

Appeal from the decision of the Alaska State Office, Bureau of Land Management, rejecting in part a notice of location and application to purchase a trade and manufacturing site, A-062496.

Set aside and remanded.

1. Alaska: Generally

Formal ceremonial transfer of Alaska to the United States took place, pursuant to the treaty of Mar. 30, 1867, on Oct. 18, 1867, and accordingly certificates issued in 1868 by the "Late Governor -- Russian Colonies in America" were ineffective to pass title to land since that title had already vested in the United States.

2. Act of May 17, 1884 -- Alaska: Possessory Rights -- Withdrawals and Reservations: Effect of

Under sec. 8 of the Organic Act of May 17, 1884, 23 Stat. 24, settlement on the public lands of Alaska vested in the settler possessory rights in that land that could be asserted against every one except the Government. Such occupancy was inoperative to prevent the United States from reserving the land for its own uses. However, where it is established that the Government intended to except those in possession from the scope of a reservation, the reservation shall not be construed as cutting off those possessory rights.

3. Act of April 29, 1950 -- Alaska: Trade and Manufacturing Sites

The Act of April 29, 1950, 43 U.S.C. § 687a-1 (1976), requires a notice of

location to be filed with BLM within 90 days from initiation of a trade and manufacturing site claim. Unless such notice is filed in the proper BLM office within the time prescribed, no credit may be given for occupancy before such filing.

4. Withdrawals and Reservations: Authority to Make

The President of the United States had, prior to enactment of sec. 704(a) of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2743, 2792, inherent authority to withdraw public lands for public purposes apart from the statutory authority vested in him by the Act of June 25, 1910, and such inherent authority is not subject to the restrictions which attend his statutory authority.

APPEARANCES: R. Eldridge Hicks, Esq., Anchorage, Alaska, for appellant; 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 HARRIS

On May 25, 1965, Pan Alaska Fisheries, Inc., filed a notice of location of a trade and manufacturing site (T&M site), A-062496, which included a parcel known as tract F of U.S. survey No. 2567, later surveyed as lot 2, U.S. survey No. 5510. On May 28, 1965, it filed its application to purchase the site. ^{1/} In a decision, dated April 15, 1982, the Alaska State Office, Bureau

^{1/} The notice of location covered two parcels located in sec. 3, T. 73 S., R. 118 W., Seward meridian, Alaska, in the City of Unalaska. Lot 2, involved in this appeal, covers 2.36 acres more or less. The other parcel was described in the application as "that portion of U.S. Survey No. 2567 returned to Public Domain by Public Land Order 2497 of March 4, 1891, containing 2.12 acres more or less." This 2.12-acre parcel was the subject of earlier Departmental adjudication. On Mar. 5, 1970, BLM rejected this parcel finding that the land was filled tidelands, and therefore, not "public land" subject to the trade and manufacturing site law. Pan Alaska appealed that decision. On June 15, 1970, the Acting Chief, Office of Appeals and Hearings, vacated the BLM decision and remanded the case for investigation of whether the land was, in fact, filled tidelands. Pan Alaska Fisheries, Inc., Anchorage 062496 (June 15, 1970). The decision stated that the record failed to contain sufficient data to support BLM's conclusion. In a Jan. 26, 1977, memorandum from the Chief, Division of Cadastral Survey to the Chief, Division of Technical Services, it is stated:

"Based on the fact that the field notes and plat of U.S. Survey No. 2567, do not indicate that the areas mentioned as being filled, are filled tideland,

of Land Management (BLM), rejected the application as to lot 2, U.S. survey No. 5510, because:

The land described in the application as tract F was withdrawn by the Executive Order of March 4, 1891, to be used as a coal depot. The withdrawal has never been revoked as to tract F. Thus, at no time since March 4, 1891 has the above mentioned land been open to selection under the public land laws. Therefore the application for trade and manufacturing site as it applies to tract F, later surveyed as Lot 2 of U.S. Survey No. 5510, is rejected and will be removed from records when this decision becomes final. [2/]

In the statement of reasons for appeal, counsel for appellant argues that the United States Government has never possessed an ownership interest in the subject property; that section 8 of the Organic Act of May 17, 1884, 23 Stat. 24, protected the predecessors of appellant in their undisturbed occupancy of the property, such that the President lacked authority to dispossess the occupants in 1891; that the President lacked general executive authority to reserve public land from entry prior to enactment of the Pickett Act, 43 U.S.C. § 141 (1970) (repealed by sec. 704(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 2792); and that the United States is estopped by its own actions from rejecting the application.

In response, counsel for BLM contends that appellant has not made a sufficient showing that the land passed into private ownership and that appellant is a successor-in-interest to such ownership; that section 8 of the Organic Act of 1884 did not protect the possessory rights of appellant's predecessor against termination by the Executive withdrawal order of March 4, 1891; that the President had inherent power to make the reservation of 1891, and in general to reserve public land from entry and settlement prior to enactment of the Pickett Act; and that the United States is not estopped by

fn. 1 (continued)

and the fact that even if they were filled tideland, they would be excepted from the Submerged Lands Act under Title 43, United States Code, Section 1313(a) and Public Law 85-303 (71 Stat. 623), this office sees no reason for further field investigation."

The record indicates no further action taken regarding the 2.12-acre parcel. We must assume that the notice of location and application to purchase as they relate to that parcel, are still pending before BLM. 2/ The BLM decision relied on 43 CFR 2562.1 which states in part:

"(a) Notice. Any qualified person, association, or corporation initiating a claim on or after April 29, 1950, under section 10 of the Act of May 14, 1898, by the occupation of vacant and unreserved public land in Alaska for the purposes of trade, manufacture, or other productive industry, must file notice of the claim for recordation in the proper office for the district in which the land is situated, within 90 days after such initiation. Where on April 29, 1950, such a claim was held by a qualified person, association, or corporation, the claimant must file notice of the claim in the proper office, within 90 days from that date." (Emphasis added.)

its own actions from rejecting the application of the appellant for a trade and manufacturing site.

[1] We will address appellant's arguments in the order in which they are raised. First, appellant contends that the land in question never belonged to the United States. It asserts that Article II of the March 30, 1867, Treaty of Cession, 15 Stat. 539, between Russia and the United States specifically excluded "private individual property" from the "right of property" ceded to the United States at the time of the transfer. Appellant submits seven copies of "Certificates" signed by Prince Maksoutoff, "Late Governor Russian Colonies in America," in May 1868 which appellant asserts evidences the certification of some pre-existing ownership interest in the lands in question (Exhs. 1-7, attached to the Statement of Reasons). ^{3/} Appellant concludes that the President was without authority to withdraw the lands in question since they were never "public lands."

Counsel for BLM acknowledges that lands which passed into private ownership prior to the Treaty of Cession are not part of the public domain over which the United States acquired jurisdiction as owner under Article II of the Treaty of Cession. He points out that if such were the case herein, the BLM decision could be affirmed with the modification that the basis for rejection would be the Department's lack of jurisdiction over the land in question because it is not public land available for location of a T&M site. Counsel argues, however, that appellant has failed to establish that the land in question did, in fact, pass into private ownership. We agree.

Counsel for BLM argues that even if one could assume that the certificates in this case had the same effect as the "Sitka certificates" in Kinkead v. United States, 150 U.S. 483 (1893), the certificates did not pass

^{3/} Appellant stated, concerning these certificates and its claim of title:

"We know today that most, if not all, of these individual grantees were associated in 1867 with an American company in the fur business, known as Hutchinson, Kohl and Company. It is possible that these grantees obtained their prior experiences in that business as employees of the Russian-American Company.

"It is also apparent from the Certificates that 'H.K. & Co.' had established a presence at Unalaska before the date of the certifications, in the form of a company sign numbering each building. As noted in the instructions from the President to General Rousseau [United States Commissioner charged with the task of administering the transfer of Alaska],

"Private dwellings and warehouses, blacksmiths', joiners', coopers', tanners', and other similar shops, icehouses, flour and sawmills, and any small barracks on the island [Sitka] are subject to the control of their owners, and are not to be included in the transfer to the United States.' Kinkead, supra at 487. [150 U.S. 483 (1893)] (Emphasis added.)"

(Statement of Reasons at 9-10). Appellant further stated that in 1872 the Alaska Commercial Company purchased all the property of Hutchinson, Kohl and Company and continued to operate a fur factory and commercial business at the site until Aug. 1, 1940, when the land was transferred to Northern Commercial Company from whom appellant purchased the property on Mar. 22, 1965.

title or constitute a binding recognition that title had passed to "private individual property holders." Counsel's position is supported by the following language from Kinkead, supra at 495:

To treat this inventory as binding either upon the government or individuals would be to acknowledge that the commissioners were invested with judicial powers to determine the title to property. Clearly they had no power to depart from the plain language of the treaty, and no power to bind the government by an assumption that government property was private property, and thus settle questions of title or ownership. The weight that has been given to contemporaneous construction has never gone to the extent of holding that the title or ownership of property may be changed by the action of executive officers appointed to carry a statute or treaty into effect.

The effect of the certificates involved herein were previously discussed in Pan Alaska Fisheries, Inc., Anchorage 062496 (June 15, 1970). See note 1 supra. Therein, it is stated:

With the appeal there were submitted copies of documents which purport to grant fee title to the appellant's predecessors in May 1868 by Prince Maksoutoff, to whose signature is appended the descriptive title "Late Gov - Russian Colonies in America." 1/ The appellant admits that the Supreme Court held that the Prince had no authority to convey a fee (Kinkead, et al. v. United States, 150 U.S. 483 (1893)), but nevertheless insists that the Prince did convey the improvements and the right of possession which has continued to date; and that it has color of title and could apply for a patent under the Color of Title Law.

In Kinkead, et al. v. United States, supra, the Supreme Court held that by section 6 of the Treaty of March 30, 1867 (15 Stat. 539), whereby the United States acquired Alaska from Russia, the parties intended that title to immovable buildings erected by the Russian-American Company upon land belonging to the Russian government should pass along with the land to the United States. The court below found that "the property in dispute * * * is not included in inventory C, where are found the names of owners to whom the commissioners gave certificates of title, but in inventory D, which is a list of buildings, the owners of which have no title in fee to the land on which they are situated." (emphasis added).

1/ It should be noted that Alaska was transferred to the United States by the Treaty of March 30, 1867 (15 Stat. 539), and that the formal ceremonial transfer took place on October 18, 1867 (Donaldson's Public Domain, pp. 143-144 (1884)). Thus, the purported certificate of title by Prince Maksoutoff was executed at least seven months after he no longer had any such authority and title was already vested in the United States. The Kinkead case cited above also comments on this.

That court went on further to say: "Obviously it was beyond the power of even the Russian government itself, without a gross violation of the treaty, to enlarge the exception of private individual property so as to include all private property, whether owned by corporation or individuals." The lower court held that the certificates of transfer by Prince Maksoutoff conveyed only a right of possession, and entered judgment that Kinkead and Sussman had not title to the property in question. This was affirmed by the Supreme Court on the appeal from the lower court's judgment.

Counsel for BLM further states that the record contains no showing of instruments, actions, or events by which title passed under Russian law to each of the seven individuals whose pre-Cession ownership was acknowledged by the certificates of Prince Maksoutoff. Counsel for BLM correctly notes that the record does not contain the conveyances by which title of the seven certificated owners was passed to Hutchison, Kohl and Company nor deeds conveying title to Alaska Commercial Company, Northern Commercial Company, and to appellant. Counsel for BLM contends that absent such showings, it must be concluded that ownership of lot 2 passed to the United States under Article II of the Treaty of Cession (Answer at 3-4).

We find that appellant has failed to establish that the land in question passed into private ownership prior to the Treaty of Cession, or that even assuming it did, that appellant is the present owner based on a chain of title originating with the certificates issued by Prince Maksoutoff. Therefore, we must conclude that ownership of lot 2 vested in the United States under the Treaty of Cession.

[2] Next, appellant contends that even if its predecessors did not have fee title under Article II of the Treaty of Cession, section 8 of the Organic Act of May 17, 1884, 23 Stat. 24, protected their possessory rights to the extent that the executive withdrawal order of March 4, 1891, did not affect their possession. That order dated March 4, 1891, reserved a tract of land embracing lot 2. It was based on a recommendation of the Secretary of the Interior that such land be reserved "from settlement and disposal" for use as a coal depot for "vessels of the United States Revenue Marine Service cruising in Alaska waters." Appellant's position is based on the following language of section 8: "That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their occupancy or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress * * *."

Counsel for BLM states that assuming, arguendo, that Alaska Commercial Company was appellant's predecessor in interest of lot 2 on May 17, 1884, its possessory rights to that lot were protected. However, counsel argues that such protection operates only against the claims of other individuals and does not prevent the United States from reserving the land. Counsel cites a number of cases to support this argument. In United States v. Flynn, 53 IBLA 208, 225, 88 I.D. 373, 382 (1981), the Board stated:

This provision accorded no permanent rights in the lands to the Natives being only designed to protect their occupancy until such time as Congress should act further on the question of title

to such lands. See Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278 (1955). Moreover, the right of occupancy was deemed to provide no rights as against the United States. See United States v. Richfield Co., *supra* at 1029-31; Alaska Commercial Co., 39 L.D. 597 (1911). See also Edwardsen v. Morton, 369 F. Supp. 1359, 1370 (D.D.C. 1973).

In Alaska Commercial Co., 39 L.D. 597, 598 (1911) (Alaska Commercial I), cited in the Flynn case, the First Assistant Secretary discussed the effect of a March 28, 1898, executive order reserving land for the Department of Agriculture as an experimental station as follows:

It may be admitted that appellant has been in the undisturbed possession of the entire tract embraced in said survey prior to and ever since the act of May 17, 1884, but it acquired by such occupancy no vested right against the United States either under that act or the act of March 3, 1891 (26 Stat., 1095), or the act of March 3, 1903 (32 Stat., 1028).

Although such occupancy may be sufficient to protect the occupant against the claim of other individuals, it is inoperative to prevent the United States from reserving the land for its own uses. Russian-American Packing Co. v. U.S., 199 U.S., 570.

Thus, it is clear that section 8 of the Act of May 17, 1884, did not preclude the United States from reserving lands in which "Indians or other persons" had possessory rights. As pointed out by counsel for BLM, this principle was adhered to in Alaska Commercial Co., 41 L.D. 75, 76 (1912) (Alaska Commercial II), which vacated Alaska Commercial I. However, the First Assistant Secretary stated in Alaska Commercial II at 76:

The Department has carefully reviewed the record herein, together with the contentions and arguments presented. It appears that neither the Commissioner in the decision appealed from nor the Department in its said decision of March 21, 1911, made any mention of the proviso attached to said Executive Order that --

The temporary reservation above described shall not interfere with any prior rights of the natives or others to land within said reservation.

* * * * *

If said Alaska Commercial Company therefore has been in the possession and had the use of the tract claimed by it since 1883 as alleged, said tract is, by the express terms of said reservation, excepted from its purview and operation, and the rights of said company, as guaranteed by said act of May 17, 1884, are not affected thereby. [Emphasis added.]

Alaska Commercial II, while acknowledging the general rule that the right of possession provided no rights as against the United States,

recognized that the United States could condition a reservation by excepting those in possession from the scope of the reservation. In Alaska Commercial II there were express terms in the executive order itself which stated that the reservation would not interfere with "any prior rights of the natives or others."

In the present case there is no express recognition in the March 4, 1891, order itself; however, the record does contain documents which evidence the events leading up to the reservation. The question is whether those documents can be construed as preserving the possessory rights of the settlers. We will examine those documents.

By letter to the President of the United States, dated February 27, 1891, Secretary of the Interior Noble stated:

By letter of January 27, 1891, the Secretary of the Treasury requested that, if not inconsistent with the public interests in charge of this Department, a reservation be declared for use as the site of a depot for coal and supplies for vessels of the United States Revenue Marine Service cruising in Alaskan waters, a portion of the public land at Ilinlink harbor, Unalaska, forming the peninsula bounded on one side by a small stream and on the other by the waters of the harbor and channel, said reservation to extend from the extremity of the peninsula at present occupied by the wharf of the Alaska Commercial Company, one thousand feet to a line drawn at a right angle across the peninsula as indicated on the tracing from United States Coast and Geodetic Survey Chart No. 822, therewith enclosed.

The Secretary further stated that the Government has at present located on said site, a building erected at a considerable cost and now used as a store house and coal depot for its revenue cutters; and that the reservation "is not to interfere with the natives settled in the locality named."

Said letter was referred for report to the Commissioner of the General Land Office, who on February 13, reported that his office was not aware of any objections that could be urged against the reservation as proposed and delineated on the diagram enclosed and recommended that it be made.

In this connection I have the honor to state that on June 19, 1890, I recommended that certain lands in Alaska be reserved by the Government for its uses for public buildings, barracks, parade grounds, parks, wharves, coaling stations, etc., and with said recommendation transmitted an opinion of the Assistant Attorney General for this Department, to the effect that the Executive had full authority in the premises, whereupon, on June 21, said reservations were made by your order, now on file in the General Land Office.

Assuming from the language of the Secretary of the Treasury that there are no settlers on said tract, I recommend that the

same be reserved from settlement and disposal and set apart for said purposes as follows:

A portion of the public land at Iliulink harbor, Unalaska, forming the peninsula bounded on one side by a small stream, and on the other by the waters of the harbor and channel, said reservation to extend from the extremity of the peninsula at present occupied by the wharf of the Alaska Commercial Company, one thousand feet to a line drawn at a right angle across the peninsula, as indicated on the tracing from United States coast and Geodetic Survey Chart, No. 822, herewith enclosed, for use as the site of a depot for coal and supplies for vessels of the United States Revenue Marine Service, cruising in Alaskan waters. [Emphasis added.]

The following was signed and dated March 4, 1891, by President Benjamin Harrison: ^{4/} "In accordance with the recommendation of the Secretary of the Interior, the above-described tract of public land in the Territory of Alaska is hereby reserved for the uses and purposes indicated by the Secretary, unless otherwise directed by Congress."

These documents present an interpretative problem. Secretary Noble's letter quotes language of the Secretary of the Treasury's letter that the reservation "is not to interfere with the natives settled in the locality named." This language indicates a knowledge of the effect of section 8 of the Organic Act. Yet, Secretary Noble conditioned his recommendation of the reservation on the assumption that "from the language of the Secretary of the Treasury * * * there are no settlers on said tract." The record does not contain a copy of the Secretary of the Treasury's January 27, 1891, letter; however, we must assume from the quoted language from that letter that it was not the intent of the Secretary of the Treasury to disturb those in possession of the land in question.

It is unclear how Secretary Noble could have assumed from the Secretary of the Treasury's letter that there were "no settlers on said tract." Appellant asserts that such an assumption was incorrect, and it points to the language in Secretary Noble's letter which states that the reservation was to extend from the extremity of the peninsula "at present occupied by the wharf of the Alaska Commercial Company" as evidence of knowledge of that company's occupancy. However, it is possible that Secretary Noble assumed that since the Secretary of the Treasury stated that the Government had already erected a building on the site, that no others occupied the area.

We conclude, based on the present record, that even though the reservation itself did not in express terms preserve the possessory rights of settlers, the documents which precipitated the reservation indicate that it

^{4/} At note 4 on page 12 of its statement of reasons, appellant states, "No extant copy of the document [Mar. 4, 1891, reservation] produced by either the Alaska State Office or the National Archives contains the signature of the President." The case file copy of the Mar. 4, 1891, document bears the signature of President Harrison.

was not the intent of the Federal Government to interfere with the settlers in the reserved area.

Counsel for BLM states that the February 27, 1891, letter from the Secretary of the Treasury indicated that the Federal Government had already appropriated the land covered by the March 4, 1891, order. He argues that "[a]t whatever time prior to February 27, 1891, such governmental use and occupancy was established, was the time when such physical appropriation initiated a reservation precluding private settlement or entry" (Answer at 16). However, such a physical appropriation is not necessarily inconsistent with our interpretation of the reservation. If the Government constructed a building in the area "at considerable cost" prior to the formal reservation, such construction would have taken place on lands which were not physically occupied by Alaska Commercial. Therefore, we assume that the Government's physical appropriation did not interfere with Alaska Commercial's possessory right. Also given the size of the reservation, it is clear that the Government's physical presence did not include the entire area of the reservation. In addition, nowhere in the present record is it made clear where the Government building was located in the reserved area. It is possible that the physical presence of the Government was in an area of the formal reservation which is not part of the 2.63 acres involved in this appeal. Thus, our conclusion that it was not the intent of the Government to interfere with the settlers in the reserved area is not affected by the fact that the Government had physically appropriated certain lands in the area prior to the formal reservation. 5/

We conclude that Alaska Commercial's possessory rights in the subject area were not terminated by the March 4, 1891, reservation because it was not the intent of the Federal Government at that time to do so. 6/

It is generally accepted that possessory rights in Federal lands may be conveyed from one person to another. Carroll v. Price, 81 F. Supp. 137,

5/ It could be argued that by failing to include the exception language in the reservation, a determination was made not to protect the possessory rights. In the absence of other evidence such would clearly be the case. However, in this case other documents support the conclusion that it was not the intent of the Federal Government by this reservation to usurp the possessory rights of settlers in the area embraced by the reservation.

6/ Appellant included with its notice of location an "Explanatory Statement" which states:

"On March 4, 1891, President Benjamin Harrison, by Executive Order, reserved some of the lands then in occupancy of the Alaska Commercial Company as a depot for coal supplies. The Company operated the coal depot and continued in undisturbed occupancy and on June 28/1913, Sherman Allen, Assistant Secretary of the Treasury, authorized the Alaska Commercial Company to construct tanks for fuel oil on the land reserved as a depot for coal supplies. The Company did so and serviced Coast Guard vessels therefrom. A part of the area was apparently treated as a U.S. Coast Guard Reserve and was put under survey as U.S. Survey 2567 executed in 1961."

It appears that, if appellant's statement is correct, Alaska Commercial worked in concert with the Government to further the purposes of the reservation.

140 (D. Alaska 1896). However, such transfers between private parties do not control the disposition of public land from the United States. Tarpey v. Madsen, 17 U.S. 215, 221 (1900). Acquisition of title to such lands depends upon compliance with the laws relating to appropriation, in this case the T&M site law.

Under section 10 of the Act of May 14, 1898, as amended, 43 U.S.C. § 687a (1976), not more than 80 acres of land in Alaska can be purchased by one: "[I]n the possession of and occupying public lands in * * * Alaska in good faith for the purposes of trade, manufacture, or other productive industry, * * * upon submission of proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry."

[3] That Act was amended by section 5 of the Act of April 29, 1950, 43 U.S.C. § 687a-1 (1976), requiring that:

All qualified persons, associations, or corporations now holding or hereafter initiating claims subject to the provisions of section 687a of this title, shall file a notice describing such claim in the manner specified by section 270 of this title in the United States land office for the district in which the land is situated within ninety days from April 29, 1950 or within ninety days from the date of the initiation of the claim, whichever is later. Unless such notice is filed in the proper district land office within the time prescribed the claimant shall not be given credit for the occupancy maintained in the claim prior to the filing of (1) a notice of the claim in the proper district land office, or (2) an application to purchase, whichever is earlier. Application to purchase claims, along with the required proof or showing, must be filed within five years after the filing of the notice of claim under this section. [7/]

The 1950 Act, quoted above, required that within 90 days of April 29, 1950, one holding a claim subject to the T&M site laws file notice of that claim in the land office. There is no evidence in the record of such a filing. Thus, assuming appellant is the successor in interest to Alaska Commercial, as alleged by appellant, it may not receive any credit for occupancy before May 25, 1965, the date of filing of its notice of location. See Kennecott Copper Corp., 8 IBLA 21, 29, 79 I.D. 636, 640 (1972). As a successor in interest, however, its possessory rights to the land would be protected. Also, the failure of a predecessor in interest to file a notice of location within 90 days of April 29, 1950, would not have caused the 1891 reservation to attach eo instante. The reason is that we have concluded that possessory rights were protected from the 1891 reservation. Therefore, the reservation did not attach to those lands which were in the possession of Alaska Commercial on March 4, 1891, and which it had been using and occupying since May 17, 1884. The failure to file could not operate to expand the reservation to cover lands which were originally excepted from its purview. Likewise, the only lands in the case that were excepted were those held by

^{7/} Section 703(a) of the Federal Land Policy and Management Act of 1976 repealed 43 U.S.C. § 687a! 687a! 5 effective Oct. 21, 1986. 90 Stat. 2789.

Alaska Commercial. To the extent that Pan Alaska now holds lands involved in this appeal and described in the 1891 reservation that were not part of the lands in which Alaska Commercial had a possessory interest on March 4, 1891, the reservation was effective and such land is not open to selection under the T&M site law.

[4] Counsel for appellant also argues that the President was without authority to reserve public lands until enactment of the Pickett Act in 1910. Such an argument is unacceptable. This Department stated in P & G Mining Co., 67 I.D. 217, 218 (1960):

It has long been recognized that the President of the United States, acting directly or through the heads of departments, may cause a particular portion of the public domain to be appropriated to public use, and, whenever a tract of land has been so appropriated, it is severed from the public domain so that laws which permit the acquisition of private rights in public land do not apply. Wilcox v. Jackson, 13 Pet. 497 (1839). Such authority remained unimpaired by the adoption of the act of June 25, 1910, which authorizes temporary withdrawals from settlement, location, sale, or entry for waterpower sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, which withdrawals remain in force until revoked by the President or by an act of Congress. United States v. Midwest Oil Co., 236 U.S. 459 (1915); Wilbur v. United States, 46 F.2d 217, 220 (D.C. Cir. 1930). [8/]

Finally, counsel for appellant asserts that BLM is estopped from denying the application. Clearly, this is not a case where the doctrine of equitable estoppel is applicable. There is no evidence of affirmative misrepresentation or affirmative concealment of a material fact by the Government. See United States v. Ruby, 588 F.2d 697 (9th Cir. 1978).

We conclude in this case that the BLM decision rejecting appellant's application as it relates to lot 2 must be set aside and the case remanded. If on remand appellant can establish that it is, in fact, the successor-in-interest to Alaska Commercial's possessory interest in any or all the lands involved in this appeal, appellant's application may not be rejected for the reason that the particular identified land has not been open to selection since March 4, 1891. ^{9/} As we stated, supra, we interpret the documents leading up to the reservation in question as indicating that it was not the intent of the Government to disturb those in possession of land within the boundaries of the reservation. However, as to any acreage in this appeal that is contained in lot 2 that was not in the possession of Alaska Commercial on March 4, 1891, the reservation attached, and a decision rejecting appellant's application to that extent would be proper.

^{8/} The implied authority of the President to make withdrawals and reservations recognized in United States v. Midwest Oil Co., supra, has been subsequently repealed. Section 704(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 2792.

^{9/} However, an assertion that Alaska Commercial had a possessory right to land that the Government physically appropriated prior to March 4, 1891, must be rejected. See discussion, supra.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded.

Bruce R. Harris
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Franklin D. Arness
Administrative Judge
Alternate Member

