EARL D. WOODY, HINTON E. WHITE

IBLA 78-505 Decided December 29, 1978

Appeal from a June 16, 1978, decision of the Alaska State Office, Bureau of Land Management, declaring mining and processing millsite null and void ab initio. F 25639.

Affirmed as modified.

1. Mining Claims: Generally--Mining Claims: Lands Subject to

Pursuant to 43 CFR 2091.2-5, an application for withdrawal temporarily precludes entry on the land in derogation thereof, from the time the application is noted on the records until revocation thereof is also noted on the records, and such withdrawal is not deemed to have expired despite the fact that the withdrawal application was noted on the records 7 years prior to location of the mining claim.

2. Mining Claims: Generally--Mining Claims: Lands Subject to

A mining claim located in part on land withdrawn for a utility corridor and segregated from mineral entry is null and void ab initio as to such land.

APPEARANCES: Lyle R. Carlson, Esq., Fairbanks, Alaska, for appellants.

OPINION BY ADMINISTRATIVE JUDGE GOSS

Earl D. Woody and Hinton E. White appeal from a decision of the Alaska State Office, Bureau of Land Management (BLM), declaring their Alladin Mining and Processing Millsite null and void ab initio. Appellants' location notice was filed April 19, 1978. The State Office decision describes the millsite as located in secs. 15 and 22, T. 1 S., R. 2 E., Fairbanks meridian, Alaska. 1/ As the decision below notes, the above-described lands are subject to various withdrawal actions:

> On March 19, 1971, the Bureau of Land Management filed a withdrawal application, F-13652, for Sections 14, 15, 22 and 23, T. 1 S., R. 2 E., Fairbanks Meridian, Alaska, for protective withdrawal for a fire control training and exercise area and for protection of a primary communications site at Fairbanks. On March 26, 1971, the withdrawal, F-13652, was noted on our official plats.
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> Departmental regulation 43 CFR 2091.2-5 (a) provides:
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>> The noting of the receipt of the application . . . in the tract books or on the official plats maintained in the proper office shall temporarily segregate such lands from settlement, location, sale, selection, entry, lease and other forms of disposal under the public land laws, including the mining and the mineral leasing laws . . . (Emphasis added.)
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> On December 30, 1971, the land in Secs. 14, 15 and 23, T. 1 S., R. 2 E., Fairbanks Meridian, Alaska, was withdrawn for a utility corridor by Public Land Order 5150. The land was withdrawn from prospecting, location and purchase under the U.S. Mining Laws (30 U.S.C. Ch. 2).

[1] Appellants argue that the above withdrawals should not affect the validity of their millsite location and make several arguments against the preclusive effect accorded the withdrawals by the State Office decision. Appellants state, with respect to the March 1971 withdrawal, that 43 CFR 2091.2-5(a), which allows a withdrawal application to "temporarily segregate" the lands at issue, "cannot justify a segregation more than seven years subsequent to the withdrawal." The law, however, is to the contrary. The longstanding rule governing the duration of any withdrawal action is that a withdrawal will preclude entry on the public lands from the time that

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1/ The location notice is defective in that it does not include a reference to the Township or Range.

it is noted on the records of the appropriate land office until such time as the withdrawal is formally revoked by subsequent Departmental action and so noted on the records. As the Assistant Solicitor held in Grace Hinseler, 74 I.D. 386 (1967), "[a] withdrawal cannot be deemed to have expired merely because it was stated to be for a temporary purpose and more than 19 years had elapsed before the first of the claims was located."

Appellants attack the validity of the several withdrawals here at issue, citing the language of the Pickett Act, 43 U.S.C. § 142 (1970) 2/ which provided that lands withdrawn under authority of that Act shall remain open to location of metalliferous minerals. Appellants argue that BLM erred in failing to note, in the various withdrawal orders, its alleged lack of authority to withdraw lands from metalliferous mineral location. In a recent case involving this same issue, we held that:

> The President's authority to withdraw or reserve portions of the public land was not impaired by the passage of the Pickett Act * * *. Since the President had general or inherent authority to withdraw public land as well as authority conferred upon him by the Pickett Act, there is no basis for assuming that this Act was the source of his authority in every instance.

Alaska Pipeline Co., 38 IBLA 1 (1978). In the absence of an express statement to the contrary in the record below, we assume that the withdrawals here before us were made under the inherent authority of the President and were not, therefore, subject to the restrictions set forth in the Pickett Act, supra.

Appellant argues that under 43 CFR 2091.2-5(a) 3/ the millsite claim should not be declared void but should be suspended pending action on withdrawal application F-13652. As to the lands in section 15, such action would be contrary to 43 CFR 2091.1, rejection of applications, which provides in part:

> Except where regulations provide otherwise, all applications must be accepted for filing. However, applications

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2/ Repealed effective October 21, 1976, by Federal Land Policy and Management Act, 90 Stat. 2792.

3/ The pertinent portion of 43 CFR 2091.2-5(a) provides:

"To that extent, action on all prior applications the allowance of which is discretionary, and on all subsequent applications, respecting such lands will be suspended until final action on the application for withdrawal or reservation has been taken."

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

(a) Withdrawal or reservation of lands; except that this does not prevent the filing of applications by village and regional corporations under 43 CFR Parts 2561 and 2652 for public lands withdrawn under section 11(a)(1) of the Alaska Native Claims Settlement Act (43 U.S.C. 1601), unless the lands are withdrawn for the national park system or are withdrawn or reserved for national defense purposes.

* * * * * * *

(e) The fact that for any reason the land has not been made subject, or restored, to the operation of the public land laws.

As to lands in section 22, it is clear that the sentence of section 2091.2-5(a) relied on by appellant does not refer to recordations under 43 U.S.C. § 1744 (Supp. 1978). Such filings are not applications. Here the lands were closed to entry for location purposes under section 2091.2-5, appellant has no patent application before the Department and application for patent could only be based on a location made when the lands were open for mining purposes. The effect of the withdrawals, therefore, is to render all subsequent mining locations null and void ab initio. "A mining claim located on land at a time when the land is withdrawn from mineral location is properly declared null and void." Floyd G. Brown, 35 IBLA 110 (1978).

Earl D. Woody and counsel for appellants state that appellants "filed the millsite application after going to the BLM office and being advised by your office that the millsite could be filed." Even were this true, the appellants also state that Mr. Woody checked the records. The records, however, should have put appellant upon notice. In any event, appellant has not presented proof of a fact situation in which an estoppel could lie. INS v. Hibi, 414 U.S. 5, 8 (1973); United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973).

In their appeal, appellants have presented an offer to the Bureau of Land Management. Such matters are not within the appellate jurisdiction of the Board.

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 herein.

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Joseph W. Goss
Administrative Judge

We concur:

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James L. Burski
Administrative Judge

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Anne Poindexter Lewis
Administrative Judge