

JOHN C. AND MARTHA W. THOMAS,
d.b.a. TUNGSTEN MINING CO. (ON RECONSIDERATION)

IBLA 79-569

Decided November 9, 1981

Reconsideration of the Board's decision John C. and Martha W. Thomas, d.b.a. Tungsten Mining Co., 53 IBLA 182 (1981).

John C. and Martha W. Thomas, d.b.a. Tungsten Mining Co., 53 IBLA 182 (1981), vacated; decision of Bureau of Land Management affirmed.

1. Mining Claims: Millsites -- Segregation -- State Selections -- Words and Phrases

"Notation rule." Under the notation rule a millsite claim, located at a time when the master title plat in the local Bureau of Land Management office shows that the lands embraced by the claim are included in a state selection application, is properly declared null and void ab initio because notation of the state selection application on the official records segregates the land from further appropriation. The rule applies even where the notation was posted in error, or where the segregative use so noted is void, voidable, or has terminated.

2. Mining Claims: Lands Subject to -- Mining Claims: Withdrawn Land -- Segregation -- State Selections -- Withdrawals and Reservations: Effect of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, where the filing is regular on its face, segregates the lands from all subsequent appropriation, including location and entry under the mining laws and a millsite located while the land is so segregated is null and void ab initio.

3. Mining Claims: Millsites -- Segregation -- State Selections

A mining claim or millsite located on land at a time when the land is segregated from the operation of the mining laws by a State selection application is properly declared null and void ab initio.

John C. and Martha W. Thomas, d.b.a. Tungsten Mining Co., 53 IBLA 182 (1981), vacated; decision of Bureau of Land Management affirmed.

APPEARANCES: William B. Murray, Esq., Portland, Oregon, for appellants; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Both the Bureau of Land Management (BLM) and John C. and Martha W. Thomas, d.b.a. Tungsten Mining Company (the Thomases), have petitioned for reconsideration of the Board's decision styled John C. and Martha W. Thomas, d.b.a. Tungsten Mining Co., 53 IBLA 182 (1981), in which we affirmed as modified a decision by the Alaska State Office, BLM, dated July 19, 1979, declaring the Bedrock Mill Site claim null and void ab initio. The claim is located in T. 9 N., R. 14 E., Fairbanks meridian, Alaska.

BLM based its decision on the fact that at the time the Thomases' claim was located, December 12, 1978, the land was covered by a State selection application, F-43788, filed under the provisions of the Alaska Statehood Act of July 7, 1958, as amended, 72 Stat. 339 (codified at 48 U.S.C. Chap. 2 (1976)). BLM concluded that from the date of the filing of the selection application, November 14, 1978, the land was "segregated from the operation of the mining laws," and that, therefore, the claim was null and void ab initio.

In John C. and Martha W. Thomas, d.b.a. Tungsten Mining Co., supra at 184, we noted that the record indicated 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).

We held that not only was the land not available for selection at the time the application was filed but that "the application could have no segregative effect." John C. and Martha W. Thomas, d.b.a. Tungsten Mining Co., supra at 184.

Nevertheless, we affirmed the BLM decision on the basis that the millsite was null and void ab initio "because it was located on lands withdrawn by PLO 5180." John C. and Martha W. Thomas, d.b.a. Tungsten Mining Co., supra at 185. In so holding, we were called upon to interpret an exception in the withdrawal order for "locations for metalliferous minerals." We concluded that the location of a millsite could not be considered a "location for metalliferous minerals." We based this conclusion on the fact that a millsite applies only to nonmineral land and that the exception must necessarily refer to the location of mining claims on mineral lands.

For the reasons stated below, we vacate our previous decision and affirm the BLM decision declaring the claim null and void ab initio.

While BLM states that it does not disagree with the result in the Thomas decision, it has requested us to reconsider our holding that filing the State selection application, where the land was not available for selection, had no segregative effect. BLM argues that when the selection application was filed and noted on the land office records it had the effect of segregating the land from all subsequent appropriations, including locations under the mining laws, regardless of whether the selection was void or voidable. BLM cites numerous administrative and judicial precedents supporting the so-called "notation rule." Furthermore, BLM submits a copy of the "Master Title Plat" covering T. 9 N., R. 14 E., Fairbanks meridian, Alaska, dated "December 4, 1978," which bears the notation "F 43788 SS Apln entire Tp."

[1] In State of Alaska, Kenneth D. Makepeace, 6 IBLA 58, 68, 79 I.D. 391, 396 (1972), we applied the notation rule stating that "an entry outstanding on the proper records of the land office, even though the entry may be void or voidable precludes the appropriation of the land until it is canceled on such records." We noted that the court in Kalerak v. Udall, 396 F.2d 746 (9th Cir. 1968), cert. denied, 393 U.S. 1118 (1969), had left open the question of the applicability of the notation rule to void or voidable state selections. Finally, we stated that noting a state selection application on a title plat amounts to a "prima facie appropriation of the land." State of Alaska, Kenneth D. Makepeace, supra at 70, 79 I.D. at 396 (emphasis in original). Such a prima facie appropriation segregates the land from all subsequent appropriations, including locations under the mining laws "regardless of whether that selection was valid, void, or voidable. See State of Alaska, Kenneth D. Makepeace, supra at 71, 79 I.D. at 397. See also Stephen Kenyon, 51 IBLA 368, 374-75 (1980).

The "Master Title Plat," relied on by BLM, also bore the notation "Entire Tp Within PLO 5180 (3/9/72) Cl and Public Interest." That notation predated the State selection notation and the substance thereof was published in the Federal Register. However, under the notation rule the State selection was outstanding on the proper records of the land office at the time the Thomases located the millsite. Therefore, even though the State selection may have been void or voidable, the notation itself precluded appropriation of the land until canceled on such records.

[2] In addition, the applicable regulations, 43 CFR 2091.6-4 and 2627.4(b), 1/ attribute a segregative effect to the filing of a State selection application. This may be distinguished from the segregative effect of noting the State selection on the public land records. See Margaret L. Klatt, 23 IBLA 59, 61 (1975). Moreover, the segregative effect of filing will operate regardless of the applicability of the notation rule. See Estate of Guy C. Groat, Jr., 46 IBLA 165, 172-73 (1980). The only limitation is that the selection must be "regular on its face." State of New Mexico, 46 L.D. 217, 222 (1917), overruled on other grounds, 48 L.D. 97 (1921). There is no evidence in the present case that State selection application F-43788 was not regular on its face when filed. 2/

The filing of a State selection application segregates the land from all subsequent appropriations, including locations under the mining laws regardless of whether the selection was valid, void, or voidable.

[3] At the time the Thomases' millsite was located, the land was segregated. It is well settled that a mining claim or millsite located on land segregated from mineral entry is properly declared null and void ab initio. Joe D. Denson, 43 IBLA 136 (1979); W. Ted Hackett, 39 IBLA 28 (1979); Janelle R. Deeter, 34 IBLA 81 (1978).

1/ 43 CFR 2627.4(b) provides:

"Land 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, 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."

43 CFR 2091.6-4 reads in pertinent part:

"Lands desired by the State under the regulations Subpart 2600 will be segregated from all appropriations based upon application or settlement and location, including locations under the mining laws, when the State files its application for selection in the proper office properly describing the lands as provided in § 2627.3(c)."

2/ The Thomases asserted in their original statement of reasons for appeal that the State selection application was defective and that it did not segregate the land in question because the application filed by the State failed to comply with certain requirements of 43 CFR 2627.3(c). While our review of a copy of the application reveals no failure to comply, 43 CFR 2627.4(b) states that segregation occurs when the State files an application in the proper office and the lands are properly described as provided in 43 CFR 2627.3(c)(1)(iii), (iv), and (v). These requirements were met. Assuming other requirements of 43 CFR 2627.3(c) were not met, the regulations provide no sanction and presumably any deficiency would be curable.

The Thomases have requested us to reconsider our holding that the location of a millsite does not come within the ambit of the exception in the withdrawal order. They argue that the location of a millsite is a "location for metalliferous minerals" where it is located "in connection with a mining claim containing a deposit of a metallic, as distinguished from a nonmetallic, mineral." They contend that the exception must be read as "locations for [extracting or processing] metalliferous minerals." They point out that under the mining laws a millsite is "includable in the same application for patent as the lode or placer claim in connection with which it is used or occupied for mining purposes." Finally, they state that tungsten, which is the basis for their claim, is a "metalliferous mineral." We have vacated our previous decision in this case and since the Thomases' claim was null and void ab initio because it was located on land segregated by the State selection application, we need not consider whether the location of a millsite is a "location for metalliferous minerals" under PLO 5180.

However, the Thomases presented certain arguments in their original statement of reasons which were addressed in our earlier Thomas decision. We will reiterate our responses to those arguments.

The Thomases contend that BLM is estopped from declaring their millsite null and void ab initio. This argument is based on alleged assurances given to the Thomases 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).

The Thomases 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 them and providing them with an opportunity for a hearing. In a related argument, they 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 segregated 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 the Thomases' 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 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 Board's decision in John C. and Martha W. Thomas, d.b.a. Tungsten Mining Co., 53 IBLA 182 (1981), is vacated and the decision of the Bureau of Land Management is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

