

Editor's note: appealed -- dismissed as time barred, Civ. No. A79-391 (D.Alaska Aug. 18, 1983), 568 F.Supp. 1; aff'd, No. 85-3861 (9th Cir. May 20, 1986), 789 F.2d 1408

CARMEL J. McINTYRE
(ON JUDICIAL REMAND)

IBLA 81-924

Decided October 1, 1982

Remand from U.S. District Court, District of Alaska, on appeal from decision of Alaska Native Claims Appeal Board affirming decision of Alaska State Office, Bureau of Land Management, approving conveyance to Native village corporation.

Homestead entry declared invalid.

1. Alaska: Homesteads -- Alaska Native Claims Settlement Act: Native Land Selections: Village Selections -- Homesteads (Ordinary): Lands Subject to -- Homesteads (Ordinary): Settlement -- Powersite Lands

Under the decision in Reeves v. Andrus, 465 F. Supp. 1065 (D. Alaska 1979), upon a determination of the Federal Power Commission that the value of land withdrawn for power purposes would not be injured by the allowance of entries under the public land laws, the Secretary of the Interior is required to restore the land to entry, at least insofar as the powersite withdrawal is concerned, within a reasonable time thereafter. Such land, however, does not become available until an order of restoration is issued. No rights may be acquired by a settler on the public land who initiates settlement at a time when the records of the Department indicate that the land is not open to entry.

2. Alaska: Homesteads -- Alaska Native Claims Settlement Act: Native Land Selections: Village Selections -- Homesteads (Ordinary): Lands Subject to -- Homesteads (Ordinary): Settlement -- Powersite Lands

Where the Department issues a decision finally adjudicating rights to the public

land adverse to an appellant and the appellant does not seek judicial review of that decision, the Department will bar reconsideration of that decision, even if arguably erroneous, where a third party has initiated adverse rights to the land originally sought.

APPEARANCES: Joseph W. Evans, Esq., Anchorage, Alaska, for appellant; John C. Siemers, Esq., and Thomas E. Meacham, Esq., Anchorage, Alaska, for Eklutna, Inc.; Joan Travostino, Esq., and David P. Frank, Esq., Anchorage, Alaska, for Cook Inlet Region, Inc.; James R. Mothershead, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

In a decision styled Appeal of Carmel J. McIntyre, 4 ANCAB 24, 86 I.D. 663 (1979), the Alaska Native Claims Appeal Board (ANCAB) affirmed a decision of the Alaska State Office, Bureau of Land Management (BLM), dated March 30, 1979, which had, in part, approved for conveyance to Eklutna, Inc., a Native village corporation, pursuant to section 14 of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1613 (1976), certain land situated in sec. 23, T. 14 N., R. 1 W., Seward meridian, Alaska. This land included 22-1/2 acres of land claimed by Carmel J. McIntyre (appellant herein). This parcel of land, more particularly described as the SW 1/4 SW 1/4 NW 1/4, S 1/2 NW 1/4 SW 1/4 NW 1/4, W 1/2 SE 1/4 SW 1/4 NW 1/4 and SE 1/4 SE 1/4 SW 1/4 NW 1/4 sec. 23, T. 14 N., R. 1 W., Seward meridian, Alaska, was originally embraced in the homestead entry A 029302, made by one Robert V. Lowe from whom McIntyre derived his interest. On the basis of this claim, McIntyre had appealed the BLM decision approving conveyance to the Native village corporation. In its November 1979 decision, ANCAB noted that that lands embraced within valid homestead entries are specifically protected under section 22(b) of ANCSA, 43 U.S.C. § 1621(b) (1976), from conveyance to a Native village corporation. ANCAB, noting that the validity of a homestead entry was properly within the subject matter jurisdiction of this Board, nevertheless affirmed the BLM conveyance decision on the ground that the validity of McIntyre's claim had been the subject of prior Departmental adjudication which had determined the matter adversely to his interests. Applying the doctrine of administrative finality, ANCAB held that the failure of McIntyre to appeal from this adverse determination barred the subsequent assertion of the claim within the Department. 1/

1/ On the basis of this decision, on Dec. 14, 1979, BLM issued a patent of the surface estate of the subject land to Eklutna, Inc., and a patent of the subsurface estate to Cook Inlet Region, Inc. In McIntyre v. United States, 490 F. Supp. 833 (D. Alaska 1980), the district court held that issuance of a patent under the circumstances of this case, did not serve to immunize ANCAB'S decision from direct review on appeal by McIntyre.

McIntyre subsequently sought judicial review of this determination in an action styled Carmel J. McIntyre v. United States, Civ. No. A 79-391 (D. Alaska). By orders entered on May 2, 1980, and January 29, 1981, the United States District Court for the District of Alaska vacated the decision of ANCAB and directed that the case be referred to this Board for a determination of "the validity of the homestead entry of Robert Lowe, plaintiff's entryman." By order of July 17, 1981, the court denied various motions to reconsider its orders and the case files were subsequently transmitted to this Board for its review.

Both the facts and the law applicable to this appeal have been extensively briefed by the respective parties, not only before this Board, but before the district court and ANCAB as well. While the basic facts are not in dispute, it is necessary to set them out at length, since they are determinative of our decision.

On March 1, 1955, Robert V. Lowe filed a notice of location of settlement or occupancy embracing, inter alia, land situated in the unsurveyed W 1/2 NW 1/4 and NW 1/4 SW 1/4 sec. 23, T. 14 N., R. 1 W., Seward meridian, Alaska. This entry was assigned serial number A 029302. Subsequently, on April 18, 1955, Lowe filed an amended location notice embracing lands in secs. 15 and 22, and covering no lands in sec. 23. However, on June 30, 1955, Lowe again amended his location notice, this time describing, inter alia, the SW 1/4 NW 1/4 sec. 23. By letter dated August 3, 1955, BLM advised Lowe that "[i]n section 23 there appears to be conflicts in the SW 1/4 NW 1/4 with * * * power site classifications [107 and 399]."

Powersite classification (PSC) 107, which issued June 12, 1925, withdrew all unsurveyed lands within one-fourth mile of Eagle River in T. 14 N., R. 1 W., Seward meridian, Alaska, from all forms of appropriation under the public land laws and reserved them for powersite purposes. PSC 399, which issued March 29, 1950, withdrew all unsurveyed lands, not reserved by PSC 107, lying below the 500-foot contour level along Eagle River in the same township. 15 FR 1900 (Apr. 4, 1950).

On February 12, 1957, Lowe filed final commuted proof as to his homestead entry and on September 30, 1957, having been informed that the plat of survey for some of his lands had been officially filed (though not for the lands in sec. 23), Lowe filed a formal application for homestead entry as required by 43 CFR 166.15 (1954).

After these filings but before patent issued for any part of the homestead, Jessie Marie Lowe, wife of the entryman, obtained a divorce from her husband. The decree of divorce, dated July 29, 1958, awarded Jessie Marie Lowe an undivided one-half interest in the lands embraced within Robert Lowe's entry. A subsequent judgment entered by the court awarded Jessie Marie Lowe sole ownership of the SE 1/4 SE 1/4 sec. 15, and the NE 1/4 NE 1/4 sec. 22 of T. 14 N., R. 1 W., Seward meridian. Robert Lowe was awarded ownership of the SE 1/4 NE 1/4 sec. 22 as well as the lands disputed herein, namely the SW 1/4 NW 1/4 sec. 23. On September 20, 1959, Robert Lowe conveyed those lands awarded him in the judgment to one Durwood Cotton, who, in turn conveyed part

to Carmel J. McIntyre. It should be noted that throughout this period of time, no patent had issued for any of the land within the amended notice of settlement. On October 5, 1960, Lowe died intestate and the application for homestead entry was thereafter pursued by Jessie Marie Lowe (who eventually became Jessie Marie McGahan) as administratrix of the Lowe estate.

By decision dated September 11, 1962, the Chief, Lands Section, BLM, rejected the application for homestead entry as to the 22-1/2 acres of land now claimed by McIntyre in the SW 1/4 NW 1/4 sec. 23, T. 14 N., R. 1 W., Seward meridian, Alaska, because the land had been withdrawn by PSC 107 and PSC 399, as well as power project 2296, which had been filed on April 26, 1961. The decision noted that on April 18, 1962, BLM published a notice in the Federal Register which conformed the powersite classifications and power project to the survey plat for the SW 1/4 NW 1/4 sec. 23, T. 14 N., R. 1 W., Seward meridian, Alaska, effective April 17, 1962. See 27 FR 3701 (Apr. 18, 1962). The remaining 137-1/2 acres of land included in the Lowe application were deemed by the September 1962 BLM decision to be unaffected and subsequently were patented to the heirs of Lowe on February 17, 1965.

On October 8, 1962, Durwood Cotton and C. J. McIntyre appealed the September 1962 BLM decision. The notice of appeal indicated that on September 20, 1959, Lowe had deeded in part the 22-1/2 acres of land to Cotton, who in turn had deeded the land to McIntyre. Jessie Marie McGahan also appealed the September 1962 BLM decision.

By decision dated January 24, 1963, the Chief, Branch of Land Appeals, Division of Appeals, BLM, affirmed the September 1962 BLM decision, holding that withdrawal of the land for powersite purposes by PSC 107 and PSC 399 "predated any settlement or occupancy of the lands by the entryman" (Decision at 2).

BLM recognized that the Federal Power Commission (FPC) had determined, pursuant to section 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1976), that the value of certain land subject to PSC 107 and PSC 399, including the 22-1/2 acres involved herein, would not be injured or destroyed for purposes of power development by location or entry under the public land laws. See DA-59-Alaska, dated November 5, 1952. 2/ BLM noted that:

[S]uch lands are not subject to location or entry under the public land laws until an appropriate order is issued by [BLM] * * * opening such land to location or entry under appropriate land

2/ Subsequently, pursuant to Restoration Order No. 3, dated January 14, 1954, the Regional Administrator opened certain land affected by DA-59-Alaska to disposition under the public land laws, pursuant to section 24 of the Federal Power Act, supra. 19 FR 387 (Jan. 21, 1954). The subject land, however, had not been restored to entry by BLM.

laws. No such order has been issued opening the land in question to entry or location. Accordingly, the lands were not subject to location or entry when the appellant filed his notice of settlement or occupancy claim. [Emphasis added.]

Id. Since appellants Cotton and McIntyre were deemed to have no better title than that of their entryman, the decision held that their claim was likewise fatally defective.

Cotton and McIntyre then appealed to the Secretary from this decision. By decision dated March 11, 1964, the Assistant Solicitor, Land Appeals, affirmed the BLM decision. See Durwood Cotton, A-29968 (Mar. 11, 1964). No appeal was pursued to the Federal courts.

On January 17, 1964, Public Land Order (PLO) No. 3314, revoked PSC 399 in its entirety. While PSC 107 was also partially revoked, the land sought by McIntyre remained subject to the withdrawal. See 29 FR 1327 (Jan. 25, 1964). On September 3, 1963, an application for a preliminary permit for the proposed Eagle River project (2405) was filed by the city of Anchorage, thereby further withdrawing the subject land.

On September 8, 1967, McIntyre filed a petition for restoration of the 22-1/2 acres. See AA-2154. Pursuant to a memorandum of understanding between BLM and the FPC, a land use study was scheduled for this parcel as well as lands embraced within three other homestead entries. However, on April 17, 1968, the FPC denied an application by McIntyre to eliminate the subject land from PSC 107 and power project 2405, stating that revocation of the withdrawal might place "an unnecessary additional financial burden on a future power developer." See DA-89-Alaska. By decision dated May 14, 1968, BLM similarly denied McIntyre's petition for revocation of the powersite withdrawals. ^{3/} The decision was affirmed on appeal within the Department for procedural reasons. C. J. McIntyre, A-31046 (Sept. 24, 1968). On December 22, 1969, a notice of trespass and notice to remove unauthorized structures were personally served by BLM on McIntyre, but no further action was apparently taken in connection with these notices.

On July 17, 1974, Eklutna, Inc., filed a selection application pursuant to section 12(a) of ANCSA, 43 U.S.C. § 1611(a) (1976), including, inter alia, the subject land, which had been withdrawn by section 11(a) of ANCSA, 43 U.S.C. § 1610(a) (1976), on December 18, 1971, subject to "valid existing rights." It was this selection application which served as a catalyst for the appeal of McIntyre decided by ANCAB in Appeal of Carmel J. McIntyre, supra, as discussed above.

^{3/} It should further be noted that subsequent to the BLM decision, PLO 4582 of Jan. 17, 1969, and subsequent amendments, withdrew all public lands in Alaska from appropriation under the public land laws. See 34 FR 1025 (Jan. 23, 1969). This general withdrawal was expressly repealed by section 11(d) of ANCSA.

Before this Board, appellant contends that when the FPC determined in 1952 that the value of the subject land would not be injured or destroyed for purposes of power development by location or entry under the public land laws, the Secretary was "required" to open the land to entry within a reasonable period of time, under the provisions of section 24 of the Federal Power Act, citing Reeves v. Andrus, 465 F. Supp. 1065 (D. Alaska 1979), and the legislative history of section 24 in support of his contention. Appellant concludes that the Board should deem the land to have been open to entry when Lowe filed his application for homestead entry in 1957, and that, thereafter, the entry segregated the land from further withdrawals, such as that effectuated by power projects 2296 and 2405. Appellant avers that he built a house on the land in late 1958 or early 1959 and has continued to reside there since that time. He contends that he has received a number of assurances from BLM officials that he would ultimately receive patent to the land and offers to substantiate this statement. Appellant argues that despite prior Departmental adjudication of the validity of the Lowe homestead entry, which concluded in March 1964, the Board should reconsider the matter and not invoke the doctrine of administrative finality because of compelling legal or equitable reasons. We will first examine Reeves v. Andrus, *supra*, and its impact on appellant's situation.

[1] Section 24 of the Federal Power Act, *supra*, provides that lands of the United States included in any proposed power project are reserved from entry, location, or other disposal under the public land laws. Lands classified for powersite purposes are considered withdrawn under section 24 of the Federal Power Act, *supra*, until the land is declared open to location, entry, or selection. However, section 24 of the Federal Power Act, *supra*, further provides that:

Whenever the Commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public-land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, for such purpose or purposes and under such restrictions as the Commission may determine.

Reeves involved a situation in which a homestead entryman, Henry E. Reeves, filed a notice of location for a tract of land on July 2, 1965. As of this date, the status maps available at the BLM offices indicated that the land was available for entry under the homestead laws. In actual fact, however, the land was within PSC 439, and, hence, withdrawn from entry. This fact was soon ascertained and Reeves was informed no later than October 20, 1965.

After lengthy correspondence between BLM and Reeves, he filed a petition with the Federal Power Commission seeking to have the land restored to homestead entry under section 24 of the Federal Power Act. On August 29, 1967, the FPC declined outright cancellation of PSC 439, but determined that

the power values of the lands which Reeves sought would not be injured or destroyed by permitting entry under the homestead laws as provided by section 24 of the Federal Power Act.

Subsequent to this FPC order, Reeves sought to have Secretary Udall revoke the withdrawal and restore the land to entry. In support thereof, Reeves had the State of Alaska submit a waiver of the State's preference right to select all land which became available. The Alaska State Director, BLM, actually prepared a restoration order. However, prior to submittal to the Director, BLM, the State Director was advised by the Office of the Solicitor in Anchorage that a recent decision issued by the court of claims, Tlingit and Haida Indians of Alaska v. United States, 389 F.2d 778 (Ct. Cl. 1968), had determined that various lands, including those sought by Reeves, were held under Indian title. Accordingly, it was recommended that the order of restoration expressly provide that the lands would not become open to entry "until such time as Indian title to the lands has been extinguished and an opening order is issued." A restoration order, as modified along these lines, was eventually transmitted to Secretary Udall for consideration.

On July 31, 1968, the Office of the Secretary notified Reeves that in light of the Tlingit and Haida Indians litigation, it would not be proper to restore the lands to entry. Thus, even as modified by the Alaska State Director, BLM, no restoration order ever issued.

After this letter there ensued protracted negotiations and judicial proceedings, which are, for the most part irrelevant herein. See Henry E. Reeves, 31 IBLA 242, 250-52 (1977). Suffice it to say that the District Court of Alaska ordered the Department to permit Reeves to exhaust his administrative remedies and to establish a factual record. A hearing was eventually held before Administrative Law Judge Dean F. Ratzman. In his decision Judge Ratzman rejected all of Reeves' claims to the land. Reeves timely pursued an appeal to this Board.

In a lengthy decision encompassing a variety of issues, the Board affirmed Judge Ratzman's findings. Of particular concern herein was the Board's analysis of the Department's authority under section 24 of the Federal Power Act insofar as it related to restoration of land after a nonimpairment finding by the FPC. Reeves had argued that the Secretary of the Interior was required, under the terms of section 24, to restore land withdrawn for power purposes to entry under the public land laws where the FPC had determined that such entry would not impair the land's value for power development purposes.

The Board rejected this argument and held that the Secretary had discretionary authority to restore such land, which discretion could only be favorably exercised when doing so was consistent with his responsibilities as the administrator of the public domain. Noting that not only were the lands affected by the Court of Claims decision in the Tlingit and Haida Indians litigation, but that the Department had a particular affirmative duty to protect the rights of Indians in public lands, the Board held that the failure to restore the lands in issue rested on salient and compelling concerns.

Recognizing that the Secretary could have restored the lands insofar as the powersite withdrawal was concerned while at the same time forbidding such entry as might conflict with Native rights, the Board stated:

While the Secretary might have employed another vehicle for preserving the status quo, such as a public land order specifically addressing the land in question, this was unnecessary, as the same result was accomplished by simply refraining from action to open the land. Nor may the Secretary be faulted for continuing to decline to restore the land to settlement, in view of recent Department policy to maintain the status quo generally in Alaska in order to prevent the establishment of conflicts with Native rights there.

Id. at 261.

Reeves then sought review of the Board's decision, including its analysis of section 24, in the Federal District Court for Alaska. In Reeves v. Andrus, 465 F. Supp. 1065 (1979), Judge von der Heydt granted partial summary judgment for the plaintiff on the issue of the nature of the Secretary's authority under section 24.

The court, in reversing the Board on this issue, first held that the statute was mandatory rather than directory. In other words, when the FPC determines that restoration to entry would not impair power values, the Secretary has no authority under section 24 to refuse to restore the land. The court recognized, however, that there might be other concerns which might necessitate preserving the land from entry. Thus, the court held that the Secretary was required to modify or revoke a powersite classification "within a reasonable period." The court continued:

This does not mean that the Secretary must instantly implement the Commission's decision. In fact, 16 U.S.C. § 818 provides for a ninety day period after notice in which the State can exercise a preference right to the land. This ninety day period would allow the Secretary to determine whether there are any other public values or interests in the land that require the site to be withdrawn from entry under other powers possessed by the Secretary.

* * * * *

This court does not agree that the Secretary of Interior can justify the refusal to modify a powersite classification by referring to other withdrawal powers which he did not use in this instance. The Secretary of Interior possessed in 1967-68 many statutory and inherent powers to withdraw, classify or reserve land to protect Native rights pending Congressional action. * * * But the Secretary did not issue a public land order under any authority which he possessed. The fact that the same result,

closure to entry, was reached does not make the refusal to modify PSC 439 any less arbitrary, nor does it change the language of 16 U.S.C. § 818. [Citations omitted.]

Id. at 1070-71. Thus, the court held that the Secretary had no authority to refuse to modify a powersite classification after the FPC had made a determination that powersite values would not be injured or destroyed by opening the land to entry under the public land laws.

The instant case involves a situation where there are both important similarities between it and Reeves as well as striking dissimilarities. Unlike Reeves, appellant's entryman Lowe was at all times notified that the lands in sec. 23 of T. 14 N., R. 1 W., were within two powersite withdrawals. Indeed, in an attempt to minimize the conflict, Lowe's first amended notice of location excluded all lands in sec. 23. While Lowe's second amendment once again embraced land in sec. 23, this was clearly done with the knowledge that sec. 23 would likely be within the powersite withdrawal when such could be conformed to the survey of the lands involved. Thus, the question of detrimental reliance on the records of BLM, a point emphasized by the court in Reeves, is simply not present in the instant case.

On the other hand, not only does the case, like Reeves, involve a finding by the FPC under section 24 of the Federal Power Act, supra, that the power value of the lands would not be injured by allowance of homestead entries, but this case involves a situation wherein that determination actually preceded the entry by over 2 years. The failure to restore the land to entry at least insofar as the powersite classification was concerned during the period between the November 5, 1952, "no injury" determination and the filing of power project 2296, on April 26, 1961, was contrary to section 24 of the Federal Power Act as interpreted by the district court in Reeves v. Andrus, supra.

Two discrete questions are thus presented. First, is the effect of the Reeves decision to retroactively revoke the withdrawal during the critical period of time so that sec. 23 was included in the Lowe entry and was thus excepted from the subsequent withdrawals occasioned by power projects 2296 and 2405 as well as PLO 4582? Second, assuming the answer to the first question is in the affirmative, does the failure of appellant McIntyre to pursue judicial review of the Departmental decisions rejecting the Lowe homestead application styled Durwood Cotton, supra, in 1964 and C. J. McIntyre, supra, in 1968, preclude, under application of principles either of administrative finality, estoppel, or laches, favorable consideration of his application at this time? For reasons which we will set forth below, we find that Reeves v. Andrus, supra, does not apply so as to retroactively revoke the withdrawals. Further, we find that, even if it did, appellant is properly precluded by considerations of administrative finality from successfully reopening the prior Departmental rejection of the Lowe homestead as to the 22-1/2 acres involved herein.

Judge von der Heydt was very careful in Reeves v. Andrus, supra, to state that the Secretary was required, within a reasonable time after notification of a favorable determination by the FPC under section 24, to take

action to revoke or restore to entry lands within a powersite withdrawal. The decision does not state that after a reasonable time the lands would automatically become available for entry, notwithstanding the Secretary's failure to act. ^{4/} Indeed, such a decision would have run afoul of over a century of Departmental and judicial precedents relating to what is generally termed the "notation rule." See 43 CFR 1813.1-1.

In a recent decision of this Board, styled Pauite Oil and Mining Corp., 67 IBLA 17 (1982), we discussed the notation rule. Quoting from a 1964 letter from Attorney General Clark to the United States Attorney in Salt Lake City, we stated:

[I]t was held long ago that when a homestead entry is made, even though erroneously, the land is considered as withdrawn from further entry until such time as the entry has been cleared from the records. Bunker Hill Co. v. United States, 226 U.S. 548, 550 (1913); McMichael v. Murphy, 197 U.S. 304, 310-312 (1905); Hodges v. Colcord, 193 U.S. 192, 194-196 (1904); Hastings etc. Railroad Co. v. Whitney, 132 U.S. 357, 360-366 (1889); Putnam v. Ickes, 64 U.S. App. D.C. 339, 342, 78 F.2d 223, 226 (1935); Germania Iron Co. v. James, 89 Fed. 811, 814-817 (C.A. 8, 1898), app. dism. 195 U.S. 638.

Historically, then, no rights can be obtained in that part of the public domain which has been segregated by reason of a pre-existing appropriation--even one subsequently found to be invalid.

Id. at 20.

The basics of the rule were encapsulized in the early Departmental decision California and Oregon Land Co. v. Hulen and Hunnicut, 46 L.D. 55 (1917). That case involved cancellation of patented entries by court decree. The Commissioner of the General Land Office had affirmed a decision of the Roseburg, Oregon, land office allowing applications for homestead entry by Hulen and Hunnicut on the basis of settlement prior to the date that the restoration of the lands in the canceled entries was noted on the records. In reversing the Commissioner's decision, the First Assistant Secretary stated:

[T]he orderly administration of the land laws forbids any departure by the Department from the salutary rule that land segregated

^{4/} Appellant has characterized the failure of the Secretary to open the land as "ultra vires." We reject this contention. In the first place, Reeves did not require that the Secretary restore land to entry, but merely that he revoke the withdrawal for power purposes. Moreover, even to that extent the March 1964 decision which rejected the Lowe application was not void, but voidable. The decision was rendered by the Department in the exercise of its jurisdiction and was entitled to respect until set aside in a proper proceeding for that purpose. State of New Mexico v. Shelton, 54 I.D. 112, 119 (1932).

from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of the local land office.

Id. at 57.

The notation rule is grounded, in part, on recognition that, considering the incredible amount of activity concerning the use and possible acquisition of Federal land, it is inevitable that errors will occur in noting the relevant records. Fairness to all members of the public dictates that, where records are improperly noted so as to appear to effectively foreclose the initiation of rights by individuals in a specific tract of land, the Department should treat the land in question as it is noted on the records, until such time as the records are changed to correctly reflect the true status of the land.

Thus, in the instant case (and unlike the Reeves case) anyone attempting to make entry on sec. 23 would have been informed that it was not available. Presumably, a number of prospective homesteaders might have considered making a settlement on the land but were dissuaded by the notation of the withdrawal. To allow a settler, in knowing trespass, to gain an advantage by his or her settlement would not only be unfair to those who considered settling in the land but refrained from doing so, it would also establish a premium on disruptive trespass settlement.

In any event, the procedures of the Department have, since the advent of section 24 of the Federal Power Act, consistently provided that even where favorable action is taken on a petition for restoration, the petitioner gains no preference right or right of preferential treatment if or when the lands are finally restored. See Hunt v. State of Utah, 59 I.D. 44, 46 (1945); Federal Water Power Act--Section 24, 47 L.D. 595, 597 (1920). Rather, the land is opened subject to the filing of applications to enter and all filed within the same period are considered simultaneous with priority determined by subsequent drawing. In like manner, the Department has always held that a settler who initiates his settlement when the land is not open to entry gains no rights thereby. California and Oregon Land Co. v. Hulen and Hunnicut, supra. Such settlement is in the nature of a trespass. See, e.g., Lyman B. Crunk, 68 I.D. 190 (1961).

Thus, nothing in Reeves compels the conclusion that Lowe's entry was improperly denied as to the 22-1/2 acres. It is true that the Department erroneously failed to revoke the powersite withdrawal in response to the section 24 finding of the FPC. It could be expected that had either Lowe's estate or McIntyre, personally, sought judicial relief between the period from DA-59-Alaska to the filing of power project 2296 mandamus could have issued to compel revocation of the withdrawal. No such appeal was undertaken. Even had one been taken, and been successfully prosecuted, however, neither the estate of Lowe nor McIntyre would have been possessed of a preference right to the land. They would merely have obtained the opportunity to participate in such a simultaneous filing procedure. Until the restoration was duly

noted, no one, regardless of whether he had settled on the land or not, could acquire any right to land within the powersite withdrawal. We do not view Reeves as compelling a contrary result.

[2] Even if Reeves necessitated a finding that Lowe's homestead entry was improperly disallowed as to the 22-1/2 acres, we are of the view that considerations attendant to the doctrine of administrative finality foreclose favorable action on McIntyre's behalf at this time.

The Board has noted that "[i]n the absence of compelling legal or equitable reasons for reconsideration, the principle of res judicata, and its counterpart, finality of administrative action, will bar consideration of a new appeal arising from a later proceeding involving the same claim and the same issues." Dallas C. Qualman, 36 IBLA 119, 121 (1978); Ben Cohen, 21 IBLA 330 (1975), and cases cited therein. This doctrine, of course, is not absolute. Thus, it has been suggested that the principle of res judicata should be relaxed as applied to an administrative decision on an issue of law. See 2 K. Davis Administrative Law Treatise §§ 18.03, 18.12 (1958). As an example, in West v. Standard Oil Co., 278 U.S. 200 (1929), the Supreme Court held that the Department could reopen proceedings regarding the extent of various school land grants to the State of California where an earlier determination by the Secretary regarding the mineral character of the land had been based on a misapprehension of the law. See also Grose v. Cohen, 406 F.2d 823, 824-25 (4th Cir. 1969).

However, it is well established in the Department that "an erroneous decision [either in law or fact] which the Department had authority to make will not be set aside where the decision has remained unchallenged for a lengthy period of time and an adverse right has intervened." (Emphasis added.) John Stuart Hunt, 31 IBLA 304, 313-14, 84 I.D. 421, 426 (1977). This position is illustrated by the following two cases, cited in Hunt.

In State of New Mexico v. Shelton, *supra*, the Department had canceled certain State indemnity selections by letter dated November 6, 1918, under a misapprehension of law that withdrawal of the land precluded selections which were filed prior to withdrawal but had not yet been approved. Despite cancellation, on October 9, 1919, the State issued a grazing lease to Robert N. Wilson, who, thereafter, occupied the land and made improvements thereon. On July 24, 1921, the Department opened the land to homestead entry and on January 26, 1931, allowed the applications of Robert S. Shelton and John T. Williams under the Stock-raising Homestead Act. On February 27, 1931, 13 years after cancellation of the selections, the State applied for reinstatement of its canceled selections. In rejecting the application, the Commissioner of the General Land Office recognized that cancellation of the State indemnity selections was erroneous in light of subsequent Supreme Court decisions, but concluded that "adverse interests have intervened since then." *Id.* at 117. In reversing the Commissioner's decision, Assistant Secretary Edwards stated:

But the circumstances as above set out show there was no room for the initiation of an adverse right. The State did not

acquiesce in the erroneous decision canceling its selections, but, on the contrary, gave notice to the world, through the actual possession of Wilson under its lease, of its claim of title to the premises. Though it was unquestionably tardy in seeking correction of the erroneous decision canceling the selections, laches cannot be imputed from mere lapse of time.

Id. The Assistant Secretary concluded, after examining a series of Departmental cases, that the Department would decline to readjudicate a claim previously denied under a construction of law later held to be erroneous where there was "either or both affirmative acquiescence in the decision attacked and sought to be vacated, or laches in passively permitting the initiation of a hostile right in reliance upon such erroneous decisions." Id. at 117-18.

In Honey Lake Valley Co., 48 I.D. 192 (1921), the Department had also canceled a State indemnity selection on July 31, 1915, under a misapprehension of law as to the effect of a later withdrawal on a pending State selection. On March 21, 1916, the land was entered by Raleigh O. Hender under the desert land laws. On January 20, 1919, 3-1/2 years after cancellation of the selection, the State filed a second selection which it said amended the first one. In affirming the Commissioner's decision, which rejected the State selection, Assistant Secretary Finney held that the State had no rights under the first selection because it had acquiesced in cancellation of the selection, by not attempting "to reselect or take other appropriate steps to acquire title to the 40 acres applied for," and thereby permitted the initiation of an adverse right. Id. at 194. Assistant Secretary Finney stated:

It could not be seriously contended that upon a change by either this Department, or the courts, in the interpretation of any law, which different construction was brought about through the diligent prosecution of the claim of another in a separate and distinct proceeding having no bearing upon this case, the reopening of a former case properly disposed of in accordance with the governing rule then in force, would be justifiable to the detriment of the property rights acquired by another in the meantime. Such a course of procedure would bring about chaotic conditions and promote endless litigation. [Emphasis added.]

Id.

In the present case, appellant argues that the filing of an application for homestead entry by Lowe in 1957 segregated the land from further withdrawals, citing Albert A. Howe, 26 IBLA 386 (1976), and, in effect, precluded the initiation of adverse rights. We disagree. The application filed by Howe had been for land which was available at the time of filing and thus served to segregate the land from a subsequent withdrawal. The Lowe application, on the other hand, embraced land shown not to be available and, further, was finally rejected by the Department by decision dated March 11, 1964. No appeal was taken from that decision. Even had the Lowe application served to prevent further withdrawals from attaching, which it did not, the rejection

of the application in the absence of a timely appeal terminated any segregative affect which could flow from the application. See Mary Olympic (On Reconsideration), 65 IBLA 26 (1982). Appellant's occupancy of the land, absent a notice of location or application to purchase timely filed on his own behalf, could similarly not prevent a withdrawal from attaching or the initiation of an adverse right. United States v. Flynn, 53 IBLA 208, 236 n.10, 238 n.12, 88 I.D. 373, 388 n.10, 389 n.12 (1981).

On December 18, 1971, the subject land was withdrawn by section 11(a) of ANCSA, supra, and on July 17, 1974, was selected by Eklutna, Inc. In such circumstances, we must conclude that appellant does not have a valid claim either at law or in equity.

We note that section 22(b) of ANCSA, 43 U.S.C. § 1621(b) (1976), provides that any person who has made a lawful homestead entry prior to August 31, 1971, "shall be protected in his right of use and occupancy until all the requirements of law for a patent have been met." We would point out that McIntyre has never made an entry under the homestead laws. Insofar as Lowe's homestead is concerned, no entry was ever allowed as to the 22-1/2 acres involved herein. Thus, there is no possible way this section could be read as protecting McIntyre's occupancy.

In any event, we conclude that appellant acquiesced in rejection of the Lowe homestead entry by not appealing or otherwise challenging the March 1964 decision rejecting the Lowe application and by not filing a notice of location or application for homestead entry on his own behalf. This inaction permitted selection of the tract by Eklutna, Inc., which thereby initiated an adverse right. Appellant's mere occupancy of the land did not prevent initiation of an adverse right since the occupancy was without color of law as the land had not been restored.

Appellant has also raised a question whether BLM may be equitably estopped from denying the validity of the Lowe homestead entry as to the subject land because of repeated assurances from BLM officials to appellant that the land would ultimately be patented to him. Appellant has failed to fully substantiate the nature of the assurances made to him and BLM denies that they were ever given. Assuming, arguendo, that such assurances were given, we do not view the facts of this case as justifying the imposition of an equitable estoppel.

In the first place, the record is clear that both Lowe and appellant were, at all times, fully cognizant that the land in sec. 23 was embraced by a withdrawal, as the records so indicated. By letter of August 3, 1955, Lowe was expressly informed "in section 23 there appears to be conflicts in the SW 1/4 NW 1/4 with those power site classifications." On September 11, 1957, the State Office wrote to Mrs. Lowe, "You asked, also, about the powersite classification in the Eagle River area. As yet, we have no information as to when or if that land will be restored to entry." Thus, the fact of withdrawal and the consequences that flowed therefrom, viz., the land was not open to entry, were matters clearly within the purview of appellant.

It may be that employees informed appellant that in view of the no injury determination by the FPC with reference to PSC 107 and PSC 399, the Department would in all likelihood restore the lands to entry. However, the filing of power project 2296 on April 26, 1961, and power project 2405, removed the Department's authority to restore the land, absent an additional section 24 finding by the FPC. In point of fact, the FPC expressly refused to make the land available. Indeed, its decision in 1968 effectively revoked the "no injury" determination as it related to PSC 107. The activities of BLM clearly do not rise to the level of affirmative misconduct. See United States v. Ruby Co., 558 F.2d 697, 703 (9th Cir. 1978).

Finally, we recognize that the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96-487, 94 Stat. 2371 (1980), may have some bearing on this case. Under section 1328(a) of ANILCA, 94 Stat. 2489 (1980), subject to valid existing rights, all applications made pursuant to the Act of March 3, 1891, 43 U.S.C. § 161 (1976), which were timely filed and described land which was available for entry when entry occurred, were approved on the 180th day following December 2, 1980, subject to certain exceptions and conditions. We note further that section 1328(c) of ANILCA specifically provides that where the land described in an application was, on the date of application, "withdrawn, reserved, or classified for powersite or power-project purposes" the land shall be deemed vacant, unappropriated, and unreserved notwithstanding the withdrawal, with certain exceptions and conditions with which we need not concern ourselves here.

This provision was added pursuant to House Concurrent Resolution 453. In support of its adoption by the Senate, Senator Stevens of Alaska caused to be printed a statement explaining its purpose. The statement provided:

The provision added by this resolution is similar to section 905(a) of the bill. That provision approves certain native allotment applications under the Act of May 6, 1906. A number of specific requirements are included in section 905(a) to require adjudication. This concept is being applied to non-native public land entries in Alaska including but not limited to pending homesteads, trade and manufacturing sites, homesite and headquarter sites. [Emphasis added.]

Cong. Rec. S 15131-32 (Dec. 1, 1980). An application for entry, rejected with finality in 1964, is not "pending" on December 1, 1980. Cf. Mary Olympic (On Reconsideration), supra. Moreover, it is arguable that even were this provision applicable to appellant's claim, the selection of the land by Eklutna in 1974 would constitute a valid existing right within the meaning of section 1328(a) of ANILCA. Otherwise, the Act would have the effect of retroactively defeasing Eklutna of rights which it had already perfected.

We hold, therefore, that the district court's decision in Reeves v. Andrus, supra, did not have the effect of retroactively revoking the withdrawal occasioned by PSC 107 and PSC 399 and, therefore, the land involved in this appeal was never available for homestead entry throughout the period of its occupation. In addition, we hold that even were it found that the land

was so available, consideration of the rights to the land acquired by Eklutna, Inc., require that we invoke the doctrine of administrative finality and reject appellant's attempt to reopen the case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the homestead entry of Robert V. Lowe is declared invalid.

James L. Burski
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Douglas E. Henriques
Administrative Judge

