

Editor's note: 81 I.D. 150; Reconsideration denied by order dated Nov. 4, 1974.

JACK Z. BOYD

(On Reconsideration)

IBLA 74-100

Decided March 27, 1974

Appeal from a letter decision of the State Office, Anchorage, Alaska, Bureau of Land Management, notifying appellant that his notice of location (AA-8438) is unacceptable for recordation.

Affirmed.

Alaska: Homesteads--Alaska Native Claims Settlement Act--Homesteads (Ordinary): Lands Subject to--Withdrawals and Reservations: Effect of--Words and Phrases

Where land included in a homestead entry of record is included among lands withdrawn "subject to valid existing rights," the withdrawal attaches, as of the date of the withdrawal, to all land described including the homestead land; as to the homestead land the withdrawal becomes effective eo instanti upon termination of the homestead entry.

Alaska: Homesteads--Alaska Native Claims Settlement Act--Homesteads

(Ordinary):
Lands
Subject
to--Withdraw
als and
Reservations
: Effect of

A notice of location filed pursuant to the homestead laws but embracing land covered by a withdrawal is unacceptable for recordation.

APPEARANCES: Thomas E. Meacham, Esq., Ely, Guess and Rudd of Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GOSS

Jack Z. Boyd has appealed 1/ to the Board of Land Appeals from a letter decision of the State Office, Anchorage, Alaska, Bureau of Land Management dated August 24, 1973, notifying him that his notice of location filed July 23, 1973, pursuant to the Act of April 29, 1950 (64 Stat. 94), as amended, 43 U.S.C. § 270 (1970), was unacceptable for recordation. Pursuant to the discretionary authority of the Board under 43 CFR 4.412, the appeal had been summarily dismissed, but in view of information now available it is appropriate

1/ By separate letter dated January 14, 1974, counsel for appellant has requested advice as to the effect of a disallowed homestead entry upon the requirements for habitation, settlement and cultivation. Since such questions are not a part of the appeal to the Board, the letter is returned to the State Office for appropriate action.

to reconsider the dismissal so that the case may be decided on its merits.

In his notice of location, appellant asserted that occupancy was initiated June 29, 1973. The State Office determined that the notice of location was unacceptable for recordation because the land was withdrawn by the Alaska Native Claims Settlement Act, on December 18, 1971 (85 Stat. 696), 43 U.S.C. § 1610 (Supp. II, 1972). That Act withdraw the entire township for village purposes in settlement of the claims of the Eskimo, Aleut and Indian Natives of Alaska. The township was further withdrawn by Public Land Order 5184, dated March 9, 1972, 37 FR 5588, which withdrew for classification or reclassification some of the areas withdrawn by section 11 of the Alaska Native Claims Settlement Act. Public Land Orders 5150, dated December 28, 1971, 36 FR 25310, and 5151, December 29, 1971, 37 FR 142, also withdrew the land for a utility and transportation corridor.

Appellant contends in his statement of reasons that the lands involved were included within the homestead entry of John L. Peden (AA-2997) prior to the dates of the law and orders cited by the State Office. Appellant states that Peden's entry expired without the filing of final proof on July 1, 1973. Appellant argues that (1) 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 withdrawals by the provisions in the law and the orders that the withdrawals are "subject to valid existing rights," and (2) upon expiration of Peden's rights the land became open to appropriation under the homestead laws.

In a somewhat similar appeal, Paxton J. Sullivan, 14 IBLA 120, 80 I.D. 810 (1974) the Board ruled against an application for homestead entry filed for withdrawn land after expiration of a prior homestead entry. In Sullivan, the Board cited a 1935 Solicitor's Opinion, 55 I.D. 205 which discussed at 208 the meaning of the phrase "subject to existing valid rights":

Unquestionably, the President, acting under the authority granted him in the act of June 25, 1910 (36 Stat. 847), as amended, could withdraw land which is already appropriated, reserved, or withdrawn. Such a withdrawal, however, could take effect as to land already appropriated, reserved, or withdrawn, only upon the valid extinguishment of the prior claim or withdrawal. Compare 5 L.D. 49; 10 L.D. 144; 15 L.D. 2; 32 L.D. 395; 50 L.D. 262. In such a case the Executive withdrawal acts as a claim to the land secondary to that which already exists. As such, it lies dormant until the extinguishment of the prior claim, at which time it can and does actively attach to the land.

It is, of course, not necessary for the President to exercise his powers to the fullest extent; and, in a given case he may desire to exclude from a withdrawal all lands theretofore appropriated, reserved or withdrawn. A determination of the intention of the President is dependent upon the terms of the order itself;

and where an intention not to include such land is expressed, the withdrawal would not attach to the theretofore withdrawn lands or other lands excluded from the scope of the order. Compare 29 L.D. 533; 30 L.D. 515.

The Executive order here in question purports to withdraw "all of the vacant, unreserved, and unappropriated public land", in certain enumerated States. This withdrawal clause is not wholly free from ambiguity. It might indicate an intention to have the order cover only such lands as were vacant, unreserved, and unappropriated at the moment the order was signed. On the other hand, it might be held that the order was intended to attach actively to all vacant, unreserved, and unappropriated lands, and hence to cover all lands which might become vacant, unreserved, and unappropriated during the life of the order.

I believe that the withdrawal clause, contained in the Executive order of November 26, 1934, properly should be construed in the latter sense. This conclusion is fortified by the express provision in the order that "the withdrawal hereby effected is subject to existing valid rights." There would be no necessity for such a provision unless the withdrawal embraced appropriated lands. If it did not, there could be no "existing valid rights" requiring protection.

Consequently, considering the Executive order as a whole, I hold that while it operates to save valid appropriations, reservations, or withdrawals during the period of their existence, it actually attaches to those lands as a secondary claim and becomes effective upon the termination of the prior claim.

It is clear, therefore, that where land is withdrawn "subject to valid existing rights," the withdrawal attaches, to all the land described, as of the date of the withdrawal. As to land in a homestead entry, the withdrawal becomes effective eo instanti when rights under the entry terminate. Cf. Dale R. Lindsey, 13 IBLA 107 (1973).

Regarding the land here involved, at the time Peden's rights terminated the withdrawals became effective. Appellant acquired no right to the land covered by the withdrawals. It was proper for the State Office to rule that the notice of location was unacceptable for recordation. 2/

Therefore, 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
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Joan B. Thompson
Administrative Judge

2/ Compare also the Board's holding in Sullivan, supra, that a public land application embracing land in a withdrawal must be rejected. Accord, Curtis Wheeler, 8 IBLA 148 (1972). Sullivan cites 43 CFR 2091.1, which provides in part:

"* * * [A]pplications 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;
- (b) An allowed entry or selection of record * * *."

