

DUTCH CREEK MINING CO.

IBLA 85-265

Decided July 6, 1987

Appeal from a decision of the Anchorage District Office, Bureau of Land Management, rejecting mining claim recordation filings, declaring the claims to be null and void ab initio, rejecting a mineral survey application for the claims, and dismissing a protest filed by the claimants. AA 038736 through 038764.

Affirmed as modified.

1. Alaska: Land Grants and Selections -- State Selections
Under sec. 6(g) of the Alaska Statehood Act, 72 Stat. 340, the Secretary of the Interior is required, when revoking an existing withdrawal of public land in Alaska, to provide a 90-day period during which time the State of Alaska is afforded a preference right to select the land. Where a public land order revokes a prior withdrawal so as to make the land available for selection by the State, the land may not be simultaneously opened for the location of mining claims for metalliferous minerals, and a public land order purportedly opening such land to mineral location is only effective after the passage of the 90-day period mandated by the Alaska Statehood Act.

2. Alaska: Mining Claims -- Mining Claims: Location -- Words and Phrases

The "date of location" of a mining claim is "the date determined by State law in the local jurisdiction in which the unpatented mining claim, mill or tunnel site is situated." 43 CFR 3833.0-5(h). Absent clear evidence to the contrary in a specific case, under Alaska State law the date of location of a mining claim is the date notice is posted on the claim as recited in the recorded certificate of location.

3. Mining Claims: Location -- Withdrawals and Reservations: Effect of

While failure to record a mining claim as required by State law does not, in and of itself, render the claim invalid, other events, such as a withdrawal or classification of the land by the United States, prior to any corrective action by the claimant, may operate as an adverse right which will make the claim invalid.

APPEARANCES: Randall E. Farleigh, Esq., Anchorage, Alaska, for Dutch Creek Mining Co.; M. Francis Neville, Esq., Office of the Attorney General, Anchorage, Alaska, for the State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Dutch Creek Mining Co., an Alaska limited partnership, has appealed from a decision of the Fairbanks District Office, Bureau of Land Management (BLM), dated December 14, 1984, which rejected location certificates filed to record a group of 29 placer mining claims, declared the claims to be null and void ab initio, rejected an application for mineral survey of the claims, and dismissed a protest to State selection AA-6911. BLM's decision stated that the claims were null and void ab initio because, under 43 CFR 2627.4(b), the land upon which they were located had been segregated by a State selection application (AA-6911) filed January 21, 1972, ^{1/} and, additionally, had been withdrawn from location under the mining laws on March 15, 1972, by Public Land Order (PLO) No. 5179.

As shown by a map prepared by one of Dutch Creek Mining Co.'s partners and contained in the application file for mineral survey 2266, the 29 claims at issue lie primarily within sections 25, 35, and 36, T. 29 N., R. 10 W., Seward Meridian. However, as more specifically indicated in the appendix, portions of some of the claims fall within neighboring sections 24, 26, and 34, and also sections 19 and 30 of T. 29 N., R. 9 W. According to appellant's location certificates, the claims were located based on a discovery of gold, and notices of location were posted on all but two of the claims on September 10, 16, 23, and 24, 1972. These claims were recorded with the Talkeetna recording district March 16, 1973. The two additional claims were posted on May 21, 1973, and were recorded June 12, 1973. Appellant's application for mineral survey of the claims was received by cadastral survey on January 1, 1976. Its protest of Alaska State selection AA-6911 was filed with BLM on March 11, 1976.

In its statement of reasons, appellant acknowledges that the State of Alaska submitted a selection application to BLM on January 21, 1972, but

^{1/} The relevant portion of the regulation provides that "[l]ands desired by the State under the regulations of this part will be segregated from all appropriations based upon application or settlement and location, including locations under the mining laws, when the State files its application for selection in the proper office properly describing the lands * * *." 43 CFR 2627.4(b). See also 43 CFR 2091.6-4.

argues that, because the land had been withdrawn from appropriation, including selection by the State, by section 17(d)(1) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1616(d)(1) (1982), the State's application was invalid and could not have the segregative effect provided by 43 CFR 2627.4(b). It also argues that at the time its claims were located the land was no longer withdrawn under PLO 5179 but had been reclassified by PLO 5254 to permit the location of mining claims for metalliferous minerals.

Appellant's arguments raise several issues which have not previously been addressed by this Board. 2/ However, prior to analyzing these issues it would be helpful to briefly explore the backdrop against which this case must be adjudicated.

[1] Section 8 of the Act of May 17, 1884, 23 Stat. 26, provided that Alaska Natives "shall not be disturbed in the possession of any lands actually in their use and occupancy or now claimed by them." This provision granted no permanent rights in the land to Alaska Natives, but rather was simply designed to safeguard their occupancy until such time as Congress might directly address the question of title to such lands. See Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278 (1955). Subsequently, as various public land laws were made applicable to Alaska, express provisions prohibited entry on lands then occupied by Natives. See generally United States v. Flynn, 53 IBLA 208, 225 n.2, 88 I.D. 373, 382 n.2 (1981). With the exception of the 1906 Native Allotment Act, 34 Stat. 197, 43 U.S.C. §§ 270-1 to 270-3 (1970), however, Congress failed to take any definitive action to resolve Native land claims in Alaska.

On January 3, 1959, Alaska was admitted to the Union. The Alaska Statehood Act, 72 Stat. 339, continued the policy of deferring ultimate resolution of Alaska Native claims while attempting to protect on-going use and occupancy of the Natives. Thus, section 4 of the Statehood Act was a disclaimer by the State of all right and title to any land "the right or title to which may be held by any Indians, Eskimos or Aleuts * * * or is held by the United States in trust for said natives." This provision was reinforced by provisions found in section 6 of the Statehood Act limiting the State's selection of the roughly 103 million acres provided by the Act to lands which were "vacant, unappropriated and unreserved at the time of their selection."

Pursuant to the selection rights afforded in the Statehood Act, the State of Alaska made numerous selections. These, in turn, generated numerous protests by various Native groups alleging that the lands sought were not "vacant" or "unappropriated" as required by the Statehood Act. Contemporaneous attempts by the Department of the Interior to solicit oil and gas lease offers likewise elicited Native protests. See generally, James W. Canon,

2/ In Thomas C. Bay, 87 IBLA 194 (1985) and Fred Thompson, 74 IBLA 231 (1983), we affirmed decisions by BLM declaring null and void mining claims located on lands included in January 21, 1972, State selections. The issue of the propriety of the selections was not raised by the appellants in those cases.

84 I.D. 176 (1977). The protests regarding lease issuance soon resulted in the suspension of all protested leasing activity pending a resolution of the Native claims. See 31 FR 15494 (Dec. 8, 1966).

As a result of these problems, the Department introduced various legislative proposals, beginning in 1967, to finally resolve Native land claims in Alaska. Ultimately, these led to the adoption of the ANCSA. While these legislative solutions were under consideration, the Department deemed it appropriate to withdraw all unreserved land in Alaska from all forms of appropriation under the public land laws, including State selection. See PLO 4582, 34 FR 1025 (Jan. 23, 1969). Because this withdrawal was issued under the aegis of the Pickett Act as a temporary withdrawal in aid of legislation, 43 U.S.C. § 141 (1970), the lands were not withdrawn from location for metalliferous minerals. See Northwest Exploration Inc. v. Watt, Civ. No. A80-81 (D. Alaska, July 7, 1982); 43 U.S.C. § 142 (1970).

PLO 4582 had originally been scheduled to expire by its own terms at midnight, December 31, 1970. It was extended, however, on a number of occasions. ^{3/} It was legislatively revoked by section 17(d)(1) of ANCSA, 43 U.S.C. § 1616(d)(1) (1982). In its place, however, section 17(d)(1) provided that, for a period of 90 days after the adoption of ANCSA "all unreserved public lands in Alaska are hereby withdrawn from all forms of appropriation under the public land laws, including the mining (except for location for metalliferous minerals) and the mineral leasing laws."

On January 21, 1972, the State of Alaska filed State selection AA-6911, encompassing approximately 368,640 acres of land, including all available land in T. 32 N., Rs. 9 and 10 W., Seward Meridian. This was one of numerous selections filed by Alaska on January 21 and 24, 1972, which aggregated in excess of 77,000,000 acres.

On March 16, 1972, Secretary Morton issued a series of PLOs affecting lands in Alaska. Of particular importance herein, PLO 5179 withdrew, inter alia, all land within T. 32 N., Rs. 9 and 10 W., Seward Meridian, from all forms of appropriation under the public land laws "including selection by the State of Alaska under the Alaska Statehood Act," as well as from location and entry under the mining laws. This withdrawal was issued under the authority of both 17(d)(1) and 17(d)(2) of ANCSA.

On April 11, 1972, the State of Alaska filed suit in the United States District Court for the District of Alaska seeking to have various sections of these PLO's declared unlawful to the extent that they subordinated the State selections filed in January 1972. See Alaska v. Morton, A-48-72 CIV (filed April 11, 1972). The Federal Government duly responded alleging, inter alia, that the January selections were not authorized by law as the lands selected were not then available. Negotiations between the parties then ensued. On September 2, 1972, the Secretary of the Interior and the Governor of Alaska signed a memorandum of understanding for the purpose of settling the pending judicial suit.

^{3/} See 35 FR 18874 (Dec. 11, 1970); 36 FR 12017 (June 24, 1971); 36 FR 23388 (Dec. 9, 1971).

Of relevance herein, section 2 of the memorandum provided that the Secretary would take the necessary steps, including the issuance or amendment of PLOs, to make certain land available for State selection. Included among these lands were secs. 8 through 36, T. 29 N., R. 9 W., and secs. 25, 35, and 36, T. 29 N., R. 10 W., Seward Meridian. Section 10 of the memorandum provided that the State agreed to withdraw all the State selections filed in January 1972, which were not for lands described in paragraphs 2, 5, 6, or 8 of the memorandum, while the Secretary agreed "to proceed immediately with the adjudication of those State selections which will be made pursuant to this agreement." [Emphasis supplied].

On September 15, 1972, PLO 5254 was filed with the Office of the Federal Register, and was published the next day. See 37 FR 18914 (Sept. 16, 1972). This PLO deleted various land from PLO 5179, including inter alia, secs. 8 through 36, T. 29 N., R. 9 W., and secs. 25, 35, and 36 of T. 29 N., R. 10 W., and added these lands to the lands subject to PLO 5186. PLO 5186, which had been issued on March 16, 1972 (37 FR 5589), provided that all lands described therein were "withdrawn under the public land laws, including location and entry under the mining laws (except for location for metalliferous minerals) * * * but not from selection by the State of Alaska under the Alaska Statehood Act." Paragraph 3 of PLO 5254 noted that its purpose was "to made additional lands available for selection by the State of Alaska." It should also be noted that, by so acting, the Secretary was fulfilling the agreement entered into between the Department and the State which terminated the Alaska v. Morton litigation discussed above.

Commencing on September 10, 1972, appellant located the subject mining claims. By September 24, 1972, all of the subject claims, except for the Cam Nos. 7 and 8, had been located.

On December 29, 1972, the State of Alaska filed notification with the BLM State Office of its intent to acquire the lands described in paragraph 2 of the memorandum of understanding. An attachment thereto specifically referred to that part of State selection application AA-6911 wherein it had applied for secs. 8 through 36, T. 29 N., R. 9 W., and secs. 25, 35, and 36, T. 29 N., R. 10 W. On April 16, 1973, in further compliance with the memorandum of understanding, the State agreed to delete all land described in AA-6911 except for that land specifically covered by section 2 of the memorandum of understanding.

With the foregoing facts in mind, we turn to consideration of the instant appeal. In its December 14, 1984, decision, the State Office rejected appellant's claims because they were located at a time when the land was not open to mineral location. Whether or not this is true is, of course, the nub of the present dispute.

Initially, we note that four claims were located on September 10, 1972 (the Jess Nos. 3-5 and the Kathy No. 3). Inasmuch as the land on which they were located was, at that time, withdrawn from mineral entry by PLO 5179, these four claims are necessarily null and void ab initio.

Insofar as the other claims are concerned, appellant argues that under PLO 5254 the lands were open to the location of mining claims for metalliferous minerals on September 15, 1972. ^{4/} It argues that State selection application AA-6911 did not segregate the land under 43 CFR 2627.4(b), because at the time that it was filed the lands were withdrawn from State selection by section 17(d)(1) of ANCSA. It also argues that, for various reasons, that notation rule should not apply in the instant case. We do not reach either of these latter two issues since, as we shall explain, we hold that, notwithstanding the language of PLO 5186 and PLO 5254, the lands involved in PLO 5254 were not open to location of claims for metalliferous minerals until December 14, 1972, and, since all but two of the claims (the Cams Nos. 7 and 8) were located prior to this time, these claims were null and void ab initio.

It is undisputed that PLO 5254 purported to except locations of metalliferous minerals from the scope of the withdrawal. Doubtless, this exception was premised on the provision of the Pickett Act which mandated that temporary withdrawals permit the location of such claims. It is equally clear, however, that the Department failed to give sufficient advertence to another statute in so acting, namely, the Alaska Statehood Act. Section 6(g) of the Alaska Statehood Act provides, in part, as follows:

Except as provided in subsection (a), all lands granted in quantity to and authorized to be selected by the State of Alaska by this Act shall be selected in such manner as the laws of the State may provide, and in conformity with such regulations as the Secretary of the Interior may prescribe. * * * Upon the revocation of any order of withdrawal in Alaska, the order of revocation shall provide for a period of not less than ninety days before the date on which it otherwise becomes effective, if subsequent to the admission of Alaska into the Union, during which period the State of Alaska shall have a preferred right of selection, subject to the requirements of this Act, except as against prior existing valid rights or as against equitable claims subject to allowance and confirmation.

^{4/} At the time PLO 5254 was issued, the effective date of a public land order was the date it was filed with the office of the Federal Register. See Elizabeth J. Martini, 42 IBLA 82 (1979); Emil I. Stadler, 15 IBLA 180 (1974). PLO 5254 indicates that it was filed on September 15, 1972 at 8:42 a.m.

Section 204(b)(1) of the Federal Land Policy and Management Act now requires that proposals for the withdrawal of lands be published in the Federal Register and provides that "[u]pon publication of such notice the land shall be segregated from the operation of the public land laws to the extent specified in the notice." 43 U.S.C. § 1714(b)(1) (1982). See 43 CFR 2310.2. Prior to the publication of withdrawal notices in the Federal Register, withdrawal orders were effective as of the date of issuance. See, e.g., Administrative Ruling, 43 L.D. 293 (1914); State of Utah, 33 L.D. 510 (1905); Currie v. State of California, 21 L.D. 134 (1895).

PLO 5254 revoked the existing withdrawal of the subject land to the extent that it prohibited selection of the land by the State of Alaska. It also, however, purported to immediately permit location of metalliferous minerals. This latter action was statutorily prohibited by section 6(g) of the Statehood Act. To the extent, therefore, that PLO 5254 attempted to authorize the location of mining claims for metalliferous minerals during the initial 90-day period following revocation of the withdrawal effected by PLO 5179, it was ineffective as a matter of law. Hence, it follows that these mining claims located during this period were null and void ab initio, since these lands could not be open to the location of any mining claims until the 90-day statutory preference period had run its course.

We noted above that, on December 29, 1972, the State reaffirmed its intent to select the lands in sections 19 and 30, T. 29 N., R. 9 W., and secs. 25, 35, and 36, T. 29 N., R. 10 W. Even were we to assume that its initial selection of these lands on January 21, 1972, was invalid, its reaffirmation of its selection on December 29, 1972, occurred when the land was open to selection and thus served to segregate the land described from subsequent appropriations. Therefore, the Cam Nos. 7 and 8, which were located subsequent to this date, are also null and void ab initio. In sum, all of the claims were located at a time when the land was not open to location and were null and void ab initio. ^{5/}

Even were we not constrained by section 6(g) to hold that the land was not open to any mineral location for the first 90 days following issuance of PLO 5254, we would still hold that these specific claims were null and void.

[2] By Departmental regulation, as well as decisions of this Board, the "date of location" of a mining claim is "the date determined by State law in the local jurisdiction in which the unpatented mining claim, mill or tunnel site is situated." 43 CFR 3833.0-5(h). ^{6/} See, e.g., Mrs. George Wagner, 63 IBLA 146 (1982); Larry Lahusen, 48 IBLA 43 (1980). Alaska Statute § 27.10.010 (1985) provides that lode and placer claims may be located "by posting a notice of location and by marking the boundaries as provided in AS 27.10.030 -- 27.10.070." Similarly, Alaska Statute § 27.10.040 (1985) states that a placer claim is to be designated by erecting substantial monuments or posts at each corner and angle, by blazing or marking the boundary lines, and "by posting on one of the posts or monuments marking the boundaries of the claim a plain sign or notice containing * * * the date of the location * * *." In addition, Alaska Statute § 27.10.050 (1985) requires that a locator record his claim "within 90 days after the date of posting the notice of location on the claim * * * by filing a certificate of location with the recorder of the recording district in which the claim is located." Along with other information, the certificate is required to state "the date of discovering and of posting the notice of location."

^{5/} We note that parts of the Kathy Nos. 1 to 3, as well as parts of the Jess Nos. 3 and 4, and the Cam Nos. 3, 5, and 6, were located on secs. 24, 26, and 34 of T. 29 N., R. 10 W. Since these sections were not affected by PLO 5254, but rather remained withdrawn from all entry under PLO 5179, all of the claims involved herein are properly deemed null and void ab initio in their entirety.

While these statutes do not explicitly equate the "date of location" required in a posted notice with the "date of posting" stated in a recorded certificate, under the location system described by them, these seems to be no other possibility. Both posting a notice of location and marking the claim's corners and boundaries are required for the location of a lode or placer claim. Until both steps have been taken, a posted notice could not truly state the date of location, and, until a claim is at least partially marked, a notice could not be posted on one of the boundary monuments. Accordingly, we find that, absent clear evidence to the contrary in a specific case, under Alaska State law, the date of location of a mining claim is the date notice is posted on the claim as recited in the recorded certificate of location. See John F. Malone, 86 IBLA 85 (1985); Ray L. Virg-In, 84 IBLA 347 (1985) (effectively reversing Ray L. Virg-In, 33 IBLA 354 (1978)); Thomas Stoelting, 70 IBLA 231 (1983).

[3] In the instant case, with the exception of the Cam Nos. 7 and 8, all of the claims were located in September, 1972. All were recorded on March 16, 1973. Alaska Statute § 27.10.050 (1985) required appellant to locally record its claims within 90 days after posting notice of location. Alaska Statute § 27.10.060 (1985) provides:

Failure to file the certificate of location for record within the required 90 days constitutes an abandonment of the claim and the ground is open to relocation. However, recordation after the 90 day period but before the ground is located by another, renews the location and saves the rights of the original locator.

Under the terms of this statute a mining claim which is unrecorded after 90 days is "abandoned." However, in Sakow v. J. E. Riley Investment Co., 9 Alaska 427 (D. Alaska 1939), aff'd, 110 F.2d 345 (9th Cir. 1940), the court said of a substantively indistinguishable predecessor of Alaska's current statute:

It is apparent that in 1915, the legislature intended to make abandonment nothing but a defense on the part of a subsequent locator. The only meaning which can be given to the proviso is the above, because a claim cannot be abandoned and, at the same time, the abandonment prevented. Nor can it be abandoned and, at the same time, the rights of the original locator saved.

The word "forfeit" should have been used instead of "abandon."

6/ As originally promulgated, the regulations defined "date of location" as "the date indicated on the notice of location or discovery posted on an unpatented mining claim * * *." 42 FR 5298, 5301 (1977). Prior to this regulation, because no Federal law controlled, the matter was left entirely to local law. See 30 U.S.C. § 28 (1982). Thus, the current regulation simply restates the earlier law. As a practical matter, decisions by this Board have generally treated the date of location as the date of posting stated in a recorded location certificate. See American Law of Mining § 33.10[5] (2d ed. 1985).

Id. at 442-43. Accordingly, we find that under Alaska State law failure to record a mining claim within 90 days of the date of posting is not fatal to the claim. 7/

While failure to record a mining claim as required by State law does not, in and of itself, render the claim invalid, other events, such as a withdrawal or classification of the land by the United States, prior to any corrective action by the claimant, may operate as an adverse right rendering the claim invalid. R. Gail Tibbetts, 43 IBLA 210, 225, 86 I.D. 538, 546 (1979); H. B. Webb, 34 IBLA 362 (1978); City of Phoenix, 53 I.D. 245 (1931). Accordingly, we find that, because appellant's mining claims were not recorded as required by Alaska Statute § 27.10.050, within 90 days after location, they were subordinated to the intervening selection of the State, and thus, in essence, forfeited.

Inasmuch as our review of the laws and land status has led us to conclude that all of appellant's mining claim involved in the present appeal are null and void, we affirm BLM's decision as modified. In addition, because all of the claims included in appellant's application for mineral survey (M.S. No. 2266) are null and void, we affirm BLM's rejection of the application. Finally, to the extent that the subject claims were the predicate for appellant's protest of the State selection application, we find that the protest was properly rejected.

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.

James L. Burski
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Kathryn A. Lynn
Administrative Judge
Alternate Member.

ATTACHMENTS:

7/ The same is not true under Federal law. Under FLPMA sec. 314, 43 U.S.C. § 1744 (1982), a claim not filed with BLM within 90 days of the date of location is conclusively deemed to be abandoned. See United States v. Locke, 105 S. Ct. 1785 (1985). This statute was not in effect at the time appellant's claims were located.

APPENDIX

| <u>Claim Name</u> | <u>BLM Number</u> | <u>Posting Date</u> | <u>Section(s)</u> |
|-------------------|-------------------|---------------------|-------------------|
| Cam 1 | AA-38736 | September 24, 1972 | 35 |
| Cam 2 | AA-38737 | September 24, 1972 | 35 |
| Cam 3 | AA-38738 | September 24, 1972 | 34, 35 |
| Cam 4 | AA-38739 | September 24, 1972 | 35 |
| Cam 5 | AA-38740 | September 24, 1972 | 34, 35 |
| Cam 6 | AA-38741 | September 24, 1972 | 34, 35 |
| Cam 7 | AA-38742 | May 21, 1973 | 35 |
| Cam 8 | AA-38743 | May 21, 1973 | 35 |
| Scott 1 | AA-38744 | September 23, 1972 | 36 |
| Scott 2 | AA-38745 | September 23, 1972 | 35 |
| Scott 3 | AA-38746 | September 23, 1972 | 35 |
| Scott 4 | AA-38747 | September 23, 1972 | 35 |
| Scott 5 | AA-38748 | September 23, 1972 | 35 |
| Scott 6 | AA-38749 | September 23, 1972 | 35 |
| Scott 7 | AA-38750 | September 23, 1972 | 35 |
| Jess 1 | AA-38751 | September 16, 1972 | 25, 36 |
| Jess 2 | AA-38752 | September 16, 1972 | 25 |
| Jess 3 | AA-38753 | September 10, 1972 | 25, 26 |
| Jess 4 | AA-38754 | September 10, 1972 | 25, 26, 35, 36 |
| Jess 5 | AA-38755 | September 10, 1972 | 35 |
| Jess 6 | AA-38756 | September 16, 1972 | 36 |
| Jess 7 | AA-38757 | September 16, 1972 | 35, 36 |
| Kathy 1 | AA-38758 | September 16, 1972 | 19, 24 |
| Kathy 2 | AA-38759 | September 16, 1972 | 24, 25 |
| Kathy 3 | AA-38760 | September 10, 1972 | 24, 25, 30 |
| Kathy 4 | AA-38761 | September 16, 1972 | 25 |
| Kathy 5 | AA-38762 | September 16, 1972 | 25 |
| Kathy 6 | AA-38763 | September 16, 1972 | 25 |
| Kathy 7 | AA-38764 | September 16, 1972 | 25 |

