

Editor's note: 80 I.D. 810 (Not in I.D. format in the IBLA volume).

PAXTON J. SULLIVAN

IBLA 73-435

Decided December 28, 1973

Appeal from decision of the Fairbanks District Office, Alaska, Bureau of Land Management, rejecting application for homestead entry serial No. F-19307.

Affirmed.

Homesteads (Ordinary): Lands Subject to--
Withdrawals and Reservations: Effect of

Where land included in a homestead entry is described among lands withdrawn subject to valid existing rights, the withdrawal attaches to the land upon cancellation of the homestead entry.

Public lands which are withdrawn from all forms of appropriation under the public land laws, except locations for metal-liferous minerals under the mining laws, are not subject to entry under the homestead laws.

APPEARANCES: Joseph Rudd, Esq., Ely, Guess and Rudd, of Anchorage, Alaska, for appellant.

OPINION BY MR. GOSS

Paxton J. Sullivan has appealed to the Secretary of the Interior from a decision of the Manager, Fairbanks District Office, Bureau of Land Management, dated May 18, 1973, rejecting his application for homestead entry.

Appellant's application, filed October 16, 1972, was rejected for the reason that the land applied for was withdrawn from entry by Public Land Order 5150 on December 27, 1971, 36 F.R. 25410, and by Public Land Order No. 5180 on March 9, 1972, 37 F.R. 5583.

Appellant contends in his statement of reasons that the lands involved were included within the homestead entry of Don D. Magee (F-484) prior to the date of the two withdrawal orders cited by the District Manager. Appellant states that Mr. Magee's entry expired without the filing of final proof on or about March 30, 1972. Appellant argues that since, at the time of the withdrawals, the lands were covered by the existing valid homestead entry, the lands were excepted from the operation of the withdrawal orders in accordance with the provision in the orders "subject to valid existing rights."

Where land in an existing homestead entry is described among other lands in a withdrawal order, the withdrawal becomes effective as to such land as soon as the existing entry is cancelled. Walter Pedersen, A-27734 (December 17, 1958); see also Solicitor's Opinion, 55 I.D. 205 (1935). Assuming the facts to be as appellant relates, the withdrawal would be effective except as to the existing rights of entryman Magee. When Magee's entry expired, the withdrawal attached to the land unconditionally and prevented any subsequent homestead entry thereon.

A public land application embracing land in a withdrawal must be rejected. Curtis Wheeler, 8 IBLA 148 (1972). Departmental regulation 43 CFR 2091.1 specifically provides in part that:

* * * applications which are accepted for filing must be rejected and cannot be held pending possible future availability of the land or interests in the land, when approval of the application is prevented by:

(a) Withdrawal or reservation of the lands * * *.

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.

Joseph W. Goss, Member

We concur:

Anne Poindexter Lewis, Member

Joan B. Thompson, Member

