

SALLY LESTER ET AL. (ON RECONSIDERATION)

IBLA 77-322

Decided May 10, 1978

Petition for reconsideration of Sally Lester, et. al., 31 IBLA 43 (1977) which affirmed a decision of the Alaska State Office, Bureau of Land Management, declaring certain mining claims null and void ab initio. F-23034

Petition granted; Sally Lester, et al., 31 IBLA 43 (1977), reaffirmed.

1. Alaska: Mining Claims -- Mining Claims: Withdrawn Land -- Withdrawals and Reservations: Effect of

A mining claim located on land in Alaska at a time when such land was withdrawn from mineral entry is properly declared null and void ab initio.

2. Alaska: Mining Claims -- Alaska Native Claims Settlement Act: Generally -- Withdrawals and Reservations: Effect of

Where the Bureau of Land Management records reveal that lands in Alaska have been withdrawn under PLO 5250 and certain of those lands have not been recommended, pursuant to sec. 17(d)(2)(C), Alaska Native Claims Settlement Act of Dec. 18, 1971, 43 U.S.C. § 1616(d)(2)(C), for addition to or creation as units of the National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems within 2 years of the date of the Act, such lands do not nevertheless become available for appropriation under the mining laws. This conclusion is compelled by the reason that PLO 5250 is based upon E.O. 10355, which not only invokes 43 U.S.C. §§ 141-142 (1970), but also the President's general or inherent authority to withdraw public lands completely from mining location.

APPEARANCES: Thomas E. Fenton, Esq., Fairbanks, Alaska, for appellants.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Appellants have filed a petition for reconsideration of the Board's decision, Sally Lester, et al., 31 IBLA 43 (1977), which affirmed a decision of the Alaska State Office, Bureau of Land Management (BLM), declaring certain mining claims null and void ab initio.

In our earlier decision we stated:

The records in the BLM office show the land to be withdrawn.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).

Id. at 45.

Appellants' argument was that the lands embracing the claims were open to location under the mining law based upon 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).

The pertinent language of that section being:

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.

We stated further that "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." Id. at 45.

Appellants argue in their petition that our finding that PLO 5250 was controlling, that the lands were still withdrawn from mining location under Executive Order 10355, dated May 26, 1952, was erroneous, and that "a hearing should be held to determine whether the subject lands were recommended for addition to or creation of the National Parks, Forest, Wildlife Refuge, and Wild and Scenic River System."

Upon receipt of the petition by the Board the case file was requested from BLM. BLM forwarded the case file and included therein was a copy of the Secretary of the Interior's letter to the Speaker of the House of Representatives, dated December 17, 1973, concerning the Secretary's (d)(2) proposals. ^{1/} The following was contained in the proposal:

TITLE IV -- ADDITIONS TO NATIONAL WILD AND SCENIC RIVERS
SYSTEM LOCATED OUTSIDE NATIONAL PARKS, NATIONAL WILDLIFE
REFUGES, AND NATIONAL FORESTS

* * * * *

BIRCH CREEK, ALASKA. * * * The segment of the main stem from the vicinity of the confluence of North Fork downstream 135 miles to the vicinity of Jumpoff Creek, the segment not to exceed 200,000 acres; to be administered by the Secretary of the Interior.

BLM also included a status plat dated August 29, 1977, indicating that as to the sections in question, sections 27 and 28, T. 7 N., R. 10 E., Fairbanks meridian, section 28 was included in the Secretary's December 17, 1973, proposal, but section 27 was not.

[1] Since section 28 was included in the proposal, the language of section 17(d)(2)(D) is clear that such section remains withdrawn. Therefore, a mining claim located within such section after the date of PLO 5250 would be void ab initio. On the other hand, section 27 was not included in the proposal and section 17(d)(2)(C) provides that such lands "shall be available * * * for appropriation under the public land laws."

[2] Our earlier decision held that all the lands in question were still withdrawn from location under Executive Order 10355,

^{1/} Section 17(d)(2)(A) of the Alaska Native Claims Settlement Act authorized the Secretary to withdraw up to 80,000,000 acres of land to be studied for possible addition to the National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers System. Section 17(d)(2)(C) required the Secretary to submit his recommendations concerning the lands to Congress within 2 years, by December 18, 1973, and such section provided that any such withdrawn lands not recommended for addition would be available for appropriation under the public land laws. Section 17(d)(2)(D) provides that lands proposed for addition would remain withdrawn foreclosed by Executive Order 10355.

as pointed out in the petition by appellants. However, that withdrawal authority is not limited by 43 U.S.C. § 142 (1970), which states that lands under such withdrawals "shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals."

The basic thrust of petitioner's request for reconsideration is the assertion that since PLO 5250 is based upon E.O. 10355, the former could not foreclose metalliferous mining. See 43 U.S.C. § 142 (1970). However, as pointed out in Denver R. Williams, 67 I.D. 315, 316 (1960):

Section 1 of Executive Order No. 10355 (17 F.R. 4831) not only delegates to the Secretary of the Interior the authority vested in the President by section 1 of the Act of June 25, 1910, but also "the authority otherwise vested in him to withdraw or reserve lands of the public domain * * *."

As Williams stated that "[s]ince the President has general or inherent authority by virtue of his office to withdraw public land as well as the authority conferred upon him by the Act of June 25, 1910, [2/] there is no basis for assuming that this Act is the source of his authority in this instance." (Citations omitted.)

Therefore, the withdrawal imposed by E.O. 5250 was efficacious to bar all mining locations.

Therefore, even though section 27 was not included in the proposal, such section did not become available for appropriation under the mining laws for any minerals.

In view of these legal conclusions, a request for hearing is denied since it would not serve any useful purpose.

2/ Sec. 704(a) of the Federal Land Policy and Management Act of October 21, 1976, P.L. 94-579, 90 Stat. 2792 (FLPMA) repeals "the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress (U.S. v. Midwest Oil Co., 236 U.S. 459)" and the Act of June 25, 1910, as amended, 43 U.S.C. §§ 141, 142 (1970). However, preexisting withdrawals made under those authorities are not repealed by FLPMA. See generally 43 U.S.C. § 1714(f) and (1)(1) (West Supp. 1977).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board's decision Sally Lester, et al., 31 IBLA 43 (1977), is reaffirmed.

Frederick Fishman
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Martin Ritvo
Administrative Judge

