

DONALD H. HALE

IBLA 85-73; IBLA 85-433

Decided April 10, 1987

Consolidated appeals from two decisions of the Fairbanks District Office, Bureau of Land Management, declaring various lode and placer mining claims null and void ab initio. F-32524 through F-32553, F-42888 through F-42905, and F-42793 through F-42887.

Reversed and remanded.

1. Alaska Native Claims Settlement Act: Native Land Selections: Regional Selections: Generally -- Mining Claims: Lands Subject to -- Public Records -- Segregation -- Words and Phrases

"Notation rule." Where an Alaska Native Corporation files an application to select land pursuant to the Alaska Native Claims Settlement Act, the filing of the application ordinarily will segregate the selected land from any subsequent appropriation under the public land laws and mineral laws until the application is rejected or withdrawn. However, where such an application is irregular on its face in that the land selected is not legally subject to such selection under the provisions of the statute, and no notation of the selection application is made upon the official title and status records of the selected land, the segregative effect of the application is not operative, and mining claims located on the land while such application was pending may not be deemed null and void ab initio.

2. Alaska Native Claims Settlement Act: Native Land Selections: Regional Selections: Generally -- Mining Claims: Lands Subject to -- Regional Corporation Selections

In the absence of a Master Title Plat or other appropriate land use record entry depicting that a Native regional corporation selection was filed under authority of sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), which, under authority of 43 CFR 2653.2(d), segregates the selected lands

from any other appropriation, it was improper for the Bureau of Land Management to invoke the notation rule as a bar to mining claims located during the pendency of the regional selection.

APPEARANCES: Thomas R. Tatka, Esq., and Phyllis Johnson, Esq., Anchorage, Alaska, for appellant. OPINION BY: FRAZIER

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

On September 30, 1976, Bering Straits Native Corporation (BSNC) filed selection application F-23060 for all lands in T. 8 S., R. 32 W., Kateel River Meridian, purportedly pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1601 (1982). It appears this application was attempted under ANCSA section 14(h)(8), 43 U.S.C. § 1613(h) (1982), for land that was not available for selection under that provision. This is so since T. 8 S. had not been previously withdrawn for Native selection pursuant to ANCSA sections 11(a), or 16, 43 U.S.C. § 1610(a) (1982), 43 U.S.C. § 1615 (1982). Nor had T. 8 S. previously been withdrawn by the Secretary for selection under section 14(h)(8). See generally Basil S. Bolstridge, 90 IBLA 54 (1985); David Cavanagh, 89 IBLA 285 (1985). Presumably in recognition of the fact that the application did not conform to ANCSA requirements, BSNC withdrew it on September 18, 1978. The State of Alaska subsequently filed application F-44503 to select the land in T. 8 S.

After BSNC had filed its putative selection application, Donald M. Hale sought to locate a number of mining claims in T. 8 S. Before doing so, however, he states that he made a thorough and diligent effort to ascertain that the land he was interested in was indeed open to mineral entry. An excerpt from his affidavit describes his effort in this regard:

2. During the summers of 1977 and 1978 I was engaged in efforts to locate lode and placer mining claims in the area covered by the rejected claims and to that end, I reviewed and researched the BLM public land records to determine if the area was withdrawn or open to my entry.

3. I was specifically concerned about the possibility of Native corporation selections because I had heard rumors of large areas being selected by Bering Straits Native Corporation.

4. I do not recall all the documents which I reviewed but I was assisted by BLM personnel in the Anchorage office and understood that I was being directed to all documents and files relevant to my inquiry. I also made confirming phone calls to the Fairbanks BLM office, regarding a potentially conflicting mining claim and the land status as open to my entry.

5. I do not now recall ever seeing a Master Title Plat for Township 8 South, Range 32 West, Kateel River Meridian which bore a notation of a regional selection, nor any other indication of a Bering Straits Native Corporation selection.

6. I do specifically recall viewing a plat to the south of Township 8 South which did bear a notation of withdrawal for Native selection, which reinforced my belief that Township 8 South was not so restricted and thus open to my entry.

7. I confirmed my interpretation with the BLM personnel, although I do not now recall or have any record of the person or persons with whom I spoke.

8. During the period after I made my locations and before the state selection was filed, both when filing my location notices and thereafter when filing my annual assessment work evidence and during other contacts with BLM personnel, it was never suggested to me that my previous locations were questionable and should be restaked. I first learned of the potential conflict from BLM in 1980.

By its decision dated September 18, 1984, the Fairbanks District Office, Bureau of Land Management (BLM), held 48 of Hale's lode mining claims in T. 8 S. to be null and void ab initio because the BSNA selection application had segregated all of that township from mineral entry at the time the claims were located. Hale's appeal from that decision was docketed as IBLA 85-73. A second BLM decision, dated February 1, 1985, held an additional 94 lode and placer claims in that township to be null and void ab initio for the same reason. Hale's appeal from that decision was docketed as IBLA 85-433. This Board granted Hale's motion to consolidate the appeals.

The sole question presented here is whether T. 8 S. was segregated from mineral entry at the time the claims were located by reason of the fact that BSNC had filed its unauthorized selection application previously, and had not yet withdrawn it. The answer lies in the resolution of two issues. First, did the filing of BSNA's selection application F-23060, without more, serve to segregate the land? Second, if the selection application were so flawed that its filing did not effect an automatic segregation, would a notation of that filing on BLM's official land title and status records for T. 8 S. serve to segregate the township from subsequent mineral entry?

[1] The salient regulation, 43 CFR 2653.2(d), provides:

(d) The filing of an application under the regulations of this section will constitute a request for withdrawal of the lands, and will segregate the lands from all other forms of

appropriation under the public land laws, including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act, as amended, subject to valid existing rights, but will not segregate the lands from selections under section 12 and 16 of the Act. The segregative effect of such an application will terminate if the application is rejected.

Thus, it is clear that it is the filing of a Native corporation's selection application which segregates the land, at least where application is filed "under the regulations of this section." See also Basil S. Bolstridge, supra. But under the regulations and the statute itself, such applications may only be filed to select lands which have been previously withdrawn for that purpose. 43 CFR 2653.3(b) provides: "(b) After December 18, 1975, selection of the lands allocated pursuant to § 2653.1(b), shall be made from any lands previously withdrawn under sections 11 or 16 of the Act which are not otherwise appropriated." (Emphasis added.) To the same effect, see 43 CFR 2653.9(a), which, in pertinent part, reads: "Lands available for section 14(h)(8) selections are those lands originally withdrawn under section 11(a)(1), or 16(a) of the Act and not conveyed pursuant to selections made under section 12(a), (b), or (c), 16(b) or 19 of the Act." (Emphasis added.)

Appellant characterizes BSNC's application for T. 8 S. "a rogue selection," which "overreached" available land. Appellant points to our holding in John C. Thomas (On Reconsideration), 59 IBLA 364, 367 (1981), to the effect that in order to have segregative effect when filed, a selection application must be "regular on its face," citing State of New Mexico, 46 L.D. 217, 222 (1917). BSNC's application was not "regular on its face when filed" he contends, because it was filed for land which by law and regulation was not available for such selection and because the application was not accompanied by the maps required by the specific instructions on the application form.

The Board agrees that the mere filing of such an application should not impose a segregation on the otherwise lawful use, entry, and appropriation of land which cannot lawfully be subject to the application. Where the Congress and/or the Department intends that land be available to certain forms of entry by members of the public at large, that land cannot be closed, the management plan frustrated, and the rights of individual entryman defeated, by the mere act of filing a selection application which is unacceptable on its face. Were it otherwise, any Native corporation would have the power to influence the availability of Federal public lands anywhere in the State, at least temporarily, by merely filing a selection application for lands to which it had no right, whether deliberately or by mistake. There is nothing to suggest in this case that BSNC deliberately filed a bogus application with the intent of closing the land to mineral entry, but regardless of whether the filing was mistaken or intentional, it cannot be recognized as having that effect.

We hold, therefore, that the mere filing of a selection application which is unacceptable on its face as a matter of law cannot have segregative effect on land which is legally unavailable for such selection.

[2] Moreover, unless a notation of the segregative effect of such an application on the official land title and status records of BLM indicates that it is filed pursuant to section 14(h) of ANCSA, it would not have a segregative effect of its own.

In the statement of reasons 1/ appellant asserts that the lands were open to his mining locations for the reason that there were no notations on BLM's Master Title Plat (MTP) or other records indicating withdrawal or segregation of the lands. Counsel for appellant filed an affidavit detailing her search of BLM records to locate an MTP, dating from the period between September 1977 and October 1978. She states therein that the BLM records failed to reveal a withdrawal or segregation of the lands. BLM has filed no answer disputing this status of its records at the time appellant located his claims and has remained silent, in the face of the assertions made in appellant's affidavits. 2/ Appellant urges that this is not a case for applying the "notation" or "tract book" rule to render his claims null and void. Under the "notation" or "tract book" rule, the mere notation or recording of an application or entry on official land office records has the effect of segregating the land from all subsequent appropriations, including locations under the mining laws, regardless of whether the selection application was void or voidable. See B. J. Toohey, 88 IBLA 66, 92 I.D. 317 (1985), and cases there collected.

However, in Basil S. Bolstridge, supra at 58, we concluded that absent an entry on an MTP or other land use record, indicating that a regional selection application was filed under the authority of section 14(h) of ANCSA and 43 CFR Subpart 2653, the notation rule could not be invoked to bar appellant's claims. 3/

1/ Considering our disposition of these appeals we need not address appellant's request for an evidentiary hearing.

2/ The Board reviewed file F-23060 in connection with this appeal, however, it was not the file related to the regional selection application. A note attached to the jacket indicates that as of Dec. 4, 1985, archives advised the file is missing from its container. After further search of files in its office, on Jan. 15, 1986, BLM reports that the file is lost. 3/ The case files contain copies of the serial register page for the regional selection application citing the legal reference for the filing as section 14(h)(8), 43 U.S.C. § 1601, Act of Dec. 18, 1971. However, in David Cavanagh, supra, the Board held that serial register pages are not part of the land status records for purposes of ascertaining the applicability of the notation rule.

As the record before us contains no MTP or other land use record entry depicting that the regional selection application F-23060 was filed under authority of section 14 of the Act or 43 CFR Subpart 2653, the notation rule may not be invoked as a bar to appellant's claims.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are reversed and the cases are remanded, so that BLM may approve appellant's mining claim locations, all else being regular.

Gail M. Frazier
Administrative Judge

We concur:

Kathryn A. Lynn
Administrative Judge
Alternate Member

Franklin D. Arness
Administrative Judge

