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SRBA



19963

DISTRICT COURT - SRDA
TWIN FALLS CO., IDAHO

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OFFICE OF THE
ATTORNEY GENERAL

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case No. 39576

) Subcase Nos.: 63-29070, and 63-29142
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**STATE OF IDAHO'S MEMORANDUM IN
OPPOSITION TO UNITED STATES' MOTION
FOR SUMMARY JUDGMENT**

INTRODUCTION

This memorandum of the State of Idaho is filed in opposition to the *Motion for Summary Judgment* filed by the United States. In summary, the State argues that the entry under the various public land disposal statutes, such as the Stock Raising Homestead Act, segregates the entered land from the public domain and that such land is not "unappropriated" land during the period of segregation. Since Public Water Reserve No. 107, (hereinafter "PWR 107") only applies to land that is vacant, unappropriated and unreserved public domain, the United States

cannot claim a federal reserved water right under PWR 107 for such land.

STATEMENT OF THE CASE

i. The Nature of the Proceeding

The present subcases present the legal issue of whether a federal reserved water right or a state beneficial use water should be determined to be appurtenant to springs located on the public domain when the real properties where the water rights are claimed were subject to entry by claimants under the various public land laws on the date of April 17, 1926—the date of entry of PWR 107.

ii. The Course of the Proceedings

The course of the proceedings relevant to the limited issue before the court may be briefly summarized as follows, for each of the two subcases: The United States filed its MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT and AFFIDAVIT OF FREDERIC W. PRICE (hereinafter “U.S. MEMORANDUM”), on December 19, 2003. A hearing on these motions is scheduled for February 4, 2004.

iii. Statement of Facts

Subcase No. 63-29070: On June 15, 1920, Fal B. Jenkins initiated a homestead entry under Section 2289, Revised Statutes of the United States for the real property that includes the place of use and point of diversion for subcase no. 63-29070. The United States assigned serial number (BL-041716) to this application. The application was subsequently cancelled on January 10, 1928 for failure to submit final proof. AFFIDAVIT OF FREDERIC W. PRICE, dated December 18, 2003, at 6; Attachment 1 at 11.

Subcase Nos. 63-29142: On April 3, 1919, George A. Pringle initiated a homestead entry under the Stock Raising and Homestead Act of December 29, 1916, ch. 9, 39 Stat. 862. for the

real property that includes the place of use and point of diversion for Subcase No. 63-29142. The United States assigned serial number (BL-041661) to this application. The application stated in part as follows:

I further state that the land applied for . . . does not contain any water hole or other body of water needed or used by the public for watering purposes

AFFIDAVIT OF FREDERIC W. PRICE, dated December 18, 2003, Attachment 2 at 50. Since a Mr. George A. Percy had also filed on a portion of this land, the General Land Office proceeded to adjudicate how the land should be divided between the two claimants. As a part of that process, George A. Pringle filed a Petition for Designation, which stated in part as follows:

Referring to the lands contained in my original entries my present application I do solemnly swear that there are no streams, springs, or bodies of water, or irrigation ditches, on or adjacent to said lands except small seepage springs on land in my present application (see plat).

That I propose to obtain water for stockwatering purposes from the seepage springs by digging them out and improving them.

AFFIDAVIT OF FREDERIC W. PRICE, dated December 18, 2003, Attachment 2 at 63.

The two claimants were given the opportunity to resolve the conflict between the two conflicting stock raising applications, and they failed to do so. The matter was submitted to the Commissioner of the General Land Office for resolution. AFFIDAVIT OF FREDERIC W. PRICE, dated December 18, 2003, Attachment 2 at 60. The Acting Assistant Commissioner initially found in favor of Mr. George A. Percy, subject to the right to appeal by Mr. George A. Pringle. AFFIDAVIT OF FREDERIC W. PRICE, dated December 18, 2003, Attachment 2 at 57-59. Mr. George A. Price filed an affidavit in support of his application, which stated in part as follows:

2nd: - The part over filed on by George A. Percy has a spring on it and this is very essential to make that which I have applied for suitable for pasture.

AFFIDAVIT OF FREDERIC W. PRICE, dated December 18, 2003, Attachment 2 at 55. Following review of the Price Affidavit, the Assistant Commissioner divided the land, and Mr. George A. Pringle received the land where the spring was located, being the N½NE¼ of section 18, Twp. 3 North, Rge. 4 East, B.M. AFFIDAVIT OF FREDERIC W. PRICE, dated December 18, 2003, Attachment 2 at 53. Neither applicant took any action from the decision of the Assistant Commissioner within the time allowed. Thus, the application of George A. Pringle was amended by interlineations to change the legal description and to reduce the stated acreage of the application in accordance with the decision of the Assistant Commissioner. AFFIDAVIT OF FREDERIC W. PRICE, dated December 18, 2003, Attachment 2 at 49-51.

Mr. George A. Pringle, thereafter, filed his NOTICE OF INTENTION TO MAKE PROOF on July 15, 1927; the notice was published, and a final proof hearing was held on August 25, 1927 and August 27, 1927. AFFIDAVIT OF FREDERIC W. PRICE, dated December 18, 2003, Attachment 2 at 44. An inspector from the General Land Office inspected the real property subject to the application of George A. Pringle on October 14th, 20th, and 21st, 1927. The report, dated December 12, 1927, stated that the inspector "found no water holes or evidence of mineral" and concluded "that the entryman in this case has placed no improvements on his additional stock-raising homestead entry for which credit may be allowed under the act of December 29, 1916" AFFIDAVIT OF FREDERIC W. PRICE, dated December 18, 2003, Attachment 2 at 23, 25. In response, Mr. Pringle relinquished the entire application on March 26, 1928. AFFIDAVIT OF FREDERIC W. PRICE, dated December 18, 2003, Attachment 2 at 18.

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ARGUMENT

- I. PWR 107 DOES NOT APPLY TO REAL PROPERTY THAT WAS SUBJECT TO AN ENTRY UNDER THE HOMESTEAD LAWS ON APRIL 17, 1926.

PWR 107 states:

[E]very smallest legal subdivision or the public land surveys which is **vacant, unappropriated, unreserved, public land** and contains a spring or waterhole, and all land within one quarter of a mile of every spring or waterhole located on unsurveyed public lands, be and the same is hereby withdraw from settlement, location, sale or entry, and reserved for public use in accordance with the provisions of Section 10 of the Act of December 29, 1916, 39 Stat. 865; 43 U.S.C. § 300) and in aid of pending legislation.

43 C.F.R. § 2321.1-1 (1967) (emphasis added). Here, it is uncontroverted that the subcases before the Court were subject to an entry under the homestead laws on April 17, 1926. The legal issue is whether the pendency of an entry under the public land laws takes this real property outside the scope of PWR 107. The general rule is that "[l]and 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 to the public domain is noted upon the records of the local land office." *California and Oregon Land Co. v. Hulen and Hunnicutt*, 46 Interior Dec. 55, 1917 WL 1344 (D.O.I.) (emphasis added). A copy is attached as Attachment I.

The Department of the Interior, (hereinafter "DOI"), continues to apply this rule that an entry or selection operates to segregate the land until later restoration to the public domain by a notation on the records of the local land office. This interpretation of the effect of an entry under the public land laws has become known as the "notation rule." The rationale for the rule has been summarized as follows:

The notation rule, which insofar as the public is concerned, strives to give all the public an opportunity to file presupposes that the item noted on the records, i.e. a homestead entry, oil or gas lease, patent, segregates the land from further conflicting appropriations. It assumes that the entry noted is valid and protects a

later would-be applicant who does not go behind it. . . . The record itself constitutes a bar to any other filing whatever the situation may be on the land itself.

B.J. Toohey, C.D. Toohey, & C.W. Toohey, 92 Interior Dec. 317, 1985 WL 264287 (D.O.I.). A copy is attached as Attachment II.

The definition of the word, "entry," is the critical inquiry here. Decisions of the DOI have long interpreted the word "entry" to be an appropriation of public lands. In *Lloyd Wilson*, 48 Interior Dec. 380, 1921 WL 1660 (D.O.I.), a copy is attached as Attachment III, First Assistant Secretary Finney concluded as follows:

While the word 'entry' is generally used in the statutes and departmental regulations relating to amendments, that word, when so used, should be taken in its generic sense and treated as 'signifying an appropriation of public lands' generally, as was said in *North and South Alabama Railroad Company* (2.L.D., 681, 682) where it was held that the word 'entry' as used in the repayment statutes included 'selection.'

Id. at 381; *see also Viola P. Dreyfus*, 61 Interior Dec. 149, 153 WL 6281 (D.O.I.). A copy is attached as Attachment IV.

Real property that is subject to an entry under the public land laws is appropriated land. Since the subject real property was not "vacant, unappropriated, unreserved public lands" when PWR 107 was entered, the United States is not entitled to claim a federal reserved water right.

II. THE UNITED STATES' ARGUMENTS DO NOT RESPOND TO THE FUNDAMENTAL LEGAL ISSUE HERE.

A. Introduction

The United States argues that there are five reasons for the Court to ignore the land entry status of land where the claimed PWR 107 spring is found as follows: (1) "A homestead entry application that is not perfected does not give the entryperson a real interest or a land appropriation." (2) "The Congressional authority for PWR 107 demonstrates that where entrypersons failed to comply with the homestead laws their entries do not defeat a withdraw

[sic] and reservation.” (3) “The Congressional authority for PWR 107 did not allow homestead entry onto lands containing bodies of water needed for the public.” (4) “For subcases involving claims made pursuant to PWR 107, the SRHA affidavits avowing that the entry does not contain any body of water needed or used by the public for watering purposes are not accurate.” (5) “The homestead entries for the land containing the water claimed in subcases 63-29070 and 63-29142 were relinquished, or cancelled, and do not demonstrate that the parcels of land were appropriated.” U.S. MEMORANDUM, at 5, 8, 9, 11, 12.

B. PWR 107 does not apply to real property that was subject to an entry on April 17, 1926.

The United States’ argument that “[a] homestead entry application that is not perfected does not give the entryperson a real interest or a land appropriation” is incorrect and inconsistent with DOI’s prior decisions. An entry is an appropriation of the land. The DOI has repeatedly described the legal effect of an entry as making a segregation of the land from the public domain. *Lloyd Wilson*, 48 Interior Dec. 380, 1921 WL 1660 (D.O.I.); *Viola P. Dreyfus*, 61 Interior Dec. 149, 153 WL 6281 (D.O.I.). Segregation of the land makes that land not “unappropriated” within the meaning of that term in PWR 107. Simply put, PWR 107, by its own terms, only applies to public land “which is vacant, unappropriated, unreserved, public land.” If the land was not unappropriated on April 17, 1926, then the United States is not entitled to a reserved water right for such lands.

C. The Congressional authority cited by the United States for PWR 107 does not apply here.

The United States argues that “[t]he legislative history of PWR 107 also demonstrates that homestead entries that failed to be perfected and patented could not defeat a withdrawal and

reservation." The United States' second argument concerns the following limitation¹ from section 2 of the Pickett Act:

That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; **but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made.**

Pickett Act or General Withdrawal Act of June 25, 1910, ch. 421, 36 Stat. 847, 848 (emphasis added). A copy is attached as Attachment V. This provision is a congressional limitation on the authority of the executive to make withdrawals under the Pickett Act. This limitation may be summarized as follows:

1. A withdrawal under this act shall not affect any land, which on the date of the withdrawal, was within a lawful homestead or desert land entry;
 - (i) except that this prohibition will not continue unless the entryman complies with applicable law.

The United States' argument turns this prohibition on executive action into a sword to deflect attention from the legal effect of the entry under the public land laws. The argument of the State is very straightforward. An entry under the public land laws segregates the land and, at least on a temporary basis, that land is not "unappropriated." The land does not become unappropriated until the records in the local land office are so noted. Since PWR 107 only applies to "vacant, unappropriated, unreserved, public land," PWR 107 does not apply to the land within the entry that was in effect on April 17, 1926.

¹ PWR 107 was entered under the authority of section 10 of the Stock Raising Homestead Act of December 29, 1916, ch. 9, 39 Stat. 862. Section 10 of this act incorporated the withdrawal procedures of the Pickett Act of June 25, 1910, ch. 421, 36 Stat. 847.

- D. The limitation in Section 10 of the Stock Raising Homestead Act regarding bodies of water does not change the result here.

Section 10 of Stock Raising Homestead Act provides, in part, as follows:

That lands containing water holes or other bodies of water needed or used by the public for watering purposes **shall not be designated under this Act** but may be reserved under the provisions of the [Pickett Act] . . .

39 Stat. 865. The United States argues that “as a matter of law, an entryperson could not appropriate land containing springs and waterholes needed or used by the public.” U.S. MEMORANDUM at 9. The United States ignores two significant limitations from section 10. First, this provision by its terms only applies to the Stock Raising Homestead Act. It does not amend any of the other acts that allowed for entry on the public domain. Second, it does not prohibit the homesteading of all land where waterholes or other bodies of water are found. Rather, the waterhole or other body of water must be “needed or used by the public.”

The present record illustrates this limitation regarding the subcases before the Court. Mr. George Pringle, the entryman for the land within subcase no. 63-29142, disclosed in his papers the existence a small seepage spring. AFFIDAVIT OF FREDERIC W. PRICE, dated December 18, 2003, Attachment 2 at 63. The spring was on the land overfilled by a Mr. George Percy, and Mr. George Pringle wanted the land because of the existence of the spring. *Id.* Later, an inspector from the General Land Office reviewed the final proof of Mr. George Pringle in 1927. He dismissed any concern about this limitation in the Stock Raising Homestead Act with the following statement: “[F]ound no water holes or evidence of mineral.” *Id.* at 23, 25. Thus, an inspector with the General Land Office, who was under a duty to identify such water holes or other bodies of water needed or used by the public, concluded none existed on that parcel even though the entryman had advised the General Land Office of the existence of the seep. The only

conclusion is that the seep identified by Mr. Pringle did not qualify as a water hole or other body of water needed or used by the public for watering purposes.

Accordingly, the United States has overstated this limitation when the United States concludes: "Accordingly, stock-raising lands containing a spring or waterhole were never legally 'appropriated by entrypersons under the SRHA.'" U.S. MEMORANDUM at 10. The spring or waterhole had to be "needed or used by the public" for the body of water to be within the prohibition of section 10 of the SRHA.

E. The Court has no basis for adopting the United States' blanket characterization of SRHA affidavits as not accurate.

The United States argues as follows:

As discussed above, the SRHA affiant had to swear the land he or she was applying to homestead did not contain any water hole or other body of water needed or used by the public for watering purposes. Despite this requirement, many parcels of public lands that were claimed under the SRHA do contain springs and waterholes necessary for use by the public. We can be certain of this because the BLM has visited these sites and conducted field verification of the springs' or waterholes existence and filed PWR 107 claims for these sources in the SRBA.

U.S. MEMORANDUM, at 11. The United States suggests that these affidavits aver that no water sources existed because of gross speculation and fraudulent behavior or because of unfamiliarity with the land entry parcel. *Id.*

Many problems exist with this argument. First, an inspection after commencement of the SRBA in 1987, and confirmation of the existence of a spring at that time does not assure that the water source actually existed in 1926. Second, courts in Idaho have required that allegations of fraud be established by clear and convincing evidence. *Sowards v. Rathbun*, 134 Idaho 702, 8 P.3d 1245 (2000). Here, the United States has not offered that sort of proof specific to each claim before the Court. Third, the present record establishes just the opposite regarding the subcases before the Court. As explained above and in the Statement of Facts, Mr. George

Pringle, the entryman for the land within subcase no. 63-29142, disclosed in his papers the existence of a small seepage spring. AFFIDAVIT OF FREDERIC W. PRICE, dated December 18, 2003, Attachment 2 at 63. Nothing in those papers suggests that the affidavit was not completely accurate.

F. The parcels of land claimed in subcases 63-29070 and 63-29142 were not unappropriated on April 17, 1926.

The United States argues as follows: "Finally, the facts surrounding the failed homesteads on the land containing the springs claimed in subcases 63-29142 and 63-29070 confirm that the land was never 'appropriated.'" The United States has again misstated the argument regarding the existence of a pending entry on the date of April 17, 1926 and has ignored completely the ordinary interpretation of the word "entry" by the DOI. *Loyd Wilson*, 48 Interior Dec. 380, 1921 WL 1660 (D.O.I.); *Viola P. Dreyfus*, 61 Interior Dec. 149, 153 WL 6281 (D.O.I.).

The United States also ignores the legal consequences of the "notation rule" discussed above. In *B. J. Toohey, C. D. Toohey, & C. W. Toohey*, 92 Interior Dec. 317, 1985 WL 264287 (D.O.I.) (Attachment II), the notation rule is explained:

The notation rule was explained in an enclosure to a letter dated April 20, 1964, to the United States Attorney, Salt Lake City, from Attorney General Clark re *Jay P. Nielson v. J.E. Keogh*, Civ. No. C-1580-63, as follows:

[I]t was held long ago that when a homestead entry is made, even though erroneously, the land is considered as withdrawn from further entry until such time as the entry has been cleared from the records.

Id. at 324. . For both of the subcases before the Court, it is undisputed that an entry was pending on the date of April 17, 1926. The existence of that entry means that the land is segregated, at least on a temporary basis, from the public domain until that entry is resolved. Therefore, the land is not "unappropriated."

III. PAST DECISIONS OF THE DISTRICT COURT DO NOT REQUIRE A DIFFERENT RESULT.

A. Special Master Haemmerle's Decision.

Special Master Haemmerle issued an earlier decision on the *prima facie* elements of a PWR 107 spring on November 16, 1998. ORDER DENYING MOTION FOR DEFAULT JUDGMENT (PWR 107). This decision stated, in part, as follows:

PWR 107 provides:

It is hereby ordered that every smallest legal subdivision of public land surveys which is **vacant, unappropriated, unreserved public land . . .**

Under the express provisions of PWR 107, the United States alleges that the *prima facie* elements for a PWR 107 reserve are as follows:

- a. Identification of a spring or waterhole;
- b. Located on **land that was unreserved federal public lands in 1926;**
- and
- c. Containing sufficient water for purposes of stock watering.

This court agrees with these *prima facie* elements.

Id. at 2-3 (citations omitted; emphasis added). The decision contains no analysis that justifies or explains the deletion of the words, vacant and unappropriated, from the *prima facie* elements. If the United States is suggesting that the Special Master had the authority to rewrite PWR 107 by deleting these words, the United States has offered no basis for this legal conclusion. The most that can be said is the use of the word, "unreserved," in the statement of the *prima facie* elements is simply a shorthand method of referring to the longer phrase contained in PWR 107. This past decision provides no basis for ignoring the express language of PWR 107.

B. Special Master Cushman's Decision.

Special Master Cushman held a hearing on December 9, 2002 on eighteen dual-based water rights claimed by the United States Department of the Interior, Bureau of Land Management. He found that "the place of use for water rights 65-19960 and 65-19962 were homesteaded at the time that President Coolidge signed the enactment of Public Water Reserve

107.” Special Master Cushman, accordingly, recommended that these two rights be decreed as state-based water rights. *Special Master’s Report and Recommendation*, Subcase Nos. 65-19812 et al., at 2. On January 27, 2003, the United States filed a *Motion to Alter or Amend*. Although briefing was completed and a hearing held, that motion is still pending. The result reached by Special Master Cushman is consistent with the position taken by the State of Idaho in the present proceeding.

C. Special Master Dolan’s Decision.

Special Master Dolan held a hearing on May 15, 2003 regarding 16 subcases in Basins 35 and 43, among others. During the hearing the State of Idaho learned that the United States had not investigated whether there were homestead entries pending for these sixteen subcases on April 17, 1926. Because Special Master Cushman had raised this issue *sua sponte*, and because that issue was pending before Special Master Cushman, Special Master Dolan postponed further consideration of this issue for three months, or until Special Master Cushman issued a decision. Since Special Master Cushman had not issued a decision after three months, Special Master Dolan proceeded to set the matter for hearing. The United States filed a *Motion for Summary Judgment and Memorandum in Support and Affidavit of Frederic W. Price*. When the State of Idaho reviewed the *Affidavit of Frederic W. Price*, it determined that it had no basis for continuing an objection for any of the sixteen subcases, and filed a *Motion to Withdraw* at that point in time. The United States filed a response where it still asked the Court to decide the issue of whether it had to research the land entry status of subcases involving PWR 107. Special Master Dolan thereafter issued his *Special Master’s Report*, Subcase Nos. 35-12296 et al. Special Master Dolan concluded that “the Special Master does not intend to rule on the BLM’s *Motion for Summary Judgment* – solely to avoid potential error.” *Id.* at 6. Nonetheless, Special Master Dolan went on to describe the argument of the United States.

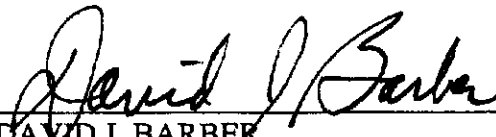
CONCLUSION

The United States has not responded to the fundamental legal issue before the Special Master whether the real property that is subject to an application for entry under the public land laws qualifies as "vacant, unappropriated, unreserved public domain" under PWR 107. The State of Idaho submits that the existence of an entry on such real property means that the land is not "unappropriated" and that such land does not qualify as a PWR 107 spring. Such real property must take the state law water right.

RESPECTFULLY Submitted this 9th day of January 2004.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO



DAVID J. BARBER
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on this 9th day of January 2004, I caused to be served the original and true and correct copies of the **STATE OF IDAHO'S MEMORANDUM IN OPPOSITION TO UNITED STATES' MOTION FOR SUMMARY JUDGMENT** on the following parties by the methods indicated below:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 27007
Twin Falls, ID 83303-2707

☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Federal Express
☐ Facsimile: (208) 736-2121
☐ Statehouse Mail

2. One copy to the claimant of the water right:

R. Lee Leininger
Trial Attorney, U.S. Dept. of Justice
General Litigation Section
Environment and Natural Resources Div.
550 West Fort Street, MSC 033
Boise, ID 83724

☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Federal Express
☐ Facsimile: (303) 312-7379
☐ Statehouse Mail

3. Copies to

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Boise, ID 83720-0098

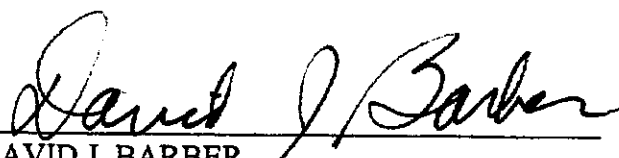
STATEHOUSE MAIL

Chief of Natural Resource Division
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(not applicable)

United States Department of Justice
Environment and Natural Resource Division
550 W. Fort Street, MSC 033
Boise, ID 83724

U.S. MAIL



DAVID J. BARBER
Deputy Attorney General

LIST OF ATTACHMENTS

- ATTACHMENT I: *California and Oregon Land Co. v. Hulen and Hunnicutt*, 46 Interior Dec. 55, 1917 WL 1344 (D.O.I.)
- ATTACHMENT II: *B.J. Toohey, C.D. Toohey, & C.W. Toohey*, 92 Interior Dec. 317, 1985 WL 264287 (D.O.I.)
- ATTACHMENT III: *Lloyd Wilson*, 48 Interior Dec. 380, 1921 WL 1660 (D.O.I.)
- ATTACHMENT IV: *Viola P. Dreyfus*, 61 Interior Dec. 149, 153 WL 6281 (D.O.I.).
- ATTACHMENT V: Pickett Act or General Withdrawal Act of June 25, 1910, ch. 421, 36 Stat. 847.

46 Pub. Lands Dec. 55

(Cite as: 46 Pub. Lands Dec. 55, 1917 WL 1344 (D.O.I.))

Department of the Interior (D.O.I.)

****1 CALIFORNIA AND OREGON LAND CO.**

v.

HULEN AND HUNNICUTT

Decided March 17, 1917

***55 Vacation of Patent--Notation of Restoration--When Lands Subject to Appropriation.**

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 to the public domain is noted upon the records of the local land office.

***56 Prior Decision Overruled in Part.**

So much of the decision in the case of Sarah V. White (40 L. D., 630), as holds that land restored to the public domain as the result of vacation of patent thereby becomes subject to settlement, if unappropriated, is overruled.

The California and Oregon Land Company has appealed from the decision of the Commissioner of the General Land Office, dated May 12, 1916, rejecting its forest lieu selection under the act of June 4, 1897 (30 Stat., 36), for Lots 1, 2, 7, 8, 9, 10, 15 and 16 of Sec. 28, T. 21 S., R. 2 W., W. M., Roseburg, Oregon, land district.

The lands described were formerly embraced in two patented entries, which were canceled by decrees of court. The local officers were, by letter of December 9, 1915, advised by the Commissioner of the General Land Office that the decrees had been recorded, and they were directed to post in their office, and to give to the press as a matter of news, a notice to the effect that on a date thirty days hence they would note the restoration of the lands upon the records of their office, and that thereupon they would be subject to all forms of appropriation permitted by the public land laws appropriate thereto.

The local officers issued notice as directed, setting January 18, 1916, at 2 o'clock p. m., as the hour of opening said lands to entry.

Within twenty days prior to January 18, 1916, as provided in the regulations of May 22, 1914 (43 L. D., 254), William Hulen presented his application to make homestead entry for Lots 1, 2, 7, and 8 of said Sec. 28; Ulysses I. Hunnicutt presented a like application for Lots 9, 10, 15, and 16 of said section, and the California and Oregon Land Company, by Robert E. Smith, its attorney in fact, presented its forest lieu selection for all of the lands.

Hulen and Hunnicutt having alleged prior settlement, the local officers allowed their applications, and rejected the forest lieu selection for conflict therewith. The Commissioner held that, the local officers having followed the regulations of May 22, 1914, supra, the applications had been properly disposed of.

The Commissioner's decision is based on the assumption that the lands became subject to settlement when the prior patents were canceled by the court decrees. In this he erred. The correct rule is that when a decree canceling a land patent becomes finally effective, the patented lands are thereby restored to the public domain, but they are not thereby restored to appropriation until the local officers are instructed by the Commissioner that the lands are restored to entry and have in accordance with instructions made notation of restoration upon the records of the local office. See cases of Hiram M. Hamilton (38 L. D., 597) and Sarah V. White (40 L. D., 630). In the latter case it was held:

****2 *57** By a final decree of cancellation of patent, land once patented becomes part of the public domain, subject to settlement, . . . if unappropriated, but does not become subject to entry until opened to entry by the General Land Office.

The quoted holding was not necessary to the disposition of the case, and the orderly administration of the land laws forbids any departure by the Department from 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 to the public domain is noted upon the records of the local land office. So much of the White decision as holds to the contrary is overruled.

It follows that, instead of recognizing any claim of prior settlement, a drawing should have been had, as directed by paragraph 4 of the regulations of May 22, 1914, *supra*. However, Hulen's entry was canceled on relinquishment filed October 17, 1916, and Hunnicutt's entry was likewise canceled on January 29, 1917. The selection of the California and Oregon Land Company will therefore be allowed, if no other objection exists.

The decision is reversed.

Vogelsang
First Assistant Secretary
46 Pub. Lands Dec. 55, 1917 WL 1344 (D.O.I.)
END OF DOCUMENT

92 Interior Dec. 317

88 IBLA 66

(Cite as: 92 Interior Dec. 317, 1985 WL 264287 (D.O.I.))

Department of the Interior (D.O.I.)
Interior Board of Land Appeals

****1 B. J. TOOHEY, C. D. TOOHEY & C. W. TOOHEY**

Decided: July 23, 1985

***317** Appeal from three decisions of the Alaska State Office, Bureau of Land Management, declaring unpatented mining claims null and void ab initio and rejecting location notices filed for recordation. AA-43572 through AA-43608, AA-43609 through AA-43655, and AA-43831 through AA-43850.

Affirmed as modified.

1. Alaska: Statehood Act--Mining Claims: Lands Subject to--Segregation--State Selections

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of a state's application to select lands, where the filing is regular on its face, segregates the lands from all subsequent ***318** appropriation, including location and entry under the mining laws. Where a selection application filed by the State of Alaska pursuant to sec. 6(b) of the Alaska Statehood Act, 72 Stat. 339, seeks to include national forest lands, the application is not regular on its face because national forest lands cannot be selected under authority of sec. 6(b) of the Act.

2. Mining Claims: Lands Subject to--Segregation--State Selections

Under the so-called "notation" or "tract book" rule, after a state selection application is filed and noted on official land office records, the mere notation or recording of the application 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.

3. Mining Claims: Lands Subject to--Segregation--State Selections

It was not error for the Bureau of Land Management to invoke the "notation rule" on the basis of state selection applications noted on its master title plats, regardless of what other records may have conveyed regarding the validity of the applications. The ordinary citizen contemplating a proposed use of the public lands would quite reasonably look to other than lands embraced in Tps. 10 and 11 N., Rs. 2 E., Seward Meridian, upon discerning from the master title plats for these townships that they were included in State selection applications. Further, there is nothing on the face of the master title plats that would suggest the State selection entries were invalid.

4. Mining Claims: Lands Subject to--Segregation--State Selections

Although the Board has on one occasion undertaken an in pari materia consideration of various land status records (i.e., the master title plat, historical index, and serial register sheets for a state selection application) as a further method of determining whether public lands were appropriated at a particular time, this was only done because of a conflict noted between the plat and the index. Here, an in pari materia consideration of the historical indices and the serial register sheets in conjunction with the master title plats fails to establish that Chugach National Forest lands (on which appellant's mining claims were located) were excluded from any of the four State selection applications at issue or that such selection applications were rejected in part to the extent national forest lands were included in the applications.

5. Mining Claims: Lands Subject to--Withdrawals and Reservations: Generally

****2** Under regulations in effect before 1976, a withdrawal application segregated all lands affected thereby upon the recording of the application on the master title plat and such segregation remained effective until the application was adjudicated and a notice of determination published in the Federal Register. Withdrawal applications filed after enactment of the Federal Land Policy and Management Act of 1976, 43 U.S.C. ss 1701-1784 (1982), are governed by distinct statutory and regulatory provisions. Thus, under sec. 204 of the Act (43 U.S.C. s 1714) Congress has required that the segregative effect of a withdrawal application terminates upon the expiration of 2 years from the date of the Federal Register notice regarding the filing of the withdrawal application. In view of this clear statutory mandate, it was error for the Bureau of Land Management to extend application of the "notation rule" to Forest Service withdrawal application AA-23139, filed after enactment of the Federal Land Policy and Management Act of 1976, as grounds for rejecting appellants' mining claim locations.

APPEARANCES: R. Eldridge Hicks, Esq., Anchorage, Alaska, for appellants; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

***319 OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON**

Appeal is taken from three June 30, 1982, decisions of the Alaska State Office, Bureau of Land Management (BLM), declaring unpatented placer mining claims of B. J. Toohey, C. D. Toohey, and C. W. Toohey (appellants) null and void ab initio and rejecting location notices filed for recordation. Events surrounding the three groups of claims are set forth below.

Claims AA-43572 through AA-43608

(Golden Claims 101 through 137)

Location notices for the above 37 placer mining claims were filed on June 11, 1981, by Cynthia D. Toohey and her daughter, Camden W. Toohey, with the Alaska State Office, BLM, pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. s 1744 (1982). The location notices indicate the claims were all located on March 14, 1981, within an area

encompassed by protracted secs. 3, 4, 9, 10, and 11, partially surveyed T. 10 N., R. 2 E., Seward Meridian, Alaska. Appellants submit that these claims lie entirely within the Chugach National Forest, although BLM's decision states that they lie partially within the National Forest.

BLM's June 30, 1982, decision rejected the recordation filings and declared the claims null and void ab initio on the following grounds: (1) State selections A-053727, A-058731, and A-063695 segregated the land pursuant to 43 CFR 2627.4(b); (2) a portion of the claims lie within land patented to the State in 1972 by patent No. 50-73-0028; and (3) the notation on the master title plat (MTP) of Forest Service withdrawal application AA-23139 segregated the land from mineral entry pursuant to the "Notation Rule."

Claims AA-43609 through AA-43655

(Glacier Claims 201 through 247)

****3** Location notices for the above 47 placer mining claims were filed June 11, 1981, by Cynthia and Camden Toohey with the Alaska State Office. The notices reflect that these claims were located on March 14, 1981, within an area encompassed by protracted sec. 2, partially resurveyed T. 10 N., R. 2 E., and protracted secs. 25, 27, 34, 35, and 36, unsurveyed T. 11 N., R. 2 E., Seward Meridian, Alaska. These claims lie entirely within the Chugach National Forest. BLM's final decision regarding the foregoing claims states:

Because all of the mining claims in Tps. 10 N. and 11 N., R. 2 E., Seward Meridian listed on the attached appendix were located in March 1981, after the lands in question had been segregated from mineral entry by Forest Service withdrawal application AA-*320 6060, and State selection applications A-053727, A-063695, and A-067451, all 47 placer mining claims listed on the attached appendix are declared null and void ab initio, and the FLPMA recordation filings are rejected in their entirety.
BLM June 30, 1982, decision at 2.

Claims AA-43831 through AA-43850

(Toohey Claims 1-16, 19-21, 24-26, 31-32) [FN1]

Location notices for the above 20 placer mining claims were filed June 29, 1981, by B. J. Toohey and his wife, Cynthia Toohey, with the Alaska State Office. The notices reflect that these claims were located on April 6, 1981, and April 13, 1981, and lie within an area encompassed by protracted sec. 3, partially surveyed T. 10 N., R. 2 E., and protracted secs. 27 and 34, unsurveyed T. 11 N., R. 2 E., Seward Meridian, Alaska. These lands are situated entirely within the Chugach National Forest. BLM's final decision regarding these claims states:

Because all of the mining claims in Tps. 10 N. and 11 N., R. 2 E., Seward Meridian listed on the attached appendix were located in April 1981, after the lands in question had been segregated from mineral entry by Forest Service withdrawal application AA-6060, and State selection applications A-058731, A-053727, A-063695, and A-067451, all 20 placer mining claims listed on the attached appendix are declared null and void ab initio, and the FLPMA recordation filings are rejected in their entirety.

Appellants' Position

Noting that all four State selection applications cited by BLM identify the entirety of T. 10 N., R. 2 E. and/or T. 11 N., R. 2 E., Seward Meridian, [FN2] including lands which lie within the Chugach National Forest, appellants submit that such applications are defective because section 6(b) of the Alaska Statehood Act, 72 Stat. 339, does not allow for selections within the Chugach National Forest. As stated by appellants, "The State of Alaska simply has found it expedient to list an entire township in its applications, without initial regard for the legality of selecting that full area" (SOR at 6).

***321** Appellants acknowledge that section 6(a) of the Statehood Act permits State selections from national forest lands, [FN3] but state: "It simply is indisputable that the four State selection files are generically Section 6(b) applications, which, by operation of law, do not apply to national forest lands" [FN4] (SOR at 7).

****4** In addition to arguing that the State selections had no actual segregative effect, issue is taken with BLM's position that, valid or not, the mere recording of a State selection on the MTP operates to bar the land from further appropriation. The same position, an embodiment of the "notation rule," discussed *infra*, is set forth in the decisions appealed from concerning the effect of two Forest Service withdrawal applications noted on the MTP prior to the filing of the mining claim location notices here involved.

Discussion

[1] We first examine whether the State selection applications independently bar appellants' claims. Two Departmental regulations are pertinent to this inquiry, each of which attributes a segregative effect to the filing of a State selection application.

At 43 CFR 2091.6-4, it is provided:

Lands desired by the State under the regulations Subpart 2600 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 as provided in s 2627.3(c). Such segregation will automatically terminate unless the State publishes first notice as provided by s 2627.4(c) within 60 days of service of such notice by the appropriate officer of the Bureau of Land Management.

***322** With respect to State selections in Alaska, 43 CFR 2627.4(b) provides:

(b) Segregative effect of applications. Lands 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 as provided in s 2627.3(c)(1)(iii), (iv), and (v). Such segregation will automatically terminate unless the State publishes first notice as provided by paragraph (c) of this section within 60 days of service of such notice by the appropriate officer of the Bureau of Land Management.

While the above regulations, in effect since 1971, clearly attribute segregative effect through the filing of State selection applications, appellants submit that the regulations contain important qualifications that the selections at issue fail to meet. Thus, it is noted that section 2627.4(b) allows for segregation only of lands "desired" by the State and that the State could not possibly have desired lands within the Chugach National Forest through the filing of a selection application under section 6(b) of the Statehood Act when that section does not allow for selections within national forests.

There is little doubt that the four State selection applications were filed pursuant to section 6(b) of the Statehood Act. As to three of these, A-053727, A-058731, and A-063695, BLM so labeled the applications in its June 30, 1982, decision rejecting mining claim location notices filed by David Cavanagh and Gary McCarthy, a case also before the Board on appeal [FN5] which involves similar issues of fact and law. The other State selection application at issue, A-067451, has also been regarded by BLM as a section 6(b) application, and, in fact, by decision dated June 17, 1980, this application was rejected in part due to its inclusion of Chugach National Forest lands.

****5** In its Answer Brief, [FN6] BLM disputes appellants' contention that the State of Alaska did not "desire" lands within the Chugach National Forest:

These regulations [43 CFR 2091.6-4 and 2627.4(b)] cannot be distinguished on the basis of the appellants' assertions that the State did not "desire" the land in dispute since it was actually unavailable to the State. The land is not only clearly described in the three State selections, but letters from the State of Alaska, which are contained in the official BLM record, specifically state that the State wants all the land in T. 10 N., R. 2 E. * * * The only exclusion mentioned by the State is for patented (non-federal) land. National forest land is not specifically excluded from the State's explicit application for the entire township. [Italics in original.] (Answer Brief at 4-5).

The State of Alaska has not appeared in this case. The State's alleged desire for Chugach National Forest lands, as propounded by BLM on appeal, is belied, however, by its failure to appeal BLM's June 17, 1980, decision rejecting in part State selection application A-067451, not to mention its nonparticipation in this proceeding. The foregoing decision states in pertinent part:

***323** On March 10, 1966, the State of Alaska filed general purposes grant selection applications A-067449, A-067450, and A-067451, for lands in Tps. 12 and 13 N., R. 3 E. and T. 11 N., Rs. 2 and 3 E., Seward Meridian, under the provisions of Sec. 6(b) of the Statehood Act. These lands are located in the Chugach Mountains and the State's selections were valid at the time of filing.

The original application for A-067451 was for all lands outside the Chugach National Forest, however, subsequent amendments were filed which included all the lands within T. 11 N., Rs. 2 and 3 E., Seward Meridian.

* * * * *

The lands described which are within the Chugach National Forest, approximately 18,280 acres in T. 11 N., R. 2 E., Seward Meridian and 21,120 acres in T. 11 N., R. 3 E., Seward Meridian * * * were not, at the time of selection, nor are they now, vacant, unappropriated, or unreserved (43 CFR 2627.3(a) [[FN7]] and therefore are not proper for selection and are hereby rejected.

BLM's Answer Brief is noticeably silent regarding the above decision. Appellants' SOR here and in Cavanagh takes due note of the significance of this adjudicatory action as far as the segregative effect of the pendency of State selection application A-067451 is concerned.

In John C. and Martha W. Thomas (On Reconsideration), 59 IBLA 364 (1981), the Board agreed that the provisions of 43 CFR 2091.6-4 and 2627.4(b) attribute a segregative effect to the filing of a State selection application. We stated, however:

The only limitation is that the selection must be "regular on its face." State of New Mexico, 46 L.D. 217, 222 (1917), overruled on other grounds, 48 L.D. 97 (1921). There is no evidence in

the present case that State selection application F-43788 was not regular on its face when filed. [Footnote omitted.]

****6** Id. at 367.

Neither BLM nor the Board found the State selection application to be irregular in Thomas. This cannot be said here. As to State selection application A-067451, BLM has formally ruled that the State could not select Chugach National Forest lands in its section 6(b) application. Appellants submit that the same decision was made by BLM in 1966 concerning State selection application A-053727. [FN8] We agree that a plain reading of the Statehood Act and the Department's implementing regulations conveys that national forest lands are not to be selected under authority of section 6(b) of the Act. [FN9]

***324** [2] However, it has been held that after a State selection application is filed and noted on official land office records, the mere notation or recording of the application has the effect of segregating the land from all subsequent appropriations, including locations under the mining laws, regardless of whether the selection was void or voidable. Thomas, *supra*, at 366. This is the so-called "notation" or "tract book" rule.

The notation or tract book rule is not a creature of regulation; [FN10] rather, it has evolved through adjudication, dating from the early days of the General Land Office to the present. In 1917, First Assistant Secretary Vogelsang recited:

[T]he orderly administration of the land laws forbids any departure by the Department from 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 to the public domain is noted upon the records of the local land office. California and Oregon Land Co. v. Hulen and Hunnicutt 46 L.D. 55, 57 (1917).

The notation rule has been described as an equal protection doctrine, grounded in fairness to the public at large. In Margaret L. Klatt, 23 IBLA 59 (1975), we stated:

The notation rule, which insofar as the public is concerned, strives to give to all the public an equal opportunity to file (Max L. Kreeger, 65 I.D. 185, 191 (1965)) presupposes that the item noted on the records, i.e., a homestead entry, oil or gas lease, patent, segregates the land from further conflicting appropriations. It assumes that the entry noted is valid and protects a later would-be applicant who does not go behind it. That is, a notation of a patent on the records segregates the land it describes from a later application, even though the patent is invalid. A later applicant, knowing of the invalidity, can gain no right to the land until the patent is canceled and the cancellation noted on the proper records. Anyone else interested in the land, whether he knows of the defect or not, can also rely on the fact that no other person can establish a prior right so long as the entry remains of record. The record itself constitutes a bar to any other filing whatever the situation may be on the land itself. Thus, everyone may rely on the record to give him an equal opportunity to file when the land again becomes available.

****7** 23 IBLA at 63-64.

Applying the notation rule to an oil and gas leasing case, the Board said the following in Paiute Oil & Mining Corp., 67 IBLA 17 (1982):

The notation rule was explained in an enclosure to a letter dated April 20, 1964, to the United States Attorney, Salt Lake City, from Attorney General Clark re Jay P. Nielson v. J. E. Keogh, Civ. No. C-158-63, as follows:

[I]t was held long ago that when a homestead entry is made, even though erroneously, the land is considered as withdrawn from further entry until such time as the entry has been cleared from the records. Bunker Hill Co. v. United States, 226 U.S. 548, 550 (1913); McMichael v. Murphy,

197 U.S. 304, 310-312 (1905); *Hodges v. Colcord*, 193 U.S. 192, 194-196 (1904); *Hastings etc. Railroad Co. v. Whitney*, 132 U.S. 357, 360-366 (1889); *Putnam v. Ickes*, 64 U.S. App. D.C. 339, 342, 78 F.2d 223, 226 (1935); *Germania Iron Co. v. James*, 89 Fed. 811, 814-817 (C.A. 8, 1898), app. dismiss. 195 U.S. 638.

*325 Historically, then, no rights can be obtained in that part of the public domain which has been segregated by reason of a pre-existing appropriation—even one subsequently found to be invalid. This same principle has long been applied by the Secretary to oil and gas leases. Within two years of the enactment of the Mineral Leasing Act, it was held in *Martin Judge*, 49 L.D. 171, 172 (1922) that "until an outstanding permit is canceled by the Commissioner and the notation of the cancellation made in the local office, no other person will be permitted to gain any right to a permit for the same class of deposits by the filing of an application therefore, or by the posting of notice of intention to apply for such a permit." None of the numerous amendments of the Act since 1922 has questioned the *Martin Judge* decision which has been uniformly followed by the Department of the Interior. *Joyce A. Cabot*, 63 I.D. 122-123 (1956); *R. B. Witaker*, 63 I.D. 124, 126-128 (1956); *Albert C. Massa*, 63 I.D. 279, 286 (1956). [Italics added.] 67 IBLA at 20.

Among other things, appellants submit that "the concept of a 'notation rule' itself was implicitly overruled by the U.S. District Court in *Kalerak v. Udall*, Civil A-35-66 (D. Ark., October 20, 1966)" and that on review by the Ninth Circuit Court of Appeals, "that court refused to reach the issue of whether the lower court ruling was correct. 396 F.2d 748" (SOR at 14).

The above litigation evolved from a Departmental decision in *State of Alaska*, 73 I.D. 1 (1966), applying the notation rule to appropriations of record that were void or voidable. The reversal of this decision by the Federal district court in *Kalerak v. Udall*, supra, and the Ninth Circuit's subsequent review of the district court's decision was scrutinized by the Board in *State of Alaska*, 6 IBLA 58, 79 I.D. 391 (1972):

As pointed out in *Cabot*, supra, at 123, whether the outstanding record appropriation is void or voidable is immaterial. If such appropriation is outstanding on the tract books, the land is not subject to further appropriation, citing *Martin Judge*, 49 L.D. 171 (1922). See *Sarah Ann Christie*, 3 IBLA 7 (July 6, 1971); *George E. Conley*, 1 IBLA 227 (January 13, 1971).

**8 It is true that in *Kalerak v. Udall*, Civil A-35-66, U.S.D.C. Alaska, October 20, 1966, the United States District Court found that the application of the State of Alaska, filed while the lands were withdrawn, " * * * was a nullity * * * " and " * * * [t]he so-called amendments, or additional selections during the 90-day period [restoration preference right period for the State to file selections], which did not embrace the lands selected on January 8, 1963 [at which time the lands were withdrawn], did not serve to validate the prior void selection."

The district court did not address itself specifically to the *Cabot* doctrine spelled out above, but implicitly it did not regard that doctrine as having any force.

However, the United States Court of Appeals for the 9th Circuit decision in *Kalerak*, at 396 F.2d 748, reversed the district court decision on the issue of the amendments and stated:

We need not decide whether the district court erred in declining to accept the Secretary's alternative ruling that Alaska's original application, even if defective, accomplished a segregation of lands which prevented plaintiffs from acquiring rights therein while the segregation remained in effect.

We adhere to the *Cabot* doctrine that an entry outstanding on the proper records of the land office, even though the entry may be void or voidable precludes the appropriation of the land until it is canceled on such records.

73 I.D. at 395-96.

*326 That the judiciary has in fact embraced the notation rule in a long line of cases is chronicled by BLM as follows:

The notation rule is not, however, just a Departmental policy, as the appellants suggest. Rather, the courts have consistently adhered to and enforced the rule. *Hodges v. Colcord*, 193 U.S. 192, 194-195 (1904); *McMichael v. Murphy*, 197 U.S. 304, 310-312 (1905); *Holt v. Murphy*, 207 U.S. 407, 415 (1907); *Germania Iron Co. v. James*, 89 F. 811 (9th Cir. 1898); *Neff v. United States*, 165 F. 273, 281 (8th Cir. 1908); *Wright v. Paine*, 289 F.2d 766, 768 (D.C. Cir. 1961); and *United States v. Central Illinois Public Service Company*, 365 F.2d 121, 122 (7th Cir. 1966), cert. denied, 386 U.S. 308 (1967).

As early as 1898 the Eighth Circuit Court of Appeals found it error to not follow the "settled practice" and "long line of decisions by department officers" that until a notation of cancellation was made the land was not open for entry or disposal. *Germania Iron Co. v. James*, supra, 89 F. at 812. The Circuit Court specifically found that the notation rule "was reasonable and just," *Id.*, 814, and "... gave equal opportunities to all applicants, brought the necessary information to the local land officers in time to enable all who intended to apply for the land to obtain and act upon it without expense, and was fair, fitting, just, and reasonable." *Id.*, 815. The Eighth Circuit Court later reaffirmed this by holding:

**9 The general rule, repeatedly announced by the Supreme Court and followed by the Land Department, is that an entry of public land under the laws of the United States segregates it from the public domain, brings it within the exceptions of the railroad land grants, appropriates it to private use, and withdraws it from subsequent entry or acquisition until the prior entry is officially canceled and removed [citations omitted].

Neff v. United States, supra, 165 F. at 281.

* * * * *

More recently, another circuit court decision held:

An entry on public land which is prima facie valid, even though subsequently declared void, segregates the land from the public domain and prevents a second entryman from obtaining any interest in it until the prior entry has been set aside. *McMichael v. Murphy*, 197 U.S. 304, 311, 25 S.Ct. 460, 49 L.Ed. 766 (1905). Since the Walker entry was still a matter of official record, Nikle acquired no interest in the land and his certificate was properly cancelled. *Cornelius v. Kessel*, 128 U.S. 456, 461[,], 9 S.Ct. 122, 32 L.Ed. 482 (1888).

United States v. Central Illinois Public Service Co., supra, 365 F.2d at 122. See also, *Wright v. Paine*, 289 F.2d at 768.
(Answer Brief at 10-16).

Notwithstanding all the good said about the notation rule, appellants are not alone in their criticism of the doctrine, which they contend is antiquated, arbitrary and capricious, and violative of due process. Most recently, it is even in disfavor with BLM.

On January 12, 1984, the Director, BLM, issued Instruction Memorandum (IM) No. 84-216 to all State Directors, forwarding draft regulations to replace 43 CFR Subpart 2091. The draft regulations evolved from a task force formed in October 1983 "to evaluate the Bureau's use of the so-called 'Tract Book/Notation Rule' and to develop comprehensive instructions concerning how and when lands are opened or closed to operation of the various public land and mining laws."

As background to the draft regulations, enclosure 1 of IM 84-216 states:

*327 The present regulations, 43 CFR 2091, do not adequately specify the dates when closures occur, and do not explain clearly the effect of the closures. Also, there is almost no mention of when or how lands are opened.

For example, the present regulations on the Recreation and Public Purposes Act state that lands classified for Recreation and Public Purposes are segregated (closed) from all appropriations, including the mining laws for a period of 18 months, after which time the classification will be vacated and the land restored to its former status. This sounds specific upon first reading, but it leaves many unanswered questions for the BLM employees who maintain the public land records and for the public who use the records.

- On what date does the 18 month period start?

- What does "segregated from all appropriations" mean? Is the land open to mineral leasing? Material sales?

- **10 - What action, if any, is needed to open the land?

- On what date is the land opened?

These kinds of questions and uncertainties have led to the continued use of the "notation rule" or "tract book rule" as the basis for establishing opening and closing dates on the public land records.

The notation or tract book rule had its origins in the early Land Offices. The clerks would handwrite in the tract books information about an entry or a relinquishment filed in the office on that same day, or an order signed in Washington days, weeks or months earlier. The effective date the land was closed or opened was the date this handwritten entry first gave public notice on these public records that a change of land status had occurred.

Records were noted by any employee who was working with the document and the notation process was usually accomplished promptly. The interested public was the local public and they monitored the daily notations to find out what changes had occurred and what lands were newly available. The notation procedure was appropriate to the circumstances of the time and the mission of the General Land Office.

Times have changed, communications and transportation have improved, and a much wider spectrum of the public is interested in the changing status of the public lands. To further complicate matters, in the early 1960's the Bureau in most offices adopted a new land record system, replacing the tract books with plats and historical indices. No longer could any clerk handnote the records. The new records are updated by drafting and typing processes which delay getting land status changes onto the public land records for days, weeks, or even months, depending upon the workload in the office.

These logistical problems in updating the records, combined with the lack of specific regulatory or other guidelines for opening and closing lands, have perpetuated the use of the notation rule as the one sure way of setting and announcing dates when specific areas of public lands are closed or opened to applications, selections, settlements, entries or locations.

These draft regulations would eliminate the further necessity for the notation rule because they specify when and how the lands become closed and opened. These draft regulations utilize three basic principles:

1. Closures that have a specific time period stated in the closing document automatically become open on the date the closure expires. (The public will know the future opening date as soon as the closure is first noted on the records.) [*Italics in original.*]

2. Closures that do not have a specific time period stated in the closing document will be opened by an order or notice published in the Federal Register that will specify an opening date, usually at least 30 days after the date of publication. (This will give adequate time to get the records properly noted in advance of the opening date.)

3. Lands in an expired or terminated withdrawal will not become open until an opening order is published in the Federal Register which will specify the opening date. This practice will continue to protect the lands while the Secretary or Congress can decide whether or not to extend the withdrawal.

****11 *328** If these regulations are adopted, the regulations and the decision documents will establish the dates of closing and opening and these dates will be identified on the records well in advance of the opening dates. The notation rule will cease to exist because it will no longer govern the dates when public lands are closed or opened. In fairness to existing applications, claims and entries, these will be adjudicated under the principles of the notation rule in accordance with existing practices and case law precedents.

The draft regulations have not been published as final, or even proposed, rules. However, even if they had been published as final rules in their proposed form, they would not be controlling in this case, as they are intended to have prospective application only. [FN11]

That BLM is considering and may adopt regulations that emasculate the tract book/notation rule principle is the agency's prerogative. Nevertheless, the present state of the law is that the notation rule may be utilized and that it fulfills an important land management function.

As the Secretary's delegate for providing objective, quasi-judicial review of BLM decisionmaking, the Board's role in a case of this type is to determine if the agency's invocation of the notation rule to reject appellants' mining claims was either legal error or an arbitrary and capricious act. The mere fact that the notation rule has passed muster with the courts does not preclude us from finding the Bureau's application of the doctrine to be wrong in particular circumstances.

Here, the notation rule was invoked under two kinds of appropriations--State selection applications and Forest Service withdrawal applications. We now consider whether BLM erred in applying the notation rule in these specific respects.

The four State selection applications were recorded on the MTP for the entirety of T. 10 N., R. 2 E., and T. 11 N., R. 2 E. Seward Meridian, at the time appellants' mining claims were located in 1981. State selection in July 1972 and the record transmitted to the General Services Administration Federal Records Center 2 years later (Serial Register, A-053727, at 3). The other three State selection files appear to remain open records, though one of these, A-067451, was adjudicated in June 1980. Unlike the other three State selection notations that appear in the right-hand column of the MTP, A-067451 is noted on the plat by lettering within one section only.

Appellants contend that BLM has placed undue reliance on whatever the MTP shows:

[V]irtually all of the various permutations on a "notation rule" embodied in the administrative and judicial decisions cited in the Answer of the BLM are quite different from the statement in the Decision of June 20, 1982. None of those earlier decisions refers to an omnipotent "master title plat." All of those decisions address more generally "the records," "the proper records," "the official records," "the plats and records," etc. Hence, whatever the vague "notation rule" is stated to be, it must include all of the proper BLM records -- including the master title plats, the use plats, the historical index, the serial register, the application files, and the Federal Register, inter alia.

****12 *329** Those same decisions cited in the Answer of the BLM require that this vague "notation rule" applies only to all of the records "in pari materia." E.g., State of Alaska, Kenneth D. Makepeace, 79 I.D. 391, 39 [sic] (1972). If the records must be construed together, the Alaska State Office cannot take the narrower position that notations on one official record (the master title plat) define the land status independent of all other legitimate record sources of land status information.

We believe that the proper filing of the homestead application cannot be predicated on a "pick and choose basis," i.e., an assertion by the appellee that he relied upon the plat and historical index to the exclusion of the State selection serial register sheet, particularly where the plat referred to the State selection application. [Citations omitted.]

Id. The Alaska State Office cannot "pick and choose" from among official records to reach a conclusion not supported by the official record as a whole. Indeed, the above quotation from Makepeace indicates that no entryman can legally rely upon the plat "to the exclusion of the State selection serial register sheet." If an entryman cannot rely on that plat in isolation, how can the Alaska State Office deny an entry by reference to that plat in isolation? (Reply Brief at 14-16).

[3] While it is true that the Board's decision in Makepeace allows for construing various BLM lands records in pari materia, it also acknowledges that the MTP may independently serve as a prima facie showing of land status:

Thus, it appears that on February 2, 1967, the plat showed prima facie that the lands in issue were embraced in the state selection application. It is true that the historical index shows a homestead entry affecting the lands in issue, but further reference to the serial register sheet of the state selection application, whose number was shown on the plat, would have demonstrated the appropriation of the land.

Either on the basis of the prima facie appropriation of the land shown by the plat or on the basis of the plat, historical index, and serial register sheet of the state selection application, the land office records reflected the appropriation of the lands in issue.

79 I.D. at 391, 396. In Thomas, supra, the Board again observed that noting a State selection application on the MTP amounts to a "prima facie appropriation of the land," quoting Makepeace with approval. 59 IBLA at 366. The Board concluded that "even though the State selection may have been void or voidable, the notation rule itself precluded appropriation of the land until canceled on such records." Id. This position was recently repeated in William Mrak, 86 IBLA 16 (1985):

The segregative effect of a State of Alaska selection application is operative on the land for which the State has applied from the date of filing and remains in effect until the State's application is finally disposed of and duly noted on BLM's public land records.

* * * * *

****13** The records forwarded to the Board for this review do not indicate whether the State's selection applications have been adjudicated by BLM and a final disposition achieved in each case. There is also the possibility that each may have been automatically terminated pursuant to the provisions of 43 CFR 2627.4(b). Final disposition of the applications, however, does not change the result in this case because the notations on the official BLM tract records for the township in question reflecting that the applications were still pending at the time appellants initiated their locations were ***330** sufficient to perpetuate the segregative effect and preclude

appellants' appropriation of the land. See Shiny Rock Mining Corporation (On Reconsideration), 77 IBLA 261 (1983).

Id. at 19. The "official BLM tract records for the township in question" referred to in Mrak are described earlier in the opinion as the master title plat.

In accordance with Thomas and Mrak, *supra*, we do not think it was error in this case for BLM to invoke the notation rule on the basis of State selections noted on the MTP's. While we know by examination of the State selection application files (and BLM's statements concerning these files) that the applications were submitted under the specific authority of section 6(b) of the Statehood Act, and that two of the applications were rejected in part because of their inclusion of national forest lands, these facts are not revealed by the entries made on the MTP's. The ordinary citizen contemplating a proposed use of the public lands for a valid purpose would quite reasonably look to other than lands embraced in townships 10 and 11 N., R. 2 E., Seward Meridian, upon discerning from the MTP for these townships that they were included in State selection applications. Further, there is nothing on the face of the MTP's that would suggest the State selection entries were invalid or conflicting. The notation rule was meant to apply to such circumstances. Makepeace, *supra*; Thomas, *supra*.

[4] Although the Makepeace decision included an *in pari materia* consideration of three land status records, i.e., the MTP, historical index (HI), and serial register sheet for a State selection application, as a further method of determining whether lands were appropriated at a particular time, this was only done because of a conflict noted between the MTP and the HI. The Board has examined copies of the HI for unsurveyed Tps. 10 and 11 N., R. 2 E., Seward Meridian, date-stamped September 4 and January 4, 1984, respectively. For township 10, the HI lists only one of the three State selection applications involved herein, viz., A-053727. The entry reflects that acreage was patented to the State pursuant to this selection application with an "action date" of July 28, 1972. Read in conjunction with the MTP for township 10, it does become evident from the HI that the status of State selection application A-053727 has not been updated on the plat. This isolated record conflict is of no assistance to appellants, however. Since the HI makes no reference to two pending State selection applications which the MTP depicts as affecting the township as a whole, A-058731 (mineral estate only) and A-063695, the presumptive ineligibility of township 10 for other appropriation still holds. [FN12] Were it the case that the HI showed all the State selection applications recorded on the MTP to be adjudicated (which they were not), it would be reasonable to consider whether, under such *331 circumstances, BLM misapplied the notation rule in this case. Similarly, it is noted that the HI for township 11 makes no reference to the State selection application filed therefor, A-067451, which is shown on the MTP to be a pending application (even though it was adjudicated in June 1980).

**14 Nor do the serial register sheets for the subject State selection applications, standing alone or in conjunction with the records discussed above, pose a basis for appellants to have surmised that any of the land within townships 10 and 11 could be appropriated for mining. For State selection application A-053727, characterized by appellants as a "closed file," none of the entries found on the serial register sheets reveals that BLM rejected this application, in part, to the extent it included Chugach National Forest lands. Though this apparently occurred through BLM decision dated August 2, 1966, the entry beside this date on the register merely reads: "Tentative approval given to 18.43 acres." In any event, the serial register goes on to note that on June 16, 1972, selection application A-053727 was amended to include all of T. 10 N., R. 2 E., Seward Meridian, except patented lands. This is followed by entry dated August 23, 1972, noting that patent 50-73-0028 was issued July 28, 1972, for an area aggregating 7,911.11 acres. Even

assuming that the foregoing register notations unequivocally signified that State selection application A-053727 did not operate as a bar to mining claim entries as of June 1981, when appellants' location notices were filed, the record still shows two other State selection applications affecting township 10, to wit: A-058731 (for mineral estate only) and A-063695. As already noted, the precise nature and status of State selection application A-058731 is in some doubt (see note 12). Assuming, in the light most favorable to appellants, that as a matter of fact and law Chugach National Forest lands could not have been segregated from mineral entry by virtue of this mineral estate selection, such lands (surface and mineral) were nevertheless clearly segregated by virtue of State selection application A-063695. Unlike the other two State selection applications for township 10, A-063695 has been neither partially nor wholly *332 adjudicated; it remains an open application as far as all public land records furnished the Board are concerned. The only challenge appellants make to this selection is the general charge that it "manifests all of the same limitations of the Section 6(b) selections noted above" and that "national forest lands were not 'open' to State selection by virtue of the type of application filed" (SOR at 9-10). This general challenge has already been discussed. It does not dispense with application of the notation rule to bar appellants' claims.

As to the one State selection application affecting T. 11 N., R. 2 E., Seward Meridian (A-067451), neither the HI nor the serial register contradicts what appears from the face of the MTP, i.e., that the lands within this township were segregated from mineral entry by virtue of this selection application. If anything, the evaluation of these three lands records in pari materia disposes of the conjecture that since the notation "A-067451 SS" appears on the MTP only in lettering found in one section of the township, rather than in the narrative column on the right-hand side of the plat, less than the full township was affected thereby. See Reply Brief at 20. Thus, the serial register for application A-067451 describes the selected lands at the time of filing as: "T. 11 N., R. 2 and 3 E., S.M., All lands outside of the Chugach National Forest boundary. Approximately 4,260 acres. Subject to prior valid rights, claims, and patented lands." Under date of June 16, 1972, the register records that this selection was amended to include: "T. 11 N., R. 2 & 3 E., SM." Finally, as of June 17, 1980, the register notes: "Rejected in part. Tentatively approved for 6,309 acres." Without having the decision of June 17, 1980, at hand, [FN13] it would not be possible from reviewing the serial register to know that Chugach National Forest lands had in fact been excluded from selection. [FN14]

****15** The Board's findings and conclusions regarding the effect of the State selection applications noted on the MTP's for Tps. 10 and 11, R. 2 E., Seward Meridian, at the time appellants' mining claim location notices were filed may be summarized as follows. The fact that state selection applications A-053727, A-058731, A-063695, and A-067451 were recorded on the MTP's in question resulted in prima facie evidence that all lands denominated as selected were thereby segregated from subsequent appropriation. This prima facie segregative effect occurred even if the State selections were void or voidable. An in pari materia consideration of the HI and the serial register sheets in conjunction with the MTP's fails to establish that Chugach National Forest lands were excluded from any of the above State selections or that such selections were rejected in part to the extent national forest *333 lands were included in the applications. Though from the evidence presented in this case, it is known that Chugach National Forest lands were excluded from State selection applications A-053727 and A-067451 in agency adjudications of these selections, these decisions were not reflected on the MTP's or otherwise publicly disseminated. Even if the foregoing partial rejections had been duly noted on the MTP, two other State selection applications, A-058731 and A-063695, remain pending and their

pendency independently bars conflicting appropriations of the same land (here, all of township 10).

[5] We turn to the effect of the two Forest Service withdrawal applications at issue. BLM appears to have erred, as a factual matter, in concluding that appellants' Toohey placer mining claims (AA-43831850) were located on lands segregated by Forest Service withdrawal AA-6060. Appellants submit that before locating these claims, they "carefully consulted the Federal Register legal description of Forest Service withdrawal AA-6060, and described the locations of [their] claims by specific reference and in a manner which prevented any overlap" (Affidavit of Cynthia D. Toohey, dated Oct. 18, 1982). BLM does not dispute appellants' contention that their Toohey placer mining claims lie contiguous to the boundary of the 270-acre area encompassed by AA-6060, as opposed to within such area. From our comparison of the MTP for unsurveyed T. 11 N., R. 2 E., Seward Meridian, depicting the area withdrawn by AA-6060 with the locations depicted by appellants for the Toohey mining claims, we are satisfied that no conflict exists. In the event our map reading is in error and certain of the Toohey claims do lie within Forest Service withdrawal application AA-6060, the notation rule would operate to bar such claims.

Withdrawal application AA-6060 was filed by the Department of Agriculture with BLM on October 22, 1970. In 1970, BLM's regulations governing withdrawals, codified at 43 CFR Subpart 2311, provided in relevant part:

s 2311.1-2 Segregative effect of applications.

****16 (a)** The noting of the receipt of the application in the tract books or on the official plats maintained by the Land Office in which the application was properly filed or in the tract books maintained by the Washington Office of the Bureau of Land Management if there is no Land Office for the State in which the lands are located shall temporarily segregate such lands from settlement location, sale, selection, entry, lease, and other forms of disposal under the public land laws, including the mining and the mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal. To that extent, action on all prior applications the allowance of which is discretionary, and on all subsequent applications, respecting such lands will be suspended until final action on the application for withdrawal or reservation has been taken. Such temporary segregation shall not affect the administrative jurisdiction over the segregated lands.

s 2311.1-4 Findings, reviews; publication.

* * * * *

***334 (c)** When an application is finally denied in whole or in part by the authorized officer, he will have published in the Federal Register a Notice of Determination which will specify the date and hour that the affected lands will be relieved of the segregative effect of the agency's application.

(d) When an application is finally approved in whole or in part by the authorized officer, he will have published in the Federal Register an appropriate order of withdrawal or reservation. In 1970, therefore, the notation rule existed in regulation as well as through adjudication. The segregative effect of a Forest Service withdrawal application commenced upon its recording on

the MTP and it remained extant until adjudicated and a notice of determination published, as appropriate, in the Federal Register. [FN15] Here, the record reflects that Forest Service withdrawal application AA-6060 remains a pending application.

The other Forest Service withdrawal application, AA-23139, filed after enactment of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. ss 1701-1784 (1982), is governed by distinct statutory and regulatory provisions that distinguish it from all other selections and withdrawals discussed thus far. Thus, section 204 of FLPMA (43 U.S.C. s 1714 (1982)), provides:

(a) Authorization and limitation; delegation of authority

On and after the effective date of this Act the Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section

* * *

(b) Application and procedures applicable subsequent to submission of application

(1) Within thirty days of receipt of an application for withdrawal, and whenever he proposes a withdrawal on his own motion, the Secretary shall publish a notice in the Federal Register stating that the application has been submitted for filing or the proposal has been made and the extent to which the land is to be segregated while the application is being considered by the Secretary. Upon publication of such notice the land shall be segregated from the operation of the public land laws to the extent specified in the notice. The segregative effect of the application shall terminate upon (a) rejection of the application by the Secretary, (b) withdrawal of lands by the Secretary, or (c) the expiration of two years from the date of the notice. [Italics added.]

**17 Apparent from the above is that Congress has mandated specific moments when the segregative effect of withdrawal applications shall terminate by operation of law. Pertinent to this case, that moment would be 2 years from the date of the Federal Register notice regarding the filing of Forest Service withdrawal application AA-23139. The required Federal Register notice for this withdrawal application was published December 5, 1978, at 43 FR 57134-57137. Hence, in the absence of rejection or approval of the application, its segregative effect automatically terminated on December 5, 1980. [FN16] The *335 Departmental regulations which implement the withdrawal provisions of section 204 of FLPMA are found at 43 CFR Part 2300. [FN17]

Against this backdrop, appellants contend that the Department is in violation of the will of Congress in permitting a continuing MTP notation of Forest Service withdrawal application AA-23139 to preclude other appropriation of the public lands subsequent to December 5, 1980, the date the segregative effect of AA-23139 terminated by statute. We agree. While we have held that the notation rule represents a valid administrative device for managing the status and disposition of public lands, we have also noted that the Department can regulate it out of existence whenever it desires. So, of course, may Congress and it has done this by, inter alia, precluding any segregative effect to withdrawal applications filed after October 21, 1976, after 2 years from the date such applications are noted in the Federal Register. It was therefore error for BLM to extend application of the notation rule to Forest Service withdrawal application AA-23139 as grounds for rejecting appellants' mining claim locations effected in 1981.

Conclusion

Appellants' mining claims were properly declared null and void ab initio and the location notices rejected in view of the fact that all lands within Tps. 10 and 11 N., R. 2 E., Seward

Meridian, were the subject of previously filed State selection applications that were noted on the MTP for these townships, regardless of whether or not the applications were void or voidable. Although BLM erred in holding that Forest Service withdrawal applications AA-6060 and AA-23139 also precluded appellants' mineral entry, this error does not obviate the segregative effect that attaches under the notation rule vis-a-vis the State selection applications noted on the MTP's.

Therefore, 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 affirmed as modified.

WM. PHILIP HORTON
Chief Administrative Judge

FN1. Appellants' statement of reasons (SOR) characterizes this group of claims as "Toohey Claims 1 through 17." The administrative record contains 20 separate location notices as identified in the appendix to BLM's decision for this group of claims. Appellants' notice of appeal, dated July 20, 1982, identified 19 of these claims for review, i.e., Toohey Mining Claim Nos. 1-8; 11-12; 15-16; 19-21; 25-26; 31-32.

FN2. The four State selection applications as per //st amendments of record are:

Serial Number	Land Description
A-053727	Entire T. 10 N., R. 2 E., Seward Meridian
A-058731	Entire T. 10 N., R. 2 E., Seward Meridian (Mineral Estate)
A-063695	Entire T. 10 N., R. 2 E., Seward Meridian
A-067451	Entire T. 11 N., R. 2 E., Seward Meridian

FN3. Sec. 6(a) states in part:

"For the purposes of furthering the development of and expansion of communities, the State of Alaska is hereby granted and shall be entitled to select, within twenty-five years after the date of the admission of the State of Alaska into the Union, from lands within national forests in Alaska which are vacant and unappropriated at the time of their selection not to exceed four hundred thousand acres of land, and from the other public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection not to exceed another four hundred thousand acres of land, all of which shall be adjacent to established communities or suitable for prospective community centers and recreational areas. Such lands shall be selected by the State of Alaska with the approval of the Secretary of Agriculture as to national forest lands and with the approval of the Secretary of the Interior as to other public lands: * * *."

FN4. Sec. 6(b) states in part:

"The State of Alaska, in addition to any other grants made in this section, is hereby granted and shall be entitled to select, within twenty-five years after the admission of Alaska into the Union, not to exceed one hundred and two million five hundred and fifty thousand acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection: * * *"

FN5. IBLA Docket No. 82-1188.

FN6. BLM's Answer Brief in Toohey consists of and incorporates by reference its Answer Brief in Cavanagh, *supra*.

FN7. 43 CFR 2627.3 includes regulations under the heading "Grant for general purposes" and is the regulatory counterpart to sec. 6(b) of the Statehood Act. Cf. 43 CFR 2627.1, Grant for community purposes (corresponding to sec. 6(a) of the Act).

FN8. Appellants' SOR at page 8 observes that by decision dated Aug. 2, 1966, BLM rejected State selection A-053727 to the extent Chugach National Forest lands were described. Exhibit 2 to the SOR, a copy of a State Office decision dated July 27, 1972, re A-053727, states in part:

"When Tract A, T. 10 N., R. 2 E., Seward Meridian, and U.S. Survey 4805, are patented to the State, title to all of the public land in this township will have passed from Federal jurisdiction with the exception of the lands in the Chugach National Forest which were rejected from the selection by the decision of August 2, 1966."

FN9. Even if the State selection applications are claimed to have been filed under sec. 6(a) of the Statehood Act, which allows for selections within national forests, the selection applications would not be regular on their face. At 43 CFR 2627.2(b), it is provided: "In addition to the requirements of s 2627.3(c), where the selected lands are national forest, the application for selection must be accompanied by a statement of the Secretary of Agriculture or his delegate showing that he approves the selection." None of the four State selection applications in this case contains such a statement.

FN10. BLM errs in representing that "the general notation rule is set out at 43 CFR 2091.1" (Answer Brief at 4). While no "general notation rule" is found in 43 CFR, it is codified in particular ways. See, e.g., 43 CFR 1825.1(b) (relinquishments).

FN11. Draft sec. 2091.0-7(c) reads:

"On the effective date of these regulations, the practice of record notation will no longer govern the availability of public lands except as provided in the regulations. All pending locations, claims, and applications will be subject to adjudication under the tract book rule principle in accordance with existing practice and case law precedents."

FN12. Appellants submit that State selection application A-058731 was filed by the State under authority of sec. 4 of the Act of Sept. 14, 1960, 74 Stat. 1024, whereby the State may select the retained mineral rights of the United States in "lands which have been disposed of." Citing to a BLM State Office decision dated June 21, 1966, appellants contend that the State cannot select land for the reserved mineral interest of the United States until "issuance of a patent with reservation to the United States" (SOR at 9), and that the Chugach National Forest lands where appellants' mining claims lie, do not satisfy this definition of "disposed of" lands. *Id.*

It is not inconceivable that some of the lands within the Chugach National Forest could have lawfully been "disposed of" by the United States with a retained mineral interest, but is not clear from the record whether or to what extent this has occurred. We do note that mineral estate selection application A-058731 is demonstrated as a sec. 6(b) and 6(h) submission, although the

language quoted from sec. 4 of the Act of Sept. 14, 1960, supra, was included by Congress as an amendment to sec. 6(a) of the Statehood Act (governing grants for community purposes). It is further noted from the final entry on the serial register sheet for this application that on Nov. 2, 1977, State selection A-058731 was "held for rejection in part," with no further details provided.

In light of the confusion that surrounds this application, the Board is not inclined to rule whether or not this selection stands as a bar to appellants' placer mining claims. Under a notation rule analysis, however, we do not have to. Regardless 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.

FN13. BLM adjudicatory decisions are not generally made available to the public at large nor are indices to such decisions maintained for public review as contemplated by 5 U.S.C. 552(a)(2) (1982) for the treatment of "final opinions * * * made in the adjudication of cases." In contrast, decisions of the Board of Land Appeals are considered "final opinions * * * made in the adjudication of cases" and the publication requirements of 5 U.S.C. s 552 (1982) are deemed applicable thereto. See 43 CFR 2.2.

FN14. Since the original application as filed Mar. 10, 1966, claimed 4,260 acres (comprising lands outside the national forest) and, subsequent to the amendment of this application to include national forest lands, the State's application was approved as to 6,309 acres, a possible deduction from these serial register entries might be that conveyance of some national forest lands was approved.

FN15. Pursuant to regulations promulgated on Jan. 19, 1981, 46 FR 5796, "public lands described in a withdrawal application filed before October 21, 1976, shall remain segregated through October 20, 1991, from settlement, sale, location or entry under the public land laws, including the mining laws, to the extent specified in the Federal Register notice or notices that pertain to the application, unless the segregative effect of the application is terminated sooner in accordance with other provisions of [43 CFR Part 2300]." See 43 CFR 2310.2(b); 43 U.S.C. s 1714(g) (1982).

FN16. The Dec. 5, 1978, Federal Register notice properly advised:

"For a period of 2 years from the date of publication of this notice in the Federal Register, the above described lands will be segregated from location, selection, and entry to the extent that the withdrawal applied for, if effected, would prevent such forms of disposal, unless the application is rejected or the withdrawal is approved prior to that date. If the withdrawal is approved, it will be for a period of 2 years, unless duly extended."

FN17. At 43 CFR 2310.2(a), it is provided in relevant part:

"Publication of the notice [of application for withdrawal] in the Federal Register shall segregate the lands described in the application or proposal from settlement, sale, location or entry under the public land laws, including the mining laws, to the extent specified in the notice, for 2 years from the date of publication of the notice unless the segregative effect is terminated sooner in accordance with the provisions of this part."

****18 I CONCUR:**

GAIL M. FRAZIER
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

*336 The majority, in effect, rejects appellants' broad attack on the "notation rule" and affirms the BLM's determination that all of the claims which are the subject of this appeal were null and void ab initio. While, as explained *infra*, I am in agreement with the majority's analysis, I wish to more fully explore one crucial aspect of its approach, viz., what are the records which are relevant for purposes of applying the notation rule.

The majority sets forth the historical genesis of the notation rule and I will not belabor that analysis here. [FN1] However, I think it is important when we discuss the present scope of the notation rule to keep in mind the fact that it arose at a time when tract books were virtually the sole repository of information concerning land status. While withdrawals or other reservations would normally emanate from either the President or Secretary in Washington, D.C., the first knowledge as to their existence would usually occur upon transmittal of the information to the land office and the subsequent entry of the information on the tract books. Thus, anyone interested in making an appropriation of land would naturally resort to the tract books in order to determine whether or not the land was open to such an appropriation, be it by settlement, entry, or the location of a mining claim.

Upon the adoption of the Federal Register Act, Act of July 26, 1935, 49 Stat. 500, as amended, 44 U.S.C. ss 1501-11 (1982), however, an alternate source of information, i.e., the Federal Register, available to the public at large, came into existence. This source of information was not, unfortunately, all-inclusive, and therefore, the existence of the Federal Register did not obviate the need for recourse to the records of the Department in order to determine the status of public land.

Thus, while under Exec. Order No. 10355, 17 FR 4831 (May 26, 1952), all orders withdrawing lands or revoking a previous withdrawal were required to be published in the Federal Register, numerous other actions which might affect the status of the land were not necessarily published in the Federal Register. [FN2] Included in such latter categories *337 would be the filing of an application under regulations which provide that the filing segregates the land from the initiation of adverse rights under the public land laws, including the mining and mineral leasing statutes, as well as the cancellation of subsisting entries whose existence would preclude others from obtaining rights on the public lands. An additional factor contributing to the confusion in this matter revolves around the retirement of the tract book system as the general method for showing land status, and its replacement with MTP's, HI's, other Use Plats, and the like. The operative question presented by the instant case is whether, and under what circumstances, an individual is justified in relying upon one set of documents or records which would indicate that the land is available where another document or record indicates that it is not open to entry.

**19 The majority expressly holds that the individual case files maintained by BLM are not part of the public records of the Department for the purposes of determining the ambit and scope of the notation rule. Since, as the majority notes, the HI does not actually contradict the MTP, the effect of this holding is to avoid the question whether conflicting land status entries allow an individual to proceed on his or her own peril. This is, indeed, the nub of the present controversy, since a review of the case files for state selections A- 053727 and A-067451 clearly shows that, contrary to the evidence of the MTP, these two selections had been rejected as to those lands

described which were within the Chugach National Forest. Appellants essentially argue that it is ridiculous to hold that the notation of these two state selections on the MTP served to segregate the land from entry until the notations were removed when, in fact, BLM has long since rejected these selections in formal adjudicatory action. [FN3] While I think there is some legitimacy to appellants' complaints, I have come to the conclusion that, insofar as the notation rule is concerned, the individual case files of the Department are not part of the public records for the purposes of determining the scope of the rule.

What, then, constitute the records which serve as the basis for the operation of the notation rule? Clearly, the majority agrees that the MTP is such a record. I would go further and rule that, in addition to the MTP, the HI and the other Use Plats are also such records and that where there is a conflict in notations, the notation rule does not apply.

*338 The original tract books operated as a combination master title plat and historical index. Thus, not only did the tract book enable an individual to discern the present status of a specific parcel of land, but it also permitted the searcher to review the chronology of the land office actions affecting the parcel. [FN4] It seems to me totally consistent with traditional land office practice to read the MTP in conjunction with the historical indices and other use plats in ascertaining current land status.

If these records should show a conflict, for example where the MTP contained a notation of a pending state selection but the HI showed that it had been finally rejected, I think an individual could justifiably proceed in accordance with the entry on the HI provided that this notation was correct. In other words, an individual could proceed at his own peril, knowing that if, in fact, the HI was erroneous, all of his efforts towards appropriating a right to the public land would come to naught. It is, however, important to recognize that where the state selection is, in fact, still pending and the individual is thereby precluded from the initiation of adverse rights, the attempted initiation of such rights would not run afoul of the notation rule, but would rather be defeated by the segregative effect of the state selection which works independently of the notation rule.

**20 This last consideration can best be illustrated by way of example. Let us assume that Congress has enacted legislation withdrawing T. 4 N., R. 1 E., Seward Meridian, Alaska, from all forms of disposition under the public land and mineral laws. In noting this action on the records, a clerical mistake is made and the withdrawal is actually noted on T. 4 N., R. 1 W. Under the notation rule, the notation of this withdrawal would preclude the initiation of new rights in T. 4 N., R. 1 W., until such time as it was properly corrected. But, the land in T. 4 N., R. 1 E., is not open to location merely because the entry was erroneously made on the wrong township plat. On the contrary, that land is withdrawn independent of the notation rule by the action of Congress.

In my view, where there are conflicting notations on the records, I feel that the notation rule cannot be rationally applied. Thus, as we have noted on numerous occasions:

The notation rule is grounded, in part, on recognition that, considering the incredible amount of activity concerning the use and possible acquisition of Federal land, it is inevitable that errors will occur in noting the relevant records. [FN5] Fairness to all *339 members of the public dictates that, where records are improperly noted so as to appear to effectively foreclose the initiation of rights by individuals in a specific tract of land, the Department should treat the land in question as it is noted on the records, until such time as the records are changed to correctly reflect the true status of the land.

Carmel J. McIntyre (On Judicial Remand), 67 IBLA 317, 327 (1982). If the notations conflict, however, on which notation is an individual justified in relying? Indeed, the situation could develop where the MTP showed no pending state selection whereas the HI had failed to note that an earlier selection had been rejected. An individual, careful enough to inquire as to the status of the land, might only peruse the MTP. Based on such a review, an individual might determine that the land is open. If, in fact, the state selection had been rejected, I do not see how we could justify invoking the notation rule to defeat the individual's entry since the whole animating rationale of the notation rule is that people have a general right to rely on the records of the Department. It is onerous enough that, should the land be withdrawn and the records fail to indicate this fact, an individual will acquire no rights thereto, even though he may have relied on a review of the MTP. It seems clearly excessive if, in addition to this possibility, a prospective appropriator is also required to search all records of the Department to make sure that there is no errant notation on any one of them which might defeat his entry even though there is no existing withdrawal or application which would foreclose his attempting appropriation. Fairness to all parties impels the conclusion that the notation rule cannot apply to foreclose entry where the relevant records themselves disagree on the status of the land.

****21** Appellants seek to expand this rule by including in the ambit of relevant records the specific case files relating to individual applications. Such case files, however, do not even purport to establish the status of the land. Indeed, such an expansion would necessarily abrogate the notation rule insofar as all erroneous notations were concerned, since a review of the case file would establish that the notation was erroneous. It is, indeed, an exception that would proceed to eat the rule. Moreover, it is hard to credit a view that all case files are part of the official land status records of which any individual must be knowledgeable since many records would not be readily obtainable in the State Office for a variety of reasons. [FN6] Individual case files were maintained even while the tract book system was in use, but this was never deemed to support the view that a notation on a tract book must give way to what was disclosed in an individual case file. ***340** Appellants' attempt to include such files as part of the land status records of the Department is properly rejected.

Inasmuch as the MTP showed that the land in both T. 10 N., R. 2 E., and T. 11 N., R. 2 E., was not available for appropriation as it was embraced in various state selection applications, [FN7] appellants' mining locations were precluded either by the segregative effect which flowed from the filing of the unadjudicated selection applications (43 CFR 2091.6-4) or by the workings of the notation rule for those applications which had been rejected, unless appellants could show that, insofar as this second category was concerned, the relevant records were themselves in conflict. While evidence on an HI that the application had been rejected would establish such a conflict, the failure of the HI to even note the filing of such an application did not rise to such a level. Accordingly, I concur with the majority's conclusion that the Alaska State Office correctly determined the subject claims to be null and void ab initio. [FN8]

JAMES L. BURSKI
Administrative Judge

FN1. Appellants' suggestion that the notation rule is invalid per se, since it is the creature of practice rather than statute, ignores not only the many Federal Court decisions set out in the text which have upheld the application of the notation rule, but also the fact that Congress implicitly recognized the existence of this rule in the Act of May 14, 1880, 21 Stat. 140, as amended, 43

U.S.C. s 202 (1970), in which it was provided that where a homestead entryman filed "a written relinquishment of his claim in the local land-office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office." Thus, while Congress was clearly aware that the general rules of the GLO would require that the tract books be noted before the land would be available for a subsequent entry, it chose to provide for a specific exception to the general rule rather than to abrogate the entire rule.

FN2. Exec. Order No. 10355 was issued to vest in the Secretary of the Interior the authority of the President to withdraw land granted both by the Pickett Act, 36 Stat. 847, 43 U.S.C. s 141 (1970), as well as the authority deemed to be granted the President by congressional acquiescence as delimited by the United States Supreme Court in *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). Sec. 704(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2792, repealed not only the Pickett Act but the implied authority to withdraw land arising from congressional acquiescence. Moreover, sec. 204 of FLPMA, 43 U.S.C. s 1714 (1982), granted the Secretary direct authority to withdraw lands and modify or revoke existing withdrawals. Thus, it is questionable whether Exec. Order No. 10355 has any present relevance. Paradoxically, however, the present regulations, adopted after the passage of FLPMA, expressly cross-reference the procedures established by the Executive Order in promulgation of any withdrawal by the Secretary under FLPMA. See 43 CFR 2310.3-3.

FN3. It is important to point out that, in reality, only the land in T. 11 N., R. 2 E., would be ultimately affected by a determination that these two notations were ineffective to result in a segregation of the land from entry. Two other state selections, A-058731 (mineral estate only) and A-063695, which have not been rejected, cover T. 10 N., R. 2 E. While appellants make various arguments that these, too, should not be a bar to the initiation of mining claims, their arguments on this issue relate to a different question, viz., whether an application which cannot be allowed and is therefore subject to rejection can nevertheless serve to segregate land until it is, in fact, rejected. Numerous cases cited by the majority clearly establish that the notation of an entry or application, regardless whether the application or entry is void or merely voidable, segregates the land until the application is actually rejected. Indeed, this is essential to the workings of any notation rule, and appellants' contrary assertions are properly rejected.

FN4. Admittedly, notations were also made on township plats returned by cadastral survey, but these were normally made in pencil unless the application was subsequently allowed as an entry or its equivalent. If the application were rejected, the pencil notation would be erased. See Circular No. 375 (Jan. 22, 1915). As a result, the plats were not as useful as the tract book in ascertaining past status of the land. The tract books, however, unlike the present MTP's which only show present land status of any Federal land, would provide a permanent record of past actions such as withdrawals, applications, or entries, even after they had been revoked, expired, or rejected, so that it would be possible to ascertain the availability of land at any specific moment in the past.

FN5. It is on this point that the BLM proposal to abolish the notation rule seems most questionable. BLM's justification for its proposal, set out in the majority opinion, is singularly silent about the effect of improper notations, even though such errors were not only part of the

original predicate for the notation rule but have also generated the great amount of adjudication on the scope of the rule. Effectively, the abolition of the notation rule would seem to sanction the practice of entering lands in apparent trespass in the hope or expectation that the individual would be able to prove that the land was open, even though the records of the Department would indicate that it was closed to adverse appropriation.

FN6. As an example, case file A-053727 which is at issue in the present case was sent to the Federal Records Center in 1974. It was ultimately retrieved from the record center. However, it was apparently misplaced in the State Office which has been unable to locate it. How could someone be expected to rely on such a record?

FN7. Appellants' declaration that they question whether the MTP's showed the same status entries on the date of the locations of their claims that they did at the time of the State Office adjudication would have more force if accompanied by an assertion that they had examined the relevant MTP's prior to the location of their claims. Thus, in *James M. Chudnow*, 67 IBLA 143 (1982), appellant positively averred that he had examined the oil and gas plat for a specific township and that, when he did so, it did not show the existence of an outstanding oil and gas lease for a parcel in question. This is a far cry from appellants' complaints herein that the MTP's might not have shown the existence of the state selection applications in question at the time the claims were located.

FN8. I also wish to expressly note my agreement with the majority's ruling that a post-FLPMA application to withdraw land is effective to segregate the land only for the period of time expressly provided by sec. 204(b) of FLPMA, 43 U.S.C. s 1714(b) (1982), regardless of whether or not the notation of the application to withdraw has been removed from the records. Just as the Act of May 14, 1880, 21 Stat. 140, as amended, 43 U.S.C. s 202 (1970), established a statutory exception to the notation rule (see n.1, supra), so must this provision be read as overriding the notation rule insofar as applications for withdrawal are concerned. This holding, however, does not alter the disposition of the specific claims on appeal as the land in question was independently affected by various state selections.

92 Interior Dec. 317, 88 IBLA 66, 1985 WL 264287 (D.O.I.)
END OF DOCUMENT

48 Interior Dec. 380
48 Pub. Lands Dec. 380
(Cite as: 1921 WL 1660 (D.O.I.))

Department of the Interior (D.O.I.)

***1 LOYD WILSON.**

Decided: December 21, 1921

**AMENDMENT--WATER EXPLORATION PERMIT--ENTRY--SECRETARY OF THE
INTERIOR-- SUPERVISORY AUTHORITY..**

The Secretary of the Interior may, through the exercise of his supervisory power, sanction the amendment of a permit to explore for water granted under the act of October 22, 1919, inasmuch as such a permit is an "entry" in the sense in which that term is used in the administration of the public land laws relating to the amendment of entries.

**AMENDMENT--SECRETARY OF THE INTERIOR--SUPERVISORY
AUTHORITY--STATUTES.**

The enactment by Congress of particular statutes making it mandatory for the Secretary of the Interior to grant amendments of entries under specified circumstances does not deprive him of the exercise of his supervisory power to grant amendments on other grounds not provided for by those statutes, and that power should be liberally exercised in cases where entries have been improperly applied for and allowed because of misinformation given to applicants.

AMENDMENT--ENTRY--WORDS AND PHRASES.

The word "entry," when used in the statutes and departmental regulations relating to amendments, is to be construed in its generic sense and treated as signifying an appropriation of public lands generally.

DEPARTMENTAL DECISIONS CITED AND APPLIED.

The cases of North and South Alabama Railroad Company (2 L. D., 681), Crail Wiley (3 L. D., 429), Samuel Meek (18 L. D., 213), Josiah Cox (27 L. D., 389), William A. Calderhead (36 L. D., 446), Elbert S. Sibert (40 L. D., 434), cited and applied.

The failure of the local officers to note the allowance of certain desert- land entries on their records caused **Loyd Wilson** to later present his application, Carson City 012346, under the act of October 22, 1919 (41 Stat., 293), for a permit to drill, or otherwise explore for water on the SE. 1/4 NW. 1/4, and E. 1/2 SW. 1/4, Sec. 26, T. 37 N., R. 25 E., M. D. M., and other lands, and resulted in the erroneous granting of that permit by this Department on December 23, 1920, as to those tracts.

Later, and after Wilson's attention had been called to the fact that his permit was in fatal conflict with those entries, he presented his application to have his permit so amended as to include therein other and unappropriated tracts adjoining the lands not in conflict in lieu of the tracts

STATE OF IDAHO'S MEMORANDUM IN
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Attachment III
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named; and by its decision of August 25, 1921, the General Land Office denied that application on the ground that "there is no authority in law for the amendment of" such permits.

The case is now before this Department for consideration and it must be held that that decision is erroneous for the reason that it is well settled that the Land Department may at any time take any action that may be necessary to correct its errors while the land involved remains subject to its jurisdiction.

There is another, and a fundamental reason why this Department can not concur in the Commissioner's conclusion that this amendment should be rejected because there is no statute which, in terms, authorizes the amendment of such permits as to the one here in question.

*2 While the word "entry" is generally used in the statutes and departmental regulations relating to amendments, that word, when so used, should be taken in its generic sense and treated as "signifying an appropriation of public lands" generally, as was said in *North and South Alabama Railroad Company* (2 L. D., 681, 682), where it was held that the word "entry" as used in the repayment statutes included "selection."

For this reason, and for the purposes of the present consideration, this permit must be considered and treated as an entry, and it has been long settled that the Secretary of the Interior has, through the exercise of the power given by section 441 of the Revised Statutes to supervise the Government's business relating to public lands, the inherent or incidental power to sanction in his discretion, the amendment of entries of any kind on equitable grounds, and for the purposes not only of correcting mistakes but to prevent unmerited loss or hardship on the part of the entryman, and it is well settled that he has that power independent of any statute specifically authoring such amendments. *William A. Calderhead* (36 L. D., 446), paragraph 10 of instructions of April 22, 1909 (37 L. D., 655, 657). And it has been repeatedly held that that power should be liberally exercised and not abridged, particularly by technical rules or in cases where entries have been made, as in this case, through misinformation given entrymen, or for similar reasons. *Crail Wiley* (3 L. D., 429), *Samuel Meek* (18 L. D., 213), *Josiah Cox* (27 L. D., 389).

It is true that Congress has enacted certain laws providing for the amendment of entries under certain circumstances, such as section 2372 of the Revised Statutes, but it was for the purposes of making it mandatory upon the Secretary to grant such amendments as are specified in these statutes, and not for the purpose of taking away by implication or otherwise his inherent power, to which reference has been made, that those statutes were enacted. *Elbert S. Sibert* (40 L. D., 434). For these reasons, it must be held that the decision appealed from was erroneous and it is consequently hereby reversed.

FINNEY

First Assistant Secretary

48 Pub. Lands Dec. 380, 1921 WL 1660 (D.O.I.)

61 Interior Dec. 149

(Cite as: 61 Interior Dec. 149, 1953 WL 6281 (D.O.I.))

A-26598

Department of the Interior (D.O.I.)
Appeal from the Bureau of Land Management

****1 VIOLA P. DREYFUS**

Decided May 5, 1953

***149 Small-Tract Leases--Amendments--Equitable Power of the Department.**

The Department may, in the exercise of its equitable power, permit the amendment of a small-tract lease to embrace land different from that originally leased where it is satisfactorily shown that through no fault of the lessee the land is so far unfit for the purpose for which it was leased as to make it practically impossible to construct the improvements required by the lease.

Viola P. Dreyfus has appealed to the head of the Department from the decision of the Assistant Director of the Bureau of Land Management dated November 30, 1951, which affirmed the action of the manager of the land office at Los Angeles in rejecting Mrs. Dreyfus' application to amend her small-tract lease (Los Angeles 084661) to substitute other land for the 5-acre tract covered by her present lease. The application was rejected because the regulations governing small-tract leases (43 CFR, Part 257) make no provision for the amendment of such leases.

The lease was issued to Mrs. Dreyfus on September 12, 1950, under the provisions of the act of June 1, 1938, as amended (43 U. S. C., 1946 ed., sec. 682a), which authorizes the Secretary of the Interior to lease tracts of public land, not to exceed 5 acres, which the Secretary (or his designated representative) may classify as chiefly valuable as home, cabin, camp, health, convalescent, recreational or business sites, under such rules and regulations as the Secretary may prescribe. Mrs. Dreyfus' lease is for cabin-site purposes, and it requires her to construct on the land, to the satisfaction of the Regional Administrator of the Bureau of Land Management, improvements appropriate to the use for which the lease was issued.

Mrs. Dreyfus contends that the land described in her lease is in accessible, and that when she attempted to go on the land to have blue-prints made for her cabin she was unable to reach it even by foot.

***150** The question arises whether, aside from the regulations governing small-tract leases, there is authority to allow Mrs. Dreyfus to substitute other land for the land covered by her lease.

One of the purposes of the statute under which the lease was issued was to permit the use of public lands for cabin sites. A cabin site is defined in the departmental regulations as a site suitable for a summer, week-end, or vacation residence (43 CFR, 1951 Cum. Pocket Supp., 257.2). The land now under lease to Mrs. Dreyfus was presumably classified as chiefly valuable as a cabin site by the Regional Administrator, pursuant to the authority delegated to him to make such classifications (43 CFR, 1951 Cum. Pocket Supp., 257.4). Mrs. Dreyfus' lease states that it is to be used for "cabin-site purposes only," and it requires that she place suitable improvements on the land "appropriate to the use for which the lease is issued." Yet Mrs. Dreyfus says she

cannot reach the land to place improvements on it. In such a situation, it seems obvious that her lease is of no value to her as a cabin site.

****2** It has long been recognized that the Department may permit the amendment of an entry of any kind on equitable grounds, not only to correct mistakes but to prevent unmerited hardship. **Loyd Wilson**, 48 L. D. 380 (1921). Thus, in cases where it has been shown that through no fault or neglect on the part of the entryman the land embraced in an entry is so far unfit for occupancy as to make it practically impossible to perform the requirements of the law thereon, amendments to substitute other land have been allowed. See 43 CFR 104.11; section 10, Circular No. 423, 44 L. D. 181 (1915); **Fred C. Barron**, 50 L. D. 597 (1924). The word "entry" when used in this context is used in its generic sense and treated as signifying an appropriation of public lands generally. **Loyd Wilson**, 48 L. D. 380 (1921).

It appears, therefore, that there is no legal objection to the amendment of a small-tract lease where it is satisfactorily shown that, through no fault or neglect on the part of the lessee, the land included in the lease is so far unfit for the purpose for which it was leased as to make it practically impossible to construct the improvements required by the lease.

It has been suggested that Mrs. Dreyfus should have examined the land before she applied for a lease, and that had she done so she would have discovered the nature of the land. However, there is no requirement in either the statute or the regulations that an applicant examine land classified as suitable for cabin-site purposes before accepting a lease for such purposes. Moreover, land classified by the Department as suitable for cabin-site purposes should, at least, be accessible by foot and of such character as to permit the construction of a cabin.

***151** Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Assistant Director is reversed, and the case is remanded to the Bureau of Land Management for the consideration of the application to amend her lease and for appropriate action thereon consistent with this decision.

Clarence A. Davis

Solicitor

61 Interior Dec. 149, 1953 WL 6281 (D.O.I.)

END OF DOCUMENT

exclusive. The franchise hereby granted shall not be construed to be exclusive and shall be subject to all general laws now in force or which may hereafter be enacted respecting railway companies.

"Sec. 12. This act shall go into effect and be law from and after the date of its approval by the governor of the Territory of Hawaii, subject, however, to the approval of the Congress of the United States.

"Approved this twenty-sixth day of April, A. D. 1909.

"WALTER F. FREAR,

"Governor of the Territory of Hawaii."

SEC. 2. That Congress may at any time alter, amend, or repeal said Act.

Approved, June 25, 1910.

CHAP. 420.—An Act Granting certain public lands to the State of Colorado for the use of the State Agricultural College, for agriculture, forestry, and other purposes.

June 25, 1910.
[H. R. 24012.]

[Public, No. 302.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized and directed to convey to the State of Colorado, for the use and benefit of the State Agricultural College, at Fort Collins, Colorado, for experimental, educational, and kindred uses in forestry, agriculture, horticulture, grazing, stock raising, and such other uses included in the work of experiments and instruction at said college, and the experiment station connected therewith, one thousand six hundred acres of vacant, unoccupied, unentered, and nonmineral land, or so much thereof as the state board of agriculture may select and designate, upon the payment therefor of the sum of one dollar and twenty-five cents per acre.

Public lands.
Granted to Colorado
for State Agricultural
College.

SEC. 2. That said land shall be selected by said state board of agriculture from any vacant, unoccupied, and unentered, nonmineral public land in township seven north, ranges seventy, seventy-one, seventy-two, seventy-three, and seventy-four west, of the sixth principal meridian, in the county of Larimer, State of Colorado, and the tracts so selected shall not contain less than forty nor more than one hundred and sixty acres each.

Selection.

Approved, June 25, 1910.

CHAP. 421.—An Act To authorize the President of the United States to make withdrawals of public lands in certain cases.

June 25, 1910.
[H. R. 24070.]

[Public, No. 303.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

Public lands.
Temporary with-
drawals by President
for power sites, irriga-
tion, etc., authorized.

SEC. 2. That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates: *Provided*, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: *And provided further*, That this Act shall not be construed as a recognition,

Mining rights con-
tinued.

Exceptions.

Provides.
Rights of bona fide
oil or gas claimants.

Status of prior
claims.

Homestead, etc., settlements excepted.

Restriction on new forest reserves.

Report of withdrawals to Congress.

abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this Act: *And provided further*, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: *And provided further*, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress.

SEC. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals.

Approved, June 25, 1910.

June 25, 1910.
[H. R. 24146.]

[Public, No. 304.]

Alaska.
Miner's labor lien.
Persons entitled.

CHAP. 422.—An Act To create, establish, and enforce a miner's labor lien in the Territory of Alaska, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every miner or other laborer who shall labor in or upon any mine or mining ground for another in the Territory of Alaska in digging, thawing, conveying, hoisting, piling, cleaning up, or any other kind of work in producing any mineral-bearing sands, gravels, earth, or rock, gold or gold dust, or other minerals, or shall aid or assist therein by his labor as cook, engineer, fireman, or in cutting and delivering wood used in said work, or in work in any like capacity in producing the dump, shall, where his labor directly aided in such production, have a lien upon the dump or mass of mineral-bearing sands, gravels, earth, or rocks, and all gold and gold dust, or other minerals therein, and all gold and gold dust extracted therefrom, for the full amount of wages for all the time which he was so employed as such laborer in producing the said dump, within one year next preceding his ceasing to labor thereon; and to the extent of the labor of the said miner or other laborer actually employed or expended thereon, within one year next prior to ceasing to labor thereon, the said lien shall be prior to and preferred over any deed, mortgage, bill of sale, attachment, conveyance, or other claim, whether the same was made or given prior to such labor or not: *Provided*, That this preference shall not apply to any such deed, mortgage, bill of sale, attachment, conveyance, or other claim given in good faith and for value prior to the approval of this Act.

Preference of lien.

Proviso.
Prior valid deeds,
etc., not affected.

Notice to be filed.

SEC. 2. That every laborer, within ninety days after the completion of the performance of the work or labor mentioned in the foregoing section who shall claim the benefit thereof, must, personally or by some other person for him, file for record in the recording precinct where the labor was performed a claim of lien containing a statement of his demand under oath, substantially in the following form:

Form.

NOTICE OF LABORER'S LIEN.

Territory of Alaska, _____ precinct, ss:

_____, claimant, against _____, defendant.

Notice is hereby given that _____, claimant, claims a lien upon (describing the dump or mass of mineral-bearing sands, gravels, earth, or rock, and its location with reasonable certainty) in the _____