

Editor's note: 88 I.D. 31; Appealed -- reversed and remanded to IBLA, Civ.No. A-80-81 (D.Alaska July 7, 1982); on judicial remand affirmed as modified -- See Northwest Exploration, Inc. (On Judicial remand), 89 IBLA 189 (Oct. 17, 1985)

NORTHWEST EXPLORATIONS, INC.

IBLA 80-787

Decided January 12, 1981

Appeal from the decision of the Alaska State Office, Bureau of Land Management, declaring various placer mining claims null and void in their entirety and two placer mining claims null and void in part.

Affirmed.

1. Act of June 25, 1910--Mining Claims: Lands Subject to --Mining Claims: Withdrawn Land--Withdrawals and Reservations: Authority to Make--Withdrawals and Reservations: Effect of

The President had nonstatutory authority to withdraw public land in addition to authority conferred upon him by the Pickett Act, 43 U.S.C. §§ 141, 142 (1970). Such nonstatutory authority was not limited by the terms of 43 U.S.C. § 142 (1970) which provided that withdrawn lands shall remain open to location for metalliferous minerals.

2. Act of June 25, 1910--Mining Claims: Lands Subject to --Mining Claims: Withdrawn Land--Segregation-- Withdrawals and Reservations: Generally--Withdrawals and Reservations: Temporary Withdrawals

Where BLM filed an application for a protective withdrawal pursuant to Exec. Order No. 10355 which would reserve the

subject land from all forms of appropriation including location and entry under the mining laws and the application was duly noted on the official status plats, the lands were segregated from the date of notation to the extent that the withdrawal, if effected, would prevent such forms of appropriation. A protective withdrawal is not a temporary withdrawal under the Pickett Act, 43 U.S.C. § 141 (1970), and is not limited by the terms of 43 U.S.C. § 142 (1970) which provides that temporarily withdrawn lands shall remain open to location for metalliferous minerals.

3. Mining Claims: Lands Subject to--Mining Claims: Withdrawn Land--Withdrawals and Reservations: Effect of
A mining claim located on land which was segregated and closed to mineral entry is properly declared null and void ab initio.
4. Administrative Procedure: Hearings--Constitutional Law: Due Process--Rules of Practice: Appeals: Effect of-- Rules of Practice: Hearings

Due process does not require notice and a prior right to be heard in every case where an individual may be deprived of property so long as the individual is given notice and an opportunity to be heard before the deprivation becomes final.

APPEARANCES: Carl Winner, Esq., Robertson, Monagle, Eastaugh & Bradley, Anchorage, Alaska, for appellant; Robert Charles Babson, Esq., Regional Solicitor's Office, Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Northwest Explorations, Inc., has appealed the decision of the Alaska State Office, Bureau of Land Management (BLM), dated June 13, 1980, declaring 28 Liberty and Chinook placer mining claims null and void ab initio and the Liberty #9 and #29 claims null and void ab initio in part.

On September 25, 1979, BLM received copies of location notices for 30 placer mining claims 1/ which appellant filed in compliance with section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), and Departmental regulations 43 CFR Part 3833. The claims are located in secs. 19, 20, and 21, T. 16 S., R. 17 W., and secs. 10, 11, 13, 14, 23, and 24, T. 16 S., R. 18 W., Fairbanks meridian, Alaska. The Liberty #1 and Liberty #2 claims were originally located in May 1966 but amended locations were filed in June 1969 to reduce the acreage of the claims. The remaining claims were either originally located or amended in 1969. The amended locations also reduced the acreage of previous association claims in compliance with Alaska State law. 2/

On April 9, 1965, the Director, National Park Service (NPS), requested that BLM "take such steps as may be necessary to withdraw

1/ See Appendix A.

2/ Although Federal mining law allows location of association placer claims up to 160 acres, the Alaskan law enacted in 1949 specifies that no association placer claim for previous metals in Alaska may exceed 40 acres in size or 2,640 feet in length. Alaska Statutes § 27.10.110.

[certain lands in T. 16 S., Rs. 16 and 18 W., Fairbanks meridian] from all forms of disposition under the public land laws--including withdrawal from prospecting, location, entry and purchase under the mining laws." The request explained a need for a withdrawal pending a study by NPS of requirements for additional public accommodations and services related to Mt. McKinley National Park. NPS wanted to ensure that lands would be available to meet those requirements determined necessary by the study. The lands identified by NPS were on the northern boundary of the park in the Kantishna area.

Following approval of the request by Under Secretary of the Interior Carver on April 22, 1965, BLM filed withdrawal application F 034575 to establish a BLM protective area under authority of Exec. Order No. 10355 (43 U.S.C § 141 note (1976)). BLM also published a Notice of Proposed Withdrawal and Reservation of Lands dated May 7, 1965, in the Federal Register on May 13, 1965 (30 FR 6593). The notice stated that the application was for withdrawal of the lands from all forms of appropriation under the public land laws, including the mining laws.

The BLM decision appealed herein indicates that the withdrawal application was noted on the official status plats in the Fairbanks Land Office on May 4, 1965. It explains that pursuant to 43 CFR 2311.1-2(a) (1965) the noting of receipt of the application temporarily segregated the identified 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, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal." The decision concluded that appellant's claims must be declared null and void because they were located on land segregated from the operation of the mining laws at the time of the locations.

In its statement of reasons, appellant argues that the Kantishna area was improperly withdrawn from mineral entry in 1965. Appellant urges that BLM lacked the authority to withdraw the lands because under the Constitution, Congress holds the power to dispose of the public lands and the only express delegation of that power to the President appeared in the Pickett Act of June 25, 1910, 43 U.S.C. §§ 141-43 (1970) (hereinafter the Pickett Act). 3/ Appellant also argues that

3/ Relevant portions of the Pickett Act read as follows;

"§ 141. Withdrawal and reservation of lands for water-power sites or other purposes.

"The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress. (June 25, 1910, ch. 421, § 1, 36 Stat. 847.)

"§ 142. Lands withdrawn open to exploration under mining laws; rights of occupants or claimants of oil- or gas-bearing lands; national forests. "All lands withdrawn under the provisions of this section and section 141 of this title 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: * * *. (June 25, 1910, ch. 421, § 2, 36 Stat. 847; Aug. 24, 1912, ch. 369, 37 Stat. 497.)"

Section 141 was repealed and section 142 amended by the Federal Land Policy and Management Act of 1976, 90 Stat. 2792.

United States v. Midwest Oil Co., 236 U.S. 459 (1915), in which the Supreme Court recognized a broad Presidential withdrawal authority by virtue of congressional acquiescence to a long continuing practice of withdrawals by the President, is of questionable validity because of Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), or, at the least, is circumscribed by the Pickett Act.

Appellant also focuses on the distinction between temporary and permanent withdrawals described in Withdrawals of Public Lands, 40 Op. Atty Gen. 73 (1941). The Attorney General had concluded that the Pickett Act applied only to temporary withdrawals for public purposes and did not affect the President's authority to make permanent withdrawals for public uses. 40 Op. Atty Gen. at 76. Appellant contends that the Kantishna area withdrawal was "beyond question" a temporary withdrawal because the Attorney General had characterized such withdrawals as those made pending the enactment of legislation designed to conserve the lands or authorize development of their natural resources. 40 Op. Atty Gen. at 76-77. Appellant alleges that the BLM Kantishna withdrawal application was aimed at conserving the area for later inclusion in Mt. McKinley National Park which could only be enlarged by specific legislation. Appellant concludes that the lands identified in the application should have been left open to mineral entry because the withdrawal would be temporary and therefore limited by the Pickett Act. Appellant also points out that 43 CFR 2311.1-2 (1965) only segregated land "to the extent that the withdrawal * * * if effected, would

prevent such forms of disposal." Since mining was allowed in the park, appellant urges, mining should have been allowed in this withdrawal. ^{4/}

Appellant ends its statement of reasons by asserting that BLM, in issuing the decision, violated its due process rights since BLM did not afford it notice that the decision would be forthcoming and an opportunity to submit written argument on its own behalf.

In response, BLM argues that (1) the withdrawal application herein was filed to establish a BLM protective area and was not a temporary withdrawal pending legislation to add the Kantishna area to Mt. McKinley National Park, (2) the proposed withdrawal of the area was permanent in nature and not subject to the Pickett Act, and (3) even if the proposal were considered to be temporary, the limitations of the Pickett Act are no longer applicable by virtue of continuing congressional acquiescence and ratification of temporary withdrawals from mineral entry. BLM contends that appellant's due process rights have been protected by appeal to this Board.

[1, 2, 3] The question of the authority of the President to make withdrawals and reservations has been addressed by this Board before. We have recognized that, until October 21, 1976, the President held and exercised over a long period of time an implied nonstatutory withdrawal power in addition to that authority which Congress has expressly

^{4/} Although mining activities had been permitted within Mt. McKinley National Park, 16 U.S.C. §§ 350, 350a (1970), section 3 of the Act of September 28, 1976, 90 Stat. 1342, repealed that authority.

delegated by statute. Glen H. Brooks, 45 IBLA 51 (1980); Alaska Pipeline Co., 38 IBLA 1 (1978); Harry H. Wilson, 35 IBLA 349 (1978); Sally Lester (On Reconsideration), 35 IBLA 61 (1978). In United States v. Midwest Oil Co., supra, the Supreme Court first upheld the exercise of nonstatutorily-based withdrawal authority by the President after examining congressional acquiescence in more than 250 instances of exercise of the power by various Presidents over a period of 80 years. 236 U.S. at 469-71. That decision was never overruled by the Court and the implied authority recognized therein was repeatedly exercised by the President or his delegate. See Mason v. United States, 260 U.S. 545, 553 (1922); Portland General Electric Co. v. Kleppe, 441 F. Supp. 859 (D. Wyo. 1977); Denver R. Williams, 67 I.D. 315 (1960); P & G Mining Co., 67 I.D. 217 (1960); Glen H. Brooks, supra; Harry H. Wilson, supra; Sally Lester (On Reconsideration), supra. In 1952, by Exec. Order No. 10355 (17 FR 4831 (May 28, 1952)), President Truman expressly distinguished between his statutory and nonstatutory authority when he delegated to the Secretary of the Interior both the temporary withdrawal authority set forth in section 1 of the Pickett Act "and the authority otherwise vested in him to withdraw or reserve lands of the public domain * * * for public purposes." Finally, and significantly with respect to this case, Congress repealed "the implied authority of the President to make withdrawals and reservations resulting from the acquiescence of Congress (U.S. v. Midwest Oil Co., 236 U.S. 459)" as well as various statutory withdrawal authorities by section 704(a), FLPMA, 90 Stat. 2792. We may infer

from the language in section 704(a) that Congress continued to recognize the existence of the President's implied withdrawal authority, in addition to statutorily delegated authority, until October 21, 1976.

Given section 704(a) of FLPMA, it does not appear that Congress perceived that United States v. Midwest Oil Co., supra, lost its vitality following Youngstown Sheet & Tube Co., v. Sawyer, supra, as appellant suggests. Furthermore, that case dealt with circumstances entirely different from the case before us: the physical seizure of private property by order of the President. Here we are dealing with the withdrawal authority of the President, both statutory and nonstatutory, related to management of existing public lands. The Pickett Act only limited the President's implied authority as to those temporary withdrawals addressed in 43 U.S.C. § 141 (1970). The President still held a recognized permanent withdrawal authority at the time of the Kantishna withdrawal. Harry H. Wilson, supra.

The question raised by appellant which remains is whether the withdrawal application at issue was or should have been made pursuant to the Pickett Act. Appellant urges that it was intended to be an application for a temporary withdrawal under the Pickett Act and that BLM has unconstitutionally nullified an act of Congress by the withdrawal application herein because the application does not conform to the Pickett Act. We do not agree. The withdrawal notice on its face makes it clear that the proposed withdrawal was not intended to be a

Pickett Act withdrawal. First, it states expressly that the land identified would be withdrawn from "all forms of appropriation under the public land laws, including the mining laws," directly inconsistent with Pickett Act limitations. See Alaska Pipeline Co., supra at 13. Second, it states that the purpose of the withdrawal is to establish a BLM protective area under Exec. Order No. 10355. (See 30 FR 6593 (May 13, 1965).)

The BLM Manual at section 2321.6 explains that the objective of the protective withdrawal program was "to prevent inadvertent disposal of or the allowance of rights in lands having significant public values which require continued Federal or other public ownership for their preservation." A protective withdrawal is defined as

a withdrawal of lands, for the purpose of withdrawing such lands from disposition under the public land laws to the extent necessary to protect the public values in the lands until a determination is made as to the use or disposition of the lands.

"Bureau of Land Management protective withdrawal" is not a determination that the lands will necessarily continue under BLM administration. "Bureau of Land Management protective withdrawals" generally include withdrawal of the lands from disposition under the general mining laws, and in Alaska, the settlement laws, but usually do not include withdrawal of the lands from the mineral leasing laws, the Recreation and Public Purposes Act, or State selection laws. A "BLM protective withdrawal" may embrace lands used or to be used for various public purposes, including:

- a. Administrative sites
- b. Natural areas
- c. Recreation areas and sites

- d. Access road locations
- e. Lookout sites
- f. Waterfront zones
- g. Roadside tracts
- h. Roadside zones or strips
- i. Research areas
- j. Material sites. [Emphasis added.]

Appellant's argument that the Kantishna area withdrawal application was made in anticipation of eventual inclusion of the land in Mt. McKinley National Park is not persuasive. We have no doubt from examining the record of this case that at the time in question NPS may have been studying lands surrounding the park, including those at issue, for recommended expansion of the park. 5/ Nevertheless, in 1965, NPS did not request that the Kantishna area be withdrawn pending passage of legislation to include it in the park; rather, they requested that the land be set aside so that it would be available if NPS determined that public lands adjacent to the park were needed to support additional public accommodations and services because of increasing demands placed on park facilities. NPS was not suggesting that the

5/ On March 9, 1972, pursuant to Exec. Order No. 10355 and section 17(d)(2)(A) of the Alaska Native Claims Settlement Act, 85 Stat. 688, 709, the Secretary of the Interior withdrew various lands in Alaska from all forms of appropriation including entry and location under the mining laws and reserved them "for study and possible recommendations to the Congress as additions to or creation as units of the National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems." Included in the lands withdrawn were fractional parts of T. 16 S., Rs. 15 through 18 W., Fairbanks meridian. (Public Land Order No. 5179, 37 FR 5579, 5582 (Mar. 16, 1972).)

lands be included in the park for this reason. The administrative vehicle which BLM chose for setting aside the area was the protective withdrawal, not a temporary withdrawal pending legislation to expand the park. If after evaluation, the application for the protective withdrawal had been approved as to some or all of the lands identified, those lands would have been permanently set aside for such public use as BLM determined was necessary. Pursuant to 43 CFR 2311.1-2(a) (1965), the application when noted on the records had the effect of segregating the lands to the same extent that the eventual withdrawal would have segregated them. In this case the application notice expressly prohibited appropriation under the mining laws. Since appellant's mining claims were located after the segregative date, BLM has properly declared them null and void.

[4] Appellant's argument that the failure by BLM to notify it of the BLM decision before issuance and provide it an opportunity to present written arguments on its behalf violates its due process rights is without merit. Due process does not require notice and a right to be heard in every case where a person is deprived of an asserted property right so long as the individual is given notice and an opportunity to be heard before the initial BLM decision, adverse to him, becomes final. Appeal to this Board satisfies the due process requirements. George H. Fennimore, 50 IBLA 280 (1980); Dorothy Smith, 44 IBLA 25 (1979); H. B. Webb, 34 IBLA 362 (1978). Furthermore, status of the public lands is a matter reflected on the public records of this Department and may be officially noticed. No property rights are

created by the location of a mining claim on land not subject to location. Appellant's arguments as to the status of the lands in question involved the interpretation of law, not a dispute as to the facts involved, and thus a hearing was not required. United States v. Consolidated Mines & Smelting Co., Ltd., 455 F.2d 432 (9th Cir. 1971).

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.

Douglas E. Henriques

Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

James L. Burski
Administrative Judge

APPENDIX A

<u>Claim Name</u>	<u>BLM Serial No.</u>	<u>Discovery Date</u>	<u>Date of Location</u>	<u>Date of Amended Location</u>	
Liberty #1	F-59188	3/6/1966	5/22/1966	6/7/1969	Liberty #2 F-59189
3/6/1966	5/22/1966	6/7/1969			
Liberty #3	F-59190	3/6/1966		6/7/1966	
Liberty #4	F-59191	3/6/1966		6/15/1966	
Liberty #5	F-59192	3/6/1966		6/18/1966	
Liberty #7	F-59194	3/6/1966		6/18/1966	
Liberty #8	F-59195	3/6/1966		6/18/1969	
Liberty #9	F-59196	3/6/1966		6/18/1969	
Liberty #10	F-59197	3/6/1966		6/15/1969	
Liberty #11	F-59198	3/6/1966		6/15/1969	
Liberty #12	F-59199	3/6/1966		6/18/1969	
Liberty #21	F-59208	3/6/1966		7/19/1969	
Liberty #29	F-59216	3/6/1966		7/14/1969	
Liberty #30	F-59217	3/6/1966		7/14/1969	
Liberty #31	F-59218	3/6/1966		7/15/1969	
Liberty #32	F-59219	3/6/1966		7/15/1969	
Liberty #33	F-59220	3/6/1966		7/15/1969	
Liberty #34	F-59221	3/6/1966		7/15/1969	
Liberty #55	F-59242	7/17/1969	7/18/1969		
Liberty #56	F-59243	7/17/1969	7/18/1969		
Liberty #57	F-59244	7/17/1969	7/18/1969		
Liberty #58	F-59245	7/17/1969	7/18/1969		
Liberty #59	F-59246	7/17/1969	7/18/1969		
Chinook #1	F-59250	6/10/1966		6/24/1969	
Chinook #2	F-59251	6/10/1966	6/24/1969		
Chinook #3	F-59252	6/10/1966	6/24/1969		
Chinook #4	F-59253	6/10/1966	6/24/1969		
Chinook #5	F-59254	6/10/1966		6/24/1969	
Chinook #6	F-59255	6/10/1966	6/24/1969		

* All location notices which purport to be amended specify that the purpose of the amendment is to reduce a previous association claim.

