

Editor's note: Reconsideration granted; decision vacated -- See John C. and Martha W. Thomas, d.b.a. Tungsten Mining Co. (On Reconsideration), 59 IBLA 364 (Nov. 9, 1981)

JOHN C. AND MARTHA W. THOMAS
d.b.a. TUNGSTEN MINING CO.

IBLA 79-569

Decided March 17, 1981

Appeal from decision of the Alaska State Office, Bureau of Land Management, declaring Bedrock Mill Site claim null and void ab initio. F 45602.

Affirmed as modified.

1. Mining Claims: Lands Subject to -- Mining Claims: Withdrawn Land -- Segregation: Filing of Application -- State Selections -- Withdrawals and Reservations: Effect of

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of a state's application to select lands segregates the lands from all subsequent appropriation, including location under the mining laws; however, the application to select has no segregative effect when at the time the application is filed, the land is withdrawn from all forms of appropriation under the public land laws, including selections by a state.

2. Mining Claims: Millsites -- Mining Claims: Withdrawals -- Withdrawals and Reservations: Effect of

A millsite located on land withdrawn from all forms of appropriation under the public land laws, including location and entry-under the mining laws, except locations for metalliferous minerals, is null and void ab initio because it is not a location for metalliferous minerals under the mining law.

3. Administrative Procedure: Hearings -- Constitutional Law: Due Process -- Rules of Practice: Hearings

Due process does not require notice and a right to be heard prior to the initial decision 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.

4. Administrative Procedure: Hearings -- Mining Claims: Hearings -- Mining Claims: Millsites -- Rules of Practice: Hearings

Notice and an opportunity for a hearing is required only where there is a disputed question of fact and where validity of a millsite location turns on the legal effect to be given facts of record concerning the status of the land when the millsite was located, no hearing is required.

APPEARANCES: William B. Murray, Esq., Portland, Oregon, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

John C. and Martha W. Thomas, d.b.a. Tungsten Mining Company, appeal from the July 19, 1979, decision of the Alaska State Office, Bureau of Land Management (BLM), declaring the Bedrock Mill Site claim null and void ab initio. 1/ The location notice states that the claim was posted on December 12, 1978. Appellants recorded the claim on December 22, 1978, in the BLM office in Fairbanks, Alaska. The claim is located in T. 9 N., R. 14 E., Fairbanks meridian, Alaska. The BLM decision states that on November 14, 1978, the State of Alaska filed State selection application F-43788 for all of the lands in T. 9 N., R. 14 E., Fairbanks meridian, under the provisions of the Alaska Statehood Act of July 7, 1958, 72 Stat. 339-343. It concludes that "because the lands have been segregated from the operation of the mining laws since November 14, 1978, a mining claim located after the date the land is segregated by the state selection is invalid from its inception." 2/

1/ While the BLM decision referred to the claim as a mining claim, the location notice states that the claim is a "mill site [which] is to be used as mill headquarters for JMT lode claims."

2/ BLM based its conclusion on 43 CFR 2627.4(b) which provides:

"Lands desired by the State under the regulations of this part will be segregated from all appropriations based upon application or settlement and location, including locations under the mining laws,

[1] Under 43 CFR 2091.6-4 and 2627.4(b), the filing of a state selection application segregates the lands from all subsequent appropriations, including locations under the mining law. The record in this case reveals, however, that at the time the State filed its selection application all the lands in T. 9 N., R. 14 E., Fairbanks meridian, were withdrawn under Public Land Order (PLO) No. 5180, 37 FR 5583 (Mar. 16, 1972), from all forms of appropriation under the public land laws including selections by the State under the Alaska Statehood Act of July 7, 1958, 48 U.S.C. Chap. 2, § 6(b) (1976). Therefore, the subject land was not available for selection at the time the application was filed. See State of Alaska, 18 IBLA 351 (1975). 3/ On appeal appellants have raised various arguments concerning the validity of the application itself. We need not consider these, however, because the filing of the state selection application did not segregate the lands in question. Such lands were not open to State selection on the date of filing. For that reason, the application could have no segregative effect. See Dennis G. Quinn, 29 IBLA 307, 309 (1977); Harold J. Naughton, 3 IBLA 237, 243, 78 I.D. 300, 303 (1971). 4/

fn. 2 (continued)

when the state files its application for selection in the proper office properly describing the lands as provided in 2627.3(c)(1)(iii), (iv), and (v). Such segregation will automatically terminate unless the State publishes first notice as provided by paragraph (c) of this section within 60 days of service of such notice by the appropriate officer of the Bureau of Land Management."

3/ On January 26, 1979, PLO 5657, 44 FR 5433, classified this land as suitable for selection by the State. On February 1, 1979, the State amended its application to include all unpatented land in the township. The amendment served to segregate the described land as of the date of filing of the amendment. See Udall v. Kalerak, 396 F.2d 746 (9th Cir. 1968); Margaret L. Klatt, 23 IBLA 59 (1975).

4/ A contrary conclusion would seem to be dictated by the Departmental decision in State of Alaska, Andrew J. Kalerak, Jr., 73 I.D. 1 (1966), which held that a State selection application filed while a withdrawal of the selected lands was in effect was premature, but that it could be considered after the withdrawal was revoked and that the application, which had been accepted and posted, had the effect of segregating the land from subsequently filed notices or claims. It also held that an amendment to the application could be considered a refiling of the original application at the time of the amendment. This decision, however, was reversed by the United States District Court for the District of Alaska in Kalerak v. Udall, Civ. No. A-35-66 (October 20, 1966), which rejected both aspects of the Department's ruling. See State of Alaska, Kenneth D. Makepeace, 6 IBLA 58, 67, 79 I.D. 391, 395 (1972). The circuit court, Kalerak v. Udall, 396 F.2d 746 (9th Cir. 1968), cert. denied, 393 U.S. 1118 (1969), reversed the district court on the issue of amendments, but stated in a footnote at 748: "We need not decide whether the district court erred in declining to accept the Secretary's alternative ruling that Alaska's original application, even

The fact that the lands were not segregated by the selection application at the time appellants located their millsite does not change the result in this case. Appellants' millsite is null and void ab initio because it was located on lands withdrawn by PLO 5180. That order withdrew the lands in question from all forms of appropriation under the public land laws, including State selections under the Alaska Statehood Act, and "from location and entry under the mining laws (except locations for metalliferous minerals)", 30 U.S.C. Ch. 2."

The only question presented is whether the location of a millsite can be considered a "location for metalliferous minerals" under 30 U.S.C. Ch. 2 (1976) so as to fall within the exception. While the definition of metalliferous is not exact, ^{5/} clearly the exception was meant to distinguish the location of metalliferous minerals from nonmetalliferous minerals. The regulation, 43 CFR 3812.1, covering minerals subject to location, states: "Whatever is recognized as a mineral by the standard authorities, whether metallic or other substance, when found in public lands in quantity and quality sufficient to render the lands valuable on account thereof, is treated as coming within the purview of the mining laws." However, whether for metalliferous or nonmetalliferous minerals, locations for such minerals would be mining claim locations. 30 U.S.C. § 22 (1976). In order for a mining claim to be valid it must be supported by the discovery of a "valuable mineral deposit." Id.

Even though the issuance of millsite patents is specifically covered by the mining law, 30 U.S.C. § 42 (1976), the statute requires and the Department has long held that only nonmineral land can be appropriated as a millsite. Emerald Oil Company, 48 L.D. 243 (1921); Mongrain v. Northern Pacific R.R. Co., 18 L.D. 105 (1894). The exception in the withdrawal is not subject to a construction which would allow the location of a millsite on the lands covered by the withdrawal. The exception was narrowly limited to "locations for metalliferous minerals." The "locations" referred to necessarily must be mining claim

fn. 4 (continued)

if defective, accomplished a segregation of lands which prevented plaintiffs from acquiring rights therein while the segregation remained in effect." While the circuit court expressed no opinion on that issue, the cases cited in the text of this decision indicate that the Department's approach to this issue now differs from that taken in the Departmental decision in Kalerak in 1966.

^{5/} Metalliferous is defined in the Dictionary of Mining, Mineral and Related Terms, U.S. Department of the Interior (1968) at 697, as follows:

"The term is not one admitting of precise definition. It means yielding or producing metals; as a metalliferous ore or deposit; a metalliferous district. But the metals and nonmetals are not subject, chemically or scientifically, to a conclusive definition or classification."

locations. If the Secretary of the Interior had intended to except millsite locations from the withdrawal, he could have done so. He did not. ^{6/}

Appellants' millsite was located at a time when the land was withdrawn from such location. A millsite located on withdrawn land is null and void ab initio. Floyd G. Brown, 35 IBLA 110 (1978); Ray L. Virg-in, 33 IBLA 354 (1978).

Appellants' other arguments are relevant to the declaration of their millsite as null and void ab initio, therefore, those arguments will be considered.

Appellants contend that BLM is estopped from declaring their millsite null and void ab initio. This argument is based on alleged assurances given to appellants by a BLM employee that the land was open for location of a millsite. While this is a mere allegation, it is clear that reliance upon erroneous information given by a BLM employee cannot provide the basis for an estoppel against the United States. 43 CFR 1810.3(c); Energy Trading, Inc., 50 IBLA 9 (1980); Alva F. Rockwell, 47 IBLA 272 (1980).

[3, 4] Appellants also claim it was error for the BLM Alaska State Office to enter a decision declaring the millsite null and void ab initio without notifying appellants and providing appellants with an opportunity for hearing. In a related argument, appellants assert there are issues of material fact which need to be resolved at a hearing before an Administrative Law Judge. The issue of fact assertedly outstanding is whether the location of the millsite actually preceded any effective attempt by the State of Alaska to select the land in question. That question is moot in light of our determination in this case that the land was withdrawn at the time the millsite was located. No disputed factual issues exist.

Even if due process were construed to require the opportunity to be heard prior to declaring the millsite location null and void ab initio, that requirement is satisfied by appellants' appeal to this Board. Where there are no disputed questions of fact and the validity of a millsite location turns on the legal effect to be given facts of record which show the status of the land when the millsite was located, no hearing before an Administrative Law Judge is required. See United

^{6/} The maxim used in statutory construction expresso unius est exclusio alterius is apropos to this situation. See A. Sutherland, 2A Statutes and Statutory Construction, § 47.23 (4th Ed. C. Dallas Sands). That maxim provides that if a statute specifies one exception to a general rule, other exceptions are excluded. However, its application is not limited to statutory construction. It has widespread application in legal reasoning and is actually a product of logic and common sense. Id. at § 47.24.

States v. Consolidated Mines and Smelting Co., Ltd., 455 F.2d 432 (9th Cir. 1971); Dredge Corp. v. Penney, 362 F.2d 889 (9th Cir. 1966), aff'g The Dredge Corp., 65 I.D. 336 (1958); 64 I.D. 368 (1957); A. B. Webb, 34 IBLA 362 (1978).

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 as modified.

Bruce R. Harris
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

