JOE R. YOUNG

171 IBLA 142 Decided February 27, 2007

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Appeal from a decision of the Alaska State Office, Bureau of Land Management, declaring the Anticipation #2 placer mining claim null and void ab initio because it was located on land not open to mineral entry at the time of location. AA-86596.

Affirmed as modified. Petition for stay denied as moot.

1. Mining Claims: Lands Subject to--Mining Claims: Withdrawn Lands--Public Records--Withdrawals and Reservations: Effect of--Withdrawals and Reservations: Temporary Withdrawals

   Under the notation rule, a mining claim located at a time when BLM's official public land records indicate that the lands on which the claim is located is segregated from mineral entry is void regardless of whether the underlying segregation was proper. The land is not available for entry until such time as the notation is removed and the land is restored to entry, even if the original notation was made in error, or the segregative effect is void or voidable, or has terminated or expired.

APPEARANCES: Joe R. Young, Anchorage, Alaska, pro se.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Joe R. Young has appealed from and petitioned for a stay of the effect of an October 11, 2006, decision of the Alaska State Office, Bureau of Land Management (BLM), declaring the Anticipation #2 placer mining claim, AA-86596, null and void ab initio because it was located on land not open to mineral entry at the time of location. BLM also rejected the notice of location, which had been filed for

recordation with BLM on September 18, 2006, by Young, and closed the claim casefile. According to the map accompanying the location notice, the claim is located in the S½NE¼ sec. 34, T. 10 N., R. 2 W., Seward Meridian, Alaska. [1/]

In its decision BLM stated that its "official records" disclosed that the land encompassed by Young's placer mining claim was not open to mineral entry at the time of location because the entire township in which the claim was located "was selected by the State of Alaska in February, 1963 which segregates the land from any further appropriation." (Decision at 1.) Although BLM did not identify the State selection by serial number, the case record shows it to be A-058731.

In his notice of appeal/petition for stay, Young asserts that he determined, based on a discussion with a State of Alaska, Department of Natural Resources, employee, that the location notice was properly filed with BLM, since the placer mining claim was located on lands still owned by the United States. He states that he was informed that "the State of Alaska does NOT have control over this section of land," and that the State selection application had been denied in 1985.

The casefile contains a copy of a Master Title Plat (MTP), dated August 12, 2005, for the Partially Surveyed T. 10 N., R. 2 W., Seward Meridian, Alaska, and a copy of a supplemental MTP, dated August 12, 2005, for secs. 26, 27, 34, and 35 of the township. Portions of the eastern half of section 34 (SE¼, S½NE¼, and NE¼NE¼), including the land where the Anticipation #2 claim is situated, are shown to be covered by Proclamation 852, which withdrew the affected lands on February 23, 1909, for the Chugach National Forest. See 35 Stat. 2231 (1909). The NW¼NE¼ and part of the S½SW¼ of the section, both of which are outside the boundary of the National Forest, are denoted as encompassed by State selection ("SS") "AA17586," which had been tentatively approved, as evidenced by the notation "TA." Both MTPs also note that the entire township ("Entire Tp") had been included in State selection "A058731[.]" [2/] The notation also refers to "ME," denoting that the State had sought only the mineral estate. [3/]

[1/] The claim is a relocation of another claim held by Young for the same lands, AA-80602, which BLM declared forfeited and void by operation of law for failure to pay the claim maintenance fee for assessment year 2007.

[2/] In accordance with 43 CFR 2627.4(b), the filing of a State selection application segregates the described lands from all forms of appropriation based upon application or settlement and location, "including locations under the mining laws."

[3/] The State of Alaska filed State selection application A-058731 on Feb. 18, 1963,

(continued...)

[1] Based on our review of the case record and Young's notice of appeal/stay petition, we conclude that the land in question is not open to mineral entry and that BLM's determination that the claim is null and void ab initio must be affirmed. However, we modify the basis for that determination, concluding that the notation rule precludes mineral entry.

In Michael L. Carver, 163 IBLA 77, 84 (2004), we discussed the notation rule and its consequences for the location of mining claims and other entries on public lands:

> Where public land records have been noted to show that a parcel of land is not open to entry under the public land laws, the parcel is not available for entry until such time as the notation is removed and the land is restored to entry, even if the original notation was made in error. William Dunn, 157 IBLA 347, 353 (2002), and cases cited. Pursuant to that rule, if a notation on the public land records indicates that land is closed to entry, the land is closed to entry even if the notation was erroneously made, or the segregative effect is void, voidable, or has terminated or expired. B. J. Toohey, 88 IBLA 66, 77-81, 92 I.D. 317, 324-26 (1985), aff'd sub nom. Cavanagh v. Hodel, No. 86-041 Civil (D. Alaska (Mar. 18, 1988)); Shiny Rock Mining Corp., 75 IBLA 136, 138 (1983). [4/] [Emphasis added.]

3/ (...continued)
pursuant to section 6(b) of the Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 340 seeking the mineral estate of the selected land.

4/ We also explained the rationale for the notation rule in Carver:
"The notation rule is founded on the concept of providing fair notice to the general public of the availability of public domain lands and so to give to all the public an equal opportunity to file entries or mining claims. See Margaret L. Klatt, 23 IBLA 59, 63 (1975). Thus, a party checking public land records is entitled to rely on a notation that lands are not available so that no other party will be able to enter those lands. The rule is described as 'the salutary rule that land segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration is noted upon the records of the local land office.' California & Oregon Land Co. v. Hulen, 46 L.D. 55, 56 (1917); see also B. J. Toohey, 88 IBLA at 77-85, 92 I.D. at 324-28." 163 IBLA at 84.

See Kosanke v. U.S. Department of the Interior, 144 F.3d 873, 876-77 (D.C. Cir. 1998); Pilot Plant, Inc., 168 IBLA 169, 179 (2006), and cases cited; but cf. Phelps Dodge Corp., 115 IBLA 214, 217 (1990) (notation rule not applicable if it thwarts the will of Congress).

We find that the public land records, specifically the August 12, 2005, MTP for the township and the August 12, 2005, supplemental MTP for secs. 26, 27, 34, and 35, reflect the fact that the land at issue in the S½NE¼ sec. 34 was subject to State selection A-058731. [5/] On its face, the notation of the selection notified the public that the affected land in sec. 34 was segregated from mineral entry.

The land on which the claim is located in the S½NE¼ sec. 34 is part of the Chugach National Forest. We have held that the filing of a State selection for national forest lands does not have any segregative effect under 43 CFR 2627.4(b) because national forest lands are not available for selection by the State. Hyak Mining Co., 119 IBLA 1, 3 (1991) (citing David Cavanagh, 89 IBLA 285, 293, 92 I.D. 564, 568 (1985), aff'd, Cavanagh v. Hodel, No. 86-041 Civil (D. Alaska (Mar. 18, 1988))). However, although Young asserts that the application has been rejected for the lands in question, which is not evidenced by the record, the notation of the selection on the MTPs continues to serve to independently segregate the affected land from mineral entry, until the notation is removed, and the land restored to mineral entry. [6/] See Hyak Mining Co., 119 IBLA at 3-4 (citing David Cavanagh, 89 IBLA at 299, 92 I.D. at 572). Since such a notation precludes the location of any mining claim, until the notation is removed from the public land records, and the land restored to mineral entry, any claim located prior to removal and restoration is properly declared null and void ab initio. Hyak Mining Co., 119 IBLA at 4-5, and cases cited.

[5/] Those documents each bear the handwritten notation: "9/25/06 KGoslin," indicating that they were examined by her prior to issuance of her decision.

[6/] In both Toohey and Cavanagh, we affirmed BLM decisions declaring placer mining claims null and void ab initio, and rejecting recordation filings, where the affected lands in the Chugach National Forest were segregated from mineral entry at the time of location, based on notation of State selection A-058731 and other State selections on the relevant MTPs. 89 IBLA at 299, 92 I.D. at 572; 88 IBLA at 92-93, 97, 92 I.D. at 332-33, 335. We also expressly stated, in both cases, referring to selection A-058731, that, "[r]egardless of whether the selection was void or voidable, its entry on the MTP segregated the mineral estate for all eligible lands within township 10 from other appropriations." 89 IBLA at 296-97 n.5, 92 I.D. at 571 n.5; 88 IBLA at 89 n.12, 92 I.D. at 330-31 n.12.

Absent evidence that BLM removed that notation from its public land records prior to location of the claim in question, location is barred by the notation rule, and the claim is properly declared null and void ab initio. See B. J. Toohey, 88 IBLA at 77-81, 92 I.D. at 324-26.

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. Young's petition for stay is denied as moot.

Bruce R. Harris
Deputy Chief Administrative Judge

CHIEF ADMINISTRATIVE JUDGE HOLT CONCURRING:

Although I concur that the notation rule, as interpreted and applied by prior decisions, and BLM's regulations, here dictate the outcome, this matter exposes the inequities that can result from adherence to a rule which in application makes the availability of the public lands to entry by otherwise entitled citizens subject to the whims of an agency's administrative efficiency. The Board has on occasion refused to be bound by the notation rule, holding that "it is clearly erroneous to apply the notation rule where to do so thwarts the will of Congress." Phelps Dodge Corp., 115 IBLA 214, 217 (1990) (where the applicable statute states that a classification resulting in segregation of public lands terminates automatically after certain time has elapsed, the Board will not apply the notation rule to thwart clear congressional intent). The case before us is not so different in practical effect.

According to the administrative record, the State of Alaska selected the lands at issue in 1963. However, the lands were located within the Chugach National Forest, and those lands were not available for selection under the relevant provisions of the Alaska Statehood Act. See Act of July 7, 1958, Pub. L. No. 85-508, § 6(b), 72 Stat. 339, 340. The State's purported selection clearly was counter to the express intent of Congress and the language of the authorizing statute. Notwithstanding this legally ineffective selection effort, and notwithstanding this Board's confirmation that such an ineffective attempt at selection results in no segregative effect on the selected lands, see Hyak Mining Co., 119 IBLA 1, 3 (1991), BLM noted the application on the public land records, and we have held that such a notation independently segregates the land from mineral entry, id. at 3-4.

To add insult to this clear injury to potential entrymen, in 1985, BLM apparently rejected the State's purported selection (according to communications between Young and the State), presumably because it was legally ineffective, but did not change the Master Title Plat to reflect its decision and end the segregative effect. As a result, twenty-one years later in 2006, a full forty-three years after the original legally void selection, the lands were still closed to any potential entryman, including Mr. Young.

It is difficult in general to argue against the recognized beneficial effects of this long-recognized rule, asserted as necessary for the orderly administration of the land laws. See, e.g., Martin Judge, 49 L.D. 171, 172 (1922); George E. Conley, 1 IBLA 227, 230 (1971). This Board has often acknowledged that "[t]he notation rule, * * * insofar as the public is concerned, strives to give to all the public an equal opportunity to file * * *." Margaret L. Klatt, 23 IBLA 59, 63 (1975). But despite the laudable goal of equal treatment for the public, in this case the rule has treated all

citizens equally unfairly. It has functioned to create a de facto closure of the public lands to all entry for forty-three years, based upon egregious agency inaction. Surely there is a better way to ensure fair entry onto the public lands.

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H. Barry Holt
Chief Administrative Judge