case, the Department should not oppose the passage of a private relief bill designed to allow appellant to patent the land containing his improvements.

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 as modified.

Joseph W. Goss, Member

I concur:

Edward W. Stuebing, Member.

I dissent:

Joan B. Thompson, Member.

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I am in agreement with the majority in finding the present record shows good faith on the part of the entryman in attempting to locate his entry outside the boundaries of the withdrawn area. Although reliance on misinformation by Bureau of Land Management employees creates no rights to land unavailable for entry such reliance does go to any question of good faith and equity. Cf. Guy T. Hargroves, A-30593 (October 17, 1966). Appellant has in part complied with the Bureau's decision of August 31, 1971, by submitting his homestead application with a description of the land conformed to the legal subdivisions of the survey. This moots any question as to such a requirement. However, in his application he has described the S 1/2 NW 1/4 NW 1/4 of section 27, T. 2 S., R. 4 E., C.R.M. This 20-acre parcel is within the subdivision, the N 1/2 NW 1/4, which the decision advised was within the power site withdrawals. The decision also declared his notice of location to be unacceptable for recordation and rejected his previously-filed final proof as to any land within that subdivision. No action was taken by the Bureau with respect to his final proof and entry as to land outside the withdrawn area. Therefore, for this and other reasons to be stated, I believe, it is premature for this Board to take action as to such land in the present posture of the case.

Appellant's appeal is concerned with the land containing his improvements. The memorandum from the Acting State Director of the Bureau's Alaska State Office, of September 9, 1971, transmitting this case, states that appellant's improvements are on the S 1/2 NW 1/4 NW 1/4 and above the 1,000-foot sea level, but are within the withdrawn area. A copy of the approved survey plat did not accompany the appeal. It is impossible to ascertain from the information in the record, other than by reliance on that statement and the decision, the true state of the facts as to the 1,000 foot contour level of the land, the boundaries of the approved survey in relation thereto, and the situs of appellant's improvements. By comparing a 1953 map of the Geological Survey showing contour lines with other information available in the record, I have sufficient question in my mind as to the location of the 1,000 foot contour level with respect to appellant's entry, including the lands which the majority says should be patented, as to preclude me from making any final determination in this matter. I reemphasize the suggestion made by the majority that an on ground inspection be made to verify the true boundaries in question here.

If further investigation by the Bureau should find that all of the lands in appellant's entry are in fact outside the withdrawn area, patent to the whole entry would be allowable, assuming all else is regular. If such investigation verifies that any lands within appellant's entry are within the withdrawn area, I suggest

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the Bureau, in the first instance, may decide whether equitable adjudication is appropriate as to any nonwithdrawn lands in the entry. It is true this Department has no authority to issue a patent for withdrawn land as it was not subject to homestead entry and settlement. 43 U.S.C. § 270-14 (1970). In the usual case, this Department will reject homestead applications and final proof where homestead entries have been made on withdrawn land. Richard L. Oelschlaeger, 67 I.D. 237 (1960), aff'd Udall v. Oelschlaeger, 389 F.2d 974 (D.C. Cir. 1967), cert. denied, 392 U.S. 909 (1968); Paul Abernathy, A-28292 (July 11, 1960); Weston A. Hillman, A-28158 (February 2, 1960). In the present case, the nature of determining the extent of the withdrawal creates a different situation. Appellant attempted to make his entry outside the withdrawn area, but the extent of that area could not in fact be determined until after the survey was made, which was after his settlement.

Although this Department may not breathe life into a void entry located on land withdrawn for power sites, Congress has the power to do so. The best solution to the problem that has arisen in this case, if appellant's improvements are on withdrawn land, is special relief legislation. Assuming no countervailing reasons not reflected by this record, I suggest this Department cooperate with appellant in seeking such relief. In the meantime, I would set aside the Bureau's decision rejecting appellant's final proof in part. The existence of an entry on the Department's records, even though void, would prevent any other rights under the public land laws from attaching to the land. See State of Alaska, Kenneth D. Makepiece, 6 IBLA 58, 79 I.D. ____ (1972), and cases cited therein. Suspension of final Departmental action on an entry is within the discretionary authority of the Secretary of the Interior pending administrative, judicial or legislative relief. Williams v. United States, 138 U.S. 514, 524 (1891). Therefore, I would suspend the final proof and the appellant's entry pending a further determination as to the status of the land, and, if the land in the entry is withdrawn, for a further reasonable time pending a determination as to other appropriate relief within the Department, or special relief legislation.