

Editor's note: Reconsideration granted; decision reaffirmed -- See Sally Lester (On Reconsideration), 35 IBLA 61 (May 10, 1978)

SALLY LESTER, ET AL.

IBLA 77-322

Decided June 21, 1977

Appeal from decision of the Alaska State Office, Bureau of Land Management, declaring certain mining claims null and void ab initio. F-23034.

Affirmed.

1. Mining Claims: Lands Subject to--Mining Claims:
Withdrawn Land--Withdrawals and Reservations: Effect of

A mining claim located on land at a time when such land was withdrawn from mineral entry is properly declared null and void ab initio.

APPEARANCES: Michael J. Lester, husband of Sarah (Sally) Lester.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

An appeal has been filed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated March 21, 1977, declaring the Laura Association, Becky Association, and Tiffany Association placer mining claims null and void ab initio. 1/ The claims were posted on June 18, 1976, and were recorded on June 21, 1976. The claims are located within protracted sections 27 and 28, T. 7 N., R. 10 E., F.M., Alaska. These lands are among those which were withdrawn from appropriation, including location and entry under the mining laws, by Public Land Order 5250, dated September 15, 1972, 37 F.R. 18730. Such order provides:

By virtue of the authority vested in the Secretary of the Interior by sections 17(d)(1) and 17(d)(2)(A) of

1/ The appeal in this case was filed by one Michael J. Lester, "lawful husband of Sarah Lester." We assume Sarah Lester is the same person as Sally Lester, one of the claimants here. Mr. Lester has not indicated whether the appeal which he filed was on behalf of all three claimants or merely on behalf of his wife.

the Alaska Native Claims Settlement Act of December 18, 1971, 85 Stat. 688, 708, 709 (hereinafter referred to as the "Act"), and pursuant to Executive Order No. 10355 of May 26, 1952 (17 F.R. 4831), it is ordered as follows:

1. Public Land Order No. 5179 of March 9, 1972, as amended by Public Land Order No. 5192 of March 17, 1972, withdrawing lands in aid of legislation concerning addition to or creation as units of the National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems, and for classification, is hereby amended to add the following described lands to paragraph 1 of said order:

* * * * *

All lands within the protracted survey sections which are wholly or in part within 1 mile of the mean high water mark of the river's banks and all islands and islets within the following named rivers and their named tributaries as they traverse the following described lands:

* * * * *

Birch Creek River
Fairbanks Meridian
Protracted Descriptions

- T. 5 N., Rs. 9, 10, 11, 12, 13, 14, and 16 E.
- T. 6 N., Rs. 9, 10, 11, 13, 14, 15, 16, and 17 E.
- T. 7 N., Rs. 10, 16, and 17 E.
- T. 8 N., Rs. 16 and 17 E.
- T. 9 N., R. 16 E. [Emphasis added.]

Mr. Lester asserts that the claims at issue are not located on Birch Creek, but are on Eagle Creek. Such a contention is not borne out by the record. The sketches in the location notices for the claims identify the creek as Birch Creek. The narrative in two of the location notices state that the claims are on "Eagle Creek also known as Birch Creek." The other notice reads "Birch Ck. AKA Eagle Ck." The official BLM plats clearly establish that the claims here at issue straddle Birch Creek in protracted sections 27 and 28, T. 7 N., R. 10 E., F.M., and that such claims are within 1 mile of the mean high water mark of the river's banks.

Various other charges and pejorative assertions have been leveled in the statement of reasons for appeal and subsequent letters from Mr. Lester. He quotes extensively from the

Constitution and Bill of Rights. He is laboring under the mistaken impression that the mere location of a mining claim somehow transmutes such claim into private property which cannot be taken without just compensation.

[1] The law is clear that a valid mining claim exists only where there has been a discovery of a valuable mineral deposit. 30 U.S.C. § 22 (1970). However, in the present case the issue is not whether there has been a discovery of a valuable mineral deposit, but whether the claim was locatable in the first instance. The records in the BLM office show the land to be withdrawn. It is well settled that mining claims located on land closed to mineral entry are null and void ab initio. W. A. Todd, 28 IBLA 180 (1976); W. R. Strickler, 27 IBLA 267 (1976); Leo J. Kottas, 73 I.D. 123 (1966), aff'd sub nom. Lutzenheizer v. Udall, 432 F.2d 328 (9th Cir. 1970).

Mr. Lester asserts that the lands are open to location under the mining law based on the language in section 17(d)(2)(c), Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. § 1616(d)(2)(c) (Supp. IV). The pertinent language reads:

Any lands withdrawn pursuant to paragraph (A) not recommended for addition to or creation as units of the National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems at the end of the two years shall be available for selection by the State and the Regional Corporations, and for appropriation under the public land laws.

The lands in question were withdrawn pursuant to section 17(d)(1) and paragraph A of section 17(d)(2) and the case record does not reveal whether or not such lands were recommended for creation of or addition to one of the above-listed units.

If the lands had only been withdrawn pursuant to section 17 and had not been the subject of such a recommendation, we would give consideration to Mr. Lester's argument. However, PLO 5250 states that the withdrawal is being made pursuant to section 17 "and pursuant to Executive Order No. 10355 of May 26, 1952 (17 FR 4831) * * *." Executive Order No. 10355 reads in pertinent part:

Section 1. (a) Subject to the provision of subsections (b), (c), and (d) of this section, I hereby delegate to the Secretary of the Interior the authority vested in the President by section 1 of the act of June 25, 1910, ch. 421, 36 Stat. § 47 (43 U.S.C. 141) [this section], and the authority otherwise vested in

him to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States in the continental United States or Alaska for public purposes, including the authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made.

Therefore, even assuming the lands were open for location in 1976, pursuant to section 17(d)(2)(c), such lands were still withdrawn from location under Executive Order 10355. 2/

Notice and opportunity for a hearing is required in a proceeding before this Department to determine the validity of a mining claim only if there is a disputed question of fact. There is no such question presented here. Where the validity of a claim turns on the legal effect to be given facts of record which show the status of the land when the claim was located, no hearing is required. W. A. Todd, supra; David Loring Gamble, 26 IBLA 249 (1976).

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.

Frederick Fishman
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Martin Ritvo
Administrative Judge

2/ Section 1 of the Act of June 25, 1910, 43 U.S.C. § 141 (1970) was repealed by the Federal Land Policy and Management Act of October 21, 1976, 43 U.S.C. §§ 1701-82. However, all withdrawals in effect as of the date of the Act "remain in full force and effect until modified under the provisions of the Act or other applicable law." 43 U.S.C. § 1701(c).