

GEORGE E. KRIER

IBLA 85-153

Decided May 30, 1986

Appeal from a decision of the Fairbanks, Alaska, District Office, Bureau of Land Management, rejecting filing of mining location notice. F-84544.

Affirmed as modified.

1. Mining Claims: Determination of Validity -- Mining Claims: Lands Subject to -- Mining Claims: Withdrawn Land -- Withdrawals and Reservations: Effect of

A mining claim located on land previously withdrawn from appropriation under the mining laws is null and void ab initio.

APPEARANCES: George E. Krier, pro se; Robert C. Babson, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

George E. Krier has appealed from a decision of the Fairbanks, Alaska, District Office, Bureau of Land Management (BLM), dated November 15, 1984, which rejected his mining claim location notice for the Forgotten Fraction claim (F-84544), stating that the lands were not open for filing because:

All available land in T. 11S, R. 34W KRM was withdrawn from all forms of appropriation and entry on 12/18/1971 by the Alaska Native Claims Settlement Act [ANCSA]. The land was set aside for selection by the Nome Village Corp. (Sitnasuak). The land was also withdrawn by PLO 5184.

Appellant argues the land was improperly withdrawn because it lies within 2 miles of the City of Nome, a first-class city on the date of enactment of ANCSA, and therefore could not be selected by the Nome Village Corporation under section 22(1) of ANCSA, 43 U.S.C. § 1621(1) (1982). <sup>1/</sup>

<sup>1/</sup> Section 22(1) of ANCSA, 43 U.S.C. § 1621(1) provides:

"Notwithstanding any provision of this chapter, no village or regional corporation shall select lands which are within two miles from the boundary, as it existed on December 18, 1971, of any home rule or first class city (excluding borough) or which are within six miles from the boundary of Ketchikan."

BLM answers that the lands were withdrawn by section 11(a)(1)(A) of ANCSA, 43 U.S.C. § 1610(a)(1)(A) (1982), which applies to the lands in each township that encloses all or part of any Native village identified pursuant to subsection (b) of section 11, because Nome is listed in subsection (b)(1). BLM states that 43 CFR 2650.6(a) provides for an exception to the selection limitation set forth in section 22(1) of the Act:

(a) Notwithstanding any other provisions of the act, no village or regional corporation may select lands which are within 2 miles from the boundary of any home rule or first-class city (excluding boroughs) as the boundaries existed and the cities were classified on December 18, 1971, or which are within 6 miles from the boundary of Ketchikan, except that a village corporation organized by Natives of a community which is itself a first class or home-rule city is not prohibited from making selections within 2 miles from the boundary of that first class or home-rule city, unless such selections fall within 2 miles from the boundary of another first class or home-rule city which is not itself a Native village or within 6 miles from the boundary of Ketchikan. [Emphasis added.]

In response appellant argues that the exception in this regulation conflicts with the statute and is void.

[1] The master title plat for section 13, (unsurveyed) T. 11 S., R. 34 W., Kateel River Meridian, indicates its withdrawal by section 11(a)(1) of ANCSA, village selection ("V/Sel") F-14908, and Public Land Order No. (PLO) 5184 of March 15, 1972 (37 FR 5588, Mar. 16, 1972). PLO 5184 withdrew all lands withdrawn by section 11 of ANCSA from location and entry under the mining laws. Because section 13 was withdrawn by PLO 5184 on the date of appellant's location, September 11, 1984, the mining claim was properly declared null and void ab initio. John F. Malone, 84 IBLA 5 (1984).

Because the land was withdrawn by PLO 5184 at the time of location of appellant's claim, we need not address appellant's argument that the exception in 43 CFR 2560.6(a) is contrary to section 22(1) of the Act.

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 affirmed as modified.

Will A. Irwin  
Administrative Judge

I concur:

Bruce R. Harris  
Administrative Judge

## ADMINISTRATIVE JUDGE BURSKI CONCURRING:

I agree that the Forgotten Fraction mining claim was properly declared null and void ab initio because Public Land Order No. (PLO) 5184 withdrew the subject land from location and entry under the mining laws. See 37 FR 5588 (Mar. 16, 1972). The majority, however, does not address the contention, which served as the primary basis for the decision below, that Sitnasuak's selection of the land effected a segregation which would also invalidate the subsequent location. Though I think that appellant has raised substantial questions as to the permissibility of that selection and conformity of 43 CFR 2650.6(a) with section 22(1) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1621(1) (1982), I, too, am unwilling at the present time, and in the absence of meaningful briefing on the legislative intent animating that section of ANCSA to rule on this question, particularly since it would not alter the outcome of the present appeal. However, in that appellant has clearly raised this issue and in light of the implicit assertion by counsel for the Bureau of Land Management (BLM) that consideration of this question is beyond the Board's purview, I think it is appropriate to discuss the authority of this Board to declare a regulation invalid and, hence, of no force or effect.

Countless Board decisions have noted that "the Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department." See, e.g., Wisnak, Inc., 87 IBLA 67, 69-70 (1985), and cases cited. With this broad generalization I have no difficulty. A problem, however, arises when one seeks to determine what the phrase "duly promulgated" means. Thus, it could be argued that it encompasses only the question whether the regulation was procedurally promulgated in accordance with the Administrative Procedure Act. Such a limited interpretation is, I would suggest, unsustainable under any logically coherent theory and is clearly contradicted by past actions of the Board in a number of different areas.

BLM's position appears to be premised on a view that a regulation represents the Secretary's interpretation of the law and, as such, is beyond the Board's competence. There might be some legitimacy to this approach if this deference were extended to Secretarial adjudications. But, in point of fact, prior decisions of the Secretary have been no more immune from being overruled than any other precedents. See United States v. Winegar, 16 IBLA 112, 81 I.D. 370 (1974) overruling Freeman v. Summers, 52 L.D. 201 (1927) (opinion by Secretary Work). Indeed, this authority has long been asserted by those invested with the responsibility for conducting Departmental adjudications. See, e.g., United States v. Carlile, 67 I.D. 417 (1960) (opinion by Deputy Solicitor Fritz) overruling in part The Clipper Mining Co. v. The Eli Mining Co., 33 L.D. 660 (1905) (an opinion by Secretary Hitchcock) and The Clipper Mining Co., 22 L.D. 527 (1896) (an opinion by Secretary Smith). The only arguable difference between a Secretarial opinion and a regulation promulgated by the Secretary lies in the oft-quoted proposition that duly promulgated regulations have the force and effect of law and are binding not only on the public at large but on the Department as well. See McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955). The point that such an argument ignores is that a regulation which is contrary to law "has no force and effect" (see, e.g., United States v. Mississippi, 578 F. Supp. 348, 352

(S.D. Miss. 1984)) and therefore is a "nullity" not binding on anyone. See Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 134 (1936). The reason for this is self-evident.

"Duly promulgated" regulations are generally accorded the force and effect of law where they are deemed substantive rather than interpretative rules and are promulgated pursuant to congressionally delegated authority to adopt such rules as are necessary to implement statutory enactments. Since, as a practical matter, it is impossible for Congress to adopt specific legislation which covers all contingencies which may arise, Congress may grant to the agency it charges with administration of a specific law the authority to adopt additional rules in order to effectuate the congressional policies animating the statute. But, leaving aside the question whether the regulation at issue, 43 CFR 2650.6(a), is properly deemed as substantive, the essential point is that even substantive rules are valid only if they are in accord with the legislative enactment upon which they are based, since Congress has delegated legislative authority to further its intent and has not granted to those charged with implementing a statute the authority to subvert it. See United States v. Larionoff, 431 U.S. 864, 873 (1977).

Once it is admitted that a rule contrary to a statutory mandate is without the force and effect of law, the only question remaining is whether or not it is within the Board's authority to so declare. That the Secretary may do so, in the course of an adjudication, is beyond peradventure. Continental Oil Co., 70 I.D. 473 (1963). And if, as the Board has had occasion to note, the Board's authority on matters properly before it is "coextensive with that of the Secretary" (Exxon Company, USA, 15 IBLA 345, 353 (1974)), it must be assumed that this aspect of adjudicatory authority has been delegated to the Board of Land Appeals. The result of a contrary rule would, indeed, be bizarre.

The Board is charged to adjudicate appeals according to the applicable laws, regulations, and Departmental policies. While it is hoped to be a rare occurrence, it remains a contingency that conflicts between these sources of authority may occur. On what basis, then, should the Board resolve the matter brought before it? To enforce a regulation which is in direct conflict with a statute would be, in effect, to countenance a situation in which a regulation assertedly adopted pursuant to statutory authority could nullify the statute itself. Congress has granted legislative authority to agencies to assist in implementing congressional decisions not to negate them. Lynch v. Rank, 747 F.2d 528 (9th Cir. 1984). If it is questionable whether or not this Board has authority to determine that a regulation is a nullity, how much more debatable must be the proposition that the Board can permit the nullification of a statute. Certainly, the Secretary, having delegated to this Board his authority to decide appeals, would not expect that the Board would knowingly direct other subordinate officials of the Department to violate the law. Rather, he would expect that the Board would, with due deference to the opinions of those vested with the authority to adopt regulations, decide such issues to the best of its ability and, where a regulation was in clear conflict with a statute, direct that the statute and not the regulation control.

There need be no fear that the assertion of such authority would somehow undermine the adjudicatory structure of the Department. The Secretary always retains his supervisory authority over the Board, 43 CFR 4.5, and, should he be convinced that the Board has erred in striking down a regulation, he could reverse the errant decision, thereby preserving the regulatory enactment. No balance of power is altered by such an approach. On the contrary, such authority is essential to the proper adjudication of appeals. And, in point of fact, such authority has been exercised on a number of occasions by this Board.

Thus, in Garland Coal & Mining Co., 52 IBLA 60, 88 I.D. 24 (1981), this Board held that 43 CFR 3523.3, which provided for the automatic termination of mineral leases for minerals other than oil or gas for nonpayment of the annual rentals, could be accorded no validity whatsoever. Id. at 72, 88 I.D. at 30. In William F. Branscome, 81 IBLA 235 (1984), the Board recognized that 43 CFR 3108.2-1(a) clearly provided that where a rental payment for an oil and gas lease was postmarked prior to the anniversary date of the lease and received within 20 days of that date, the lease would not terminate. Notwithstanding the clear regulatory language, the Board noted that this was contrary to the underlying statute (30 U.S.C. § 188(b) (1982)), and held that the proper approach would be to treat such a late payment as establishing reasonable diligence which would permit reinstatement of the terminated lease under 30 U.S.C. § 188(c) (1982).

More generally, in the course of its adjudications of recordations and filings made under section 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the Board has directed that various deficiencies be treated as curable defects despite the fact that, as written, the regulations clearly provided that such deficiencies would give rise to a conclusive presumption of abandonment. See generally Harvey A. Clifton, 60 IBLA 29 (1981); Harry J. Pike, 57 IBLA 15 (1981); Feldslite Corp. of America, 56 IBLA 78, 88 I.D. 643 (1981).

The decisions cited in the preceding two paragraphs represent the better rule. While the Board accords considerable deference and consideration to regulatory enactments, where the Board determines that a regulation is in clear conflict with a statute, 1/ it is not only within the Board's authority, it is its duty, to direct that the regulation not be followed.

With respect to the regulation at issue, appellant correctly points out that, at least facially, 43 CFR 2650.6(a) appears to adopt a limitation to the scope of section 22(1) which cannot fairly be said to arise from a simple reading of the statute. It may be that the legislative history of this section of ANCSA shows this limitation to be consistent with congressional intent. But, no such showing has been made in the instant case. I

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1/ It is my view that, consistent with the deference which we should accord to those whose authority encompasses rulemaking, a regulation may be nullified only where it is in clear conflict with the statutory basis for its adoption. Thus, simple disagreement with the efficacy of a regulation is a clearly insufficient basis upon which to predicate a decision that the regulation may not be enforced.

think that it would be necessary, prior to deciding an issue of such importance, to direct the parties to brief this precise question.

However, as noted earlier, even were appellant successful in his challenge to 43 CFR 2650.6(a), the subject claim would still be a nullity as it was located after the land had been segregated from entry and location by PLO 5184. Thus, a determination of the efficacy of 43 CFR 2650.6(a) is not controlling as to the result of this appeal. Just as Federal courts will generally avoid constitutional issues where a case may be disposed of on a purely statutory basis, I believe that this Board should refrain from deciding whether or not a regulation violates a statutory enactment where the answer will not be determinative of the ultimate issues presented by the appeal. In this case, since application of PLO 5184 is determinative of the question of the validity of the Forgotten Fraction mining claim, it is unnecessary to delve further into the question as to the validity of 43 CFR 2650.6(a). Accordingly, I concur with the majority decision affirming the finding of invalidity of the subject mining claim.

James L. Burski  
Administrative Judge.