

Appeal from decision of the Fairbanks District Office, Bureau of Land Management, declaring claims owned by appellants null and void ab initio. F 72693 through F 72733 and F 73030 through F 73060.

Affirmed.

1. Administrative Authority: Generally -- Alaska: Alaska Native Claims Settlement Act: Generally -- Executive Orders and Proclamations -- President of the United States -- Secretary of the Interior -- Withdrawals and Reservations: Effect of

Withdrawals remain in force until specifically revoked or modified by competent authority. The Alaska National Interest Lands Conservation Act, P.L. 96-478 (94 Stat. 2371), does not affect the existence or validity of Public Land Order No. 5250.

2. Mining Claims: Withdrawn Lands -- Withdrawals and Reservations: Effect of

Mining claims are properly declared to be void ab initio when it is shown that the master plat in the local Bureau of Land Management office shows that the lands located are within an area withdrawn from mineral entry.

3. Administrative Procedure: Hearings -- Hearings -- Mining Claims: Hearings

No hearing is required to declare a mining claim invalid when it is shown that at the time of location of the claims the land was not open to location.

APPEARANCES: Wallace McGregor, pro se; Dennis J. Hopewell, Office of the Regional Solicitor, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Appellants are appealing from a decision of the Bureau of Land Management (BLM) declaring mining claims owned by appellants 1/ null and void ab initio.

1/ The claims in question were located by Larry McMaster and Floyd Miller. This appeal is taken on behalf of McMaster and the heirs of Floyd Miller.

The 72 claims in question were located between November 24, 1980, and November 24, 1983. Appendix A lists the claims which are the subject of this appeal, their respective location dates, and location. In its decision, BLM based its determination on the provisions of Public Land Order (PLO) No. 5250, which withdrew certain lands described in the order from all forms of appropriation, including appropriation under the mining laws. The BLM decision noted that all of the mining claims were within the lands described in PLO 5250, and concluded that the claims were located during a time that the lands were not subject to location and were, therefore, void ab initio. The recordation filings submitted by appellants were rejected.

In their statement of reasons appellants made the following assertions:

A. To the extent that Public Land Order No. 5250 purported to withdraw the lands from location for "metalliferous minerals," it exceeded the authority of the Department of the Interior, not being based upon the Pickett Act, and thus was void as it relates to metalliferous minerals.

B. In the event the withdrawal claimed to have been made by Public Land Order No. 5250 was effective to prevent location of mining claims for metalliferous minerals the order was automatically vacated when its purpose had been served, upon enactment of the Alaska Lands Conservation Act, P.L. 96-487[.]

C. The decision of the Bureau of Land Management from which this appeal is taken is invalid, having been issued without notice or an opportunity for a hearing before issuance, in violation of the constitutional requirement of due process.

Since the appellants do not contend that the claims are located outside the lands described by PLO 5250, it is not necessary to describe the land withdrawn. The thrust of the appellants' contentions is to the ability of the Secretary to withdraw the lands from mineral entry and the effectiveness of the withdrawal at the time that the claims were located.

This is not the first time that this Board addressed the issue of whether the Secretary had the power to withdraw the land from mineral entry under PLO 5250. In Harry H. Wilson, 35 IBLA 349, 355 (1978), 2/ this Board stated that:

The sources of authority stated in PLO 5250 for the withdrawals therein are sections 17(d)(1) and 17(d)(2)(A) of ANCSA and Executive Order No. 10355 (17 FR 4831, May 26, 1952) (cited also in 43 U.S.C. § 141 note (1970)). In E.O. 10355 the President said in part:

2/ This decision was appealed. The determination on appeal is pending. Wilson v. United States, Civ. No. A78 225 (D. Alaska, filed Aug. 28, 1978).

* * * I hereby delegate to the Secretary of the Interior the authority vested in the President by section 1 of the act of June 25, 1910, ch. 421, 36 Stat. 847 * * *, and the authority otherwise vested in him to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States in the continental United States or Alaska for public purposes, * * *. [Emphasis supplied.]

We note that the authority granted the Secretary by the President in E.O. 10355 expressly was not limited to the power conferred by the Pickett Act, as amended.

The provisions of the Alaska Native Claims Settlement Act (ANCSA) referred to in the first paragraph of PLO 5250 state, in part: "The Secretary is directed to withdraw from all forms of appropriation under the public land laws, including the mining and mineral leasing laws * * * up to, but not to exceed, eighty million acres." This section of ANCSA specifically provides the power and authority to make the withdrawal contemplated by PLO 5250.

[1] The appellants urge this Board to find that the provisions of the Alaska National Interest Lands Conservation Act (ANILCA) terminated PLO 5250. ^{3/} We do not find the contention to be supported by either ANILCA or applicable law. Withdrawals remain in force until specifically revoked or modified by competent authority. See United States v. Consolidated Mines & Smelting Co., 455 F.2d 432 (9th Cir. 1971). In order to prevail in this case, appellants must submit evidence which demonstrates that legislation or an order by a competent authority has specifically modified or revoked PLO 5250. None has been presented and we can find none. The only specific reference to revocation of any land orders found in ANILCA is found in section 1322, which does not mention or affect the existence or validity of PLO 5250.

[2] Following the publication of PLO 5250, the withdrawal of the lands subject to PLO 5250 was noted on the tract book with appropriate notation that the land had been withdrawn from mineral entry. Since the official records of BLM carried the notation that the lands were withdrawn from mineral entry at the time that the mining claims were located, the "tract book rule" (notation rule) would qualify as an independent basis for the determination that the land had been withdrawn from mineral entry rendering the claims void ab initio. Hodges v. Colcord, 193 U.S. 192 (1904). Germania Iron Co. v. James, 89 F. 811 (8th Cir. 1898); California & Oregon Land Co. v. Hulen & Hunnicutt, 46 L.D. 55 (1917). Hiram Hamilton, 38 L.D. 597 (1910); State of Alaska, 6 IBLA 58, 79 I.D. 391 (1972).

^{3/} If this were true, the major portion of the appellants' mining claims would still be invalid, as the majority of the claims were located prior to Dec. 2, 1980, the date of enactment of ANILCA.

[3] Since the mining claims were void ab initio, there is no factual question before this Board. Where there are no issues of fact, there is no need for a hearing. Therefore, BLM properly acted when issuing the determination without first offering the appellants an opportunity for a hearing. United States v. Consolidated Mines & Smelting Co., *supra*; Dredge Corp. v. Penney, 362 F.2d 889 (9th Cir. 1966). Specifically, this Board has held that no hearing is required to declare a mining claim invalid when it is shown that at the time of location of the claims the land was not open to location. Rudolph Chase, 8 IBLA 351 (1972).

The appellants have presented no reason for this Board to conclude that BLM erred in its determination that the mining claims which are the subject hereof are null and void ab initio.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

APPENDIX ALEGAL DESCRIPTION

BLM

<u>Serial</u>	<u>Date</u>	<u>Posted</u>	<u>Location</u>
<u>Number</u>	<u>Name of Claim</u>		

FAIRBANKS MERIDIAN

F 72693 Canyon Associate #1 11/25/80 Sec. 14, T. 8 S., R. 33 E.
 F 72694 Canyon Associate #2 11/25/80 Sec. 23, T. 8 S., R. 33 E.

COPPER RIVER MERIDIAN

F 72695 Cherry Associate #1 11/24/80 Sec. 6, T. 26 N., R. 22 E.
 F 72696 Cherry Associate #2 11/24/80 Sec. 6, T. 26 N., R. 22 E.
 F 72697 Cherry Associate #3 11/24/80 Sec. 7 & 8, T. 26 N., R. 22 E. F 72698 Cherry Associate #4
 11/24/80 Sec. 7 & 8, T. 26 N., R. 22 E. F 72699 Cherry Associate #5 11/24/80 Sec. 7 & 8, T. 26
 N., R. 22 E. F 72700 Cherry Associate #6 11/24/80 Sec. 7 & 8, T. 26 N., R. 22 E. F 72701 Cherry
 Associate #7 11/24/80 Sec. 7 & 8, T. 26 N., R. 22 E. F 72702 Cherry Associate #8 11/24/80 Sec.
 7 & 8, T. 26 N., R. 22 E.

FAIRBANKS MERIDIAN

F 72703 Smith Creek Associate #1 11/25/80 Sec. 20, T. 8 S., R. 34 E.
 F 72704 Smith Creek Associate #2 11/25/80 Sec. 20, T. 8 S., R. 34 E.
 F 72705 Smith Creek Associate #3 11/25/80 Sec. 29, T. 8 S., R. 34 E.
 F 72706 Smith Creek Associate #4 11/25/80 Sec. 29, T. 8 S., R. 34 E.
 F 72707 Smith Creek Associate #5 11/25/80 Sec. 29, T. 8 S., R. 34 E.

COPPER RIVER MERIDIAN

F 72708 Walker Associate #1 11/24/80 Sec. 32, T. 27 N., R. 21 E.
 F 72709 Walker Associate #2 11/24/80 Sec. 31, T. 27 N., R. 21 E.
 F 72710 Walker Associate #3 11/24/80 Sec. 31, T. 27 N., R. 21 E.
 Sec. 5, T. 26 N., R. 21 E.
 F 72711 Walker Associate #4 11/24/80 Sec. 31, T. 27 N., R. 21 E.
 Sec. 6, T. 26 N., R. 21 E.
 F 11712 Walker Associate #5 11/24/80 Sec. 6, T. 26 N., R. 21 E.
 F 11713 Walker Associate #6 11/24/80 Sec. 6, T. 26 N., R. 21 E.
 F 11714 Walker Associate #7 11/24/80 Sec. 6, T. 26 N., R. 21 E.
 F 11715 Walker Associate #8 11/24/80 Sec. 6, T. 26 N., R. 21 E.
 F 72716 Walker Associate #9 11/24/80 Sec. 6, T. 26 N., R. 21 E.
 F 72717 Walker Associate #10 11/24/80 Sec. 6, T. 26 N., R. 21 E.
 F 72718 Walker Associate #11 11/24/80 Sec. 6, T. 26 N., R. 21 E.
 F 72719 Walker Associate #12 11/24/80 Sec. 1, T. 26 N., R. 20 E.
 F 72720 Walker Associate #13 11/24/80 Sec. 1, T. 26 N., R. 20 E.
 F 72721 Walker Associate #14 11/24/80 Sec. 1, T. 26 N., R. 20 E.
 F 72722 Walker Associate #15 11/24/80 Sec. 1, T. 26 N., R. 20 E.
 F 72723 Walker Associate #16 11/24/80 Sec. 1, T. 26 N., R. 20 E.
 F 72724 Walker Associate #17 11/24/80 Sec. 1, T. 26 N., R. 20 E.
 F 72725 Walker Associate #18 11/24/80 Sec. 1, T. 26 N., R. 20 E.
 F 72726 Walker Associate #19 11/24/80 Sec. 1, T. 26 N., R. 20 E.
 F 72727 Walker Associate #20 11/24/80 Sec. 1 & 12,
 T. 26 N., R. 20 E.
 F 72728 Walker Associate #21 11/24/80 Sec. 2 & 12,
 T. 26 N., R. 20 E.

APPENDIX ALEGAL DESCRIPTION

BLM Serial Number	Name of Claim	Date Posted	Location
COPPER RIVER MERIDIAN			
F 72729	Walker Associate #22	11/24/83	Sec. 11, T. 26 N., R. 20 E.
F 72730	Walker Associate #23	11/24/83	Sec. 11, T. 26 N., R. 20 E.
F 72731	Walker Associate #24	11/24/80	Sec. 11, T. 26 N., R. 20 E.
F 72732	Walker Associate #25	11/24/80	Sec. 11, T. 26 N., R. 20 E.
F 72733	Walker Associate #26	11/24/80	Sec. 11, T. 26 N., R. 20 E.
F 73030	Walker Associate #27	3/8/81	Sec. 11, T. 26 N., R. 20 E.
F 73031	Walker Associate #28	3/8/81	Sec. 11, T. 26 N., R. 20 E.
F 73032	Walker Associate #29	3/8/81	Sec. 10, T. 26 N., R. 20 E.
F 73033	Walker Associate #30	3/8/81	Sec. 10, T. 26 N., R. 20 E.
F 73034	Walker Associate #31	3/8/81	Sec. 10, T. 26 N., R. 20 E.
F 73035	Walker Associate #32	3/8/81	Sec. 10, T. 26 N., R. 20 E.
F 73036	Walker Associate #33	3/8/81	Sec. 10 & 15, T. 26 N., R. 20 E.
F 73037	Walker Associate #34	3/8/81	Sec. 10 & 15, T. 26 N., R. 20 E.
F 73038	Walker Associate #35	3/8/81	Sec. 10 & 15, T. 26 N., R. 20 E.
F 73039	Walker Associate #36	3/8/81	Sec. 10 & 15, T. 26 N., R. 20 E.
F 73040	Walker Associate #37	3/8/81	Sec. 10 & 15, T. 26 N., R. 20 E.
F 73041	Walker Associate #38	3/8/81	Sec. 15 & 16, T. 26 N., R. 20 E.
F 73042	Walker Associate #39	3/8/81	Sec. 16, T. 26 N., R. 20 E.
F 73043	Walker Associate #40	3/8/81	Sec. 16, T. 26 N., R. 20 E.
F 73044	Walker Associate #41	3/8/81	Sec. 16, T. 26 N., R. 20 E.
F 73045	Walker Associate #42	3/8/81	Sec. 16, T. 26 N., R. 20 E.
F 73046	Walker Associate #43	3/9/81	Sec. 16, T. 26 N., R. 20 E.
F 73047	Walker Associate #44	3/9/81	Sec. 16, T. 26 N., R. 20 E.
F 73048	Walker Associate #45	3/9/81	Sec. 16, T. 26 N., R. 20 E.
F 73049	Walker Associate #46	3/9/81	Sec. 16, T. 26 N., R. 20 E.
F 73050	Walker Associate #47	3/9/81	Sec. 16 & 17, T. 26 N., R. 20 E.
F 73051	Walker Associate #48	3/9/81	Sec. 17, T. 26 N., R. 20 E.
F 73052	Walker Associate #49	3/9/81	Sec. 17 & 20, T. 26 N., R. 20 E.
F 73053	Walker Associate #50	3/9/81	Sec. 17, T. 26 N., R. 20 E.
F 73054	Walker Associate #51	3/9/81	Sec. 17, T. 26 N., R. 20 E.
F 73055	Walker Associate #52	3/9/81	Sec. 17, T. 26 N., R. 20 E.
F 73056	Walker Associate #53	3/9/81	Sec. 17, T. 26 N., R. 20 E.
F 73057	Walker Associate #54	3/9/81	Sec. 18, T. 26 N., R. 20 E.
F 73058	Walker Associate #55	3/9/81	Sec. 18, T. 26 N., R. 20 E.
F 73059	Walker Associate #56	3/9/81	Sec. 18, T. 26 N., R. 20 E.
F 73060	Walker Associate #57	3/9/81	Sec. 18, T. 26 N., R. 20 E.

