Editor's note: Appealed -- dismissed, Civ. No. A76-44 (D.Alaska Nov. 2, 1977)

MARGARET L. KLATT
ALLAN D. KLATT

IBLA 74-153 Decided December 11, 1975

Appeal from decisions of Alaska State Office, Bureau of Land Management, rejecting homestead applications AA-8295 and AA-8296.

Affirmed.

1. Alaska: Generally--Alaska: Land Grants and Selections: Generally--Alaska: Land Grants and Selections: Validity--Homesteads (Ordinary): Lands Subject to--Segregation: Filing of Application--State Selections

   The filing of an amended Alaska State Selection, after a prior trade and manufacturing site claim for which a notice of location was recorded is canceled and closed of record but where the cancellation has not been posted on the records, segregates the land it describes from further appropriations based on application or settlement and location.

APPEARANCES: Thomas E. Meacham, Esq., of Ely, Guess & Rudd, Anchorage, Alaska, for appellants.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Margaret L. Klatt and Allan D. Klatt have appealed from separate decisions of the Alaska State Office, Bureau of Land Management, dated November 1, 1973, which rejected their respective homestead applications, AA-8295 and AA-8296, because the lands described in the applications were segregated from appropriation under the public land laws by a prior Alaska State selection A-061778.

Margaret Klatt's application described land in sec. 24, T. 12 N., R. 4 W., Seward Meridian, Alaska, while Allan Klatt's application described land in Sec. 13, same township and range. Both applications were filed on January 5, 1973.

The State selection was originally filed on October 26, 1964. It covered all available lands in said T. 12, excluding any prior valid rights, claims or patented lands.

At that time the lands in section 24 covered by Margaret Klatt's application, AA-8295, were covered by previous trade and manufacturing site settlement claims A-061259 and A-061265. These two claims did not proceed to patent. A-061259 was closed on the land office records on May 3, 1969. In a decision dated November 22, 1971, Richard B. Collins, whose earlier application to purchase a trade and manufacturing site had been found inadequate, and who is claimant under A-061265, which had been initiated in 1964, was required to file an application to purchase a 5-acre headquarter site within 60 days of the decision or the claim would be considered canceled and the case file closed when the decision became final. When Collins did not comply with these requirements, the decision was deemed final as of December 21, 1971, the end of the 30-day period for taking an appeal. The historical index, posted on June 29, 1972, noted that the case was closed as of December 21, 1971. The serial register for A-061265 was posted on July 11, 1972, also stating that the case was closed on December 12, 1971.

Again as of October 26, 1964, the lands in section 13, in Allan Klatt's application, A-061778, were covered by two homestead entry applications and a trade and manufacturing settlement claim. None of these applications proceeded to patent and they were closed on the land office records on July 6, 1968, April 15, 1969, and September 11, 1968, respectively.

On June 16, 1972, the State amended its application to include all of the lands in said T. 12 N., excluding only patented lands. The Klatts' applications, as we have seen, were filed on January 5, 1973.

The State Office held that a prior adverse settlement claim not carried to patent could not be asserted against a subsequent state selection, but that a prior homestead entry of record on the date of filing of a state selection segregated the land from state selection. It concluded that the subject lands were open to application from the dates of the closures of the homestead entries until June 16, 1972, when the State amended its application. 1/ The State

1/ Since the disputed lands in section 24 were covered only by trade and manufacturing site settlement claims and were never in

Office then found that lands in the Klatts' applications were segregated from appropriation under the public land laws as of June 16, 1972, by the State selection as provided by Departmental regulation 43 CFR 2627.4(b), 2/ and were not thereafter open to entry. Accordingly, it rejected the Klatt applications filed on January 5, 1973.

In their appeals appellants contend that (1) the homestead entries and trade and manufacturing site claims existing of record when the State filed its original selection segregated the lands they covered from State selection, (2) that the June 16, 1972, amendment to the State selection was not effective to segregate the subject lands from the Klatts' applications to enter because it was not noted on a status plat or historical index, or in the serial register or in any other record of the State Office available for public inspection, until some time subsequent to the date the Klatts filed their respective applications.

Since, in our opinion, the amended State selection filed on June 16, 1972, foreclosed a later filed homestead entry application, we need not consider the effect of the earlier State filing.

[1] The contention that a State selection application has no segregative effect until it is noted on the public land records is without merit. The pertinent regulation, supra in footnote 2, gives the State selection a segregative effect upon its filing and does not require notation before the segregation is effective. Thus the land was segregated from homestead application at the latest when the State filed its amended application on June 16, 1972. Udall v. Kalerak, 396 F.2d 746, 648, cert. denied, 393 U.S. 1118 (1969), aff'g State of Alaska, 73 I.D. 1 (1966). Accordingly, it was proper to reject the Klatts' applications filed thereafter. Bobby W. Brown, 18 IBLA 228 (1975).

While the dissent agrees with this discussion as to all of the land in Allan Klatt's application and as to half of the land in Margaret Klatt's, it concludes, as appellants contend, that the other 80 acres in the latter application were not open to State

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fn. 1 (continued)
a homestead entry, the State Office apparently considered them open to State selection at all times. However, since the State selection "excluded" lands in any prior valid rights, claims, or patented lands, the State Office considered them not embraced by the State selection as originally filed.

2/ The regulation provides:

"Lands desired by the State * * * will be segregated from all appropriations based upon application or settlement and location * * * when the State files its application for selection. * * *"

selection as of June 16, 1972, the date the State filed its amendment to its selection application, because on that date the cancellation of the Collins' trade and manufacturing site had not yet been noted on the serial register page or the historical index. It would hold that once a trade and manufacturing settlement claim has been duly initiated and a notice of location recorded, the land does not become open to state selection until the cancellation of the trade and manufacturing site has been noted on the proper State Office records. We do not agree.

The mere filing of a notice of location for a trade and manufacturing site creates no rights in the land, "the establishment of such rights being entirely dependent upon the acts performed in occupying, possessing and improving land and their relationship to the requirements of law under which the settler seeks to obtain title. * * *" Vernard E. Jones, 76 I.D. 133, 137 (1970). 3/ Elden E. Reese, 21 IBLA 251 (1975). In an earlier case, Peter Pan Seafoods, Inc. v. Shimmel, 72 I.D. 242 (1965), the Department considered whether a soldier's additional homestead application could be filed for land covered by a recorded notice of location for a trade and manufacturing site. It concluded that in the circumstances the recorded claim was not a bar to later application. The decision stated:

> The Department has consistently held that the right to acquire a trade and manufacturing site is limited to land which is actually occupied and used for purposes of trade and manufacture and that an application for a prospective business site is not within the law. Wilbur J. Erskine, 51 L.D. 194 (1925). The Department has specifically held that the mere filing of a notice of location of a trade and manufacturing site claim, without more,

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3/ The opinion continues:

"The actual appropriation and occupancy of land generally are accomplished facts at the time a notice of location is filed. Thus, the acceptance of a notice of location for recordation is not the allowance of an application for land but is, in reality, nothing more than the acknowledgement that the initiation of settlement rights as of a particular date has been claimed and a noting of the land office records to reflect the existence of that claim, and the acceptance for recordation of a notice of location is not a bar to a subsequent finding that, in fact, no rights were established in the attempted settlement. See Charles B. Forck et al., A-29108 (October 8, 1962). It is clear, then, that the acceptance of appellant's notice of location for recordation on September 20, 1966, did not preclude a later determination that the land which appellant claimed was not open to entry and that no rights were established by his settlement on the land."

> does not create in the one filing an interest in the land as against a subsequent applicant so as to subject the subsequent application to rejection. Loran John Whittington, Chester H. Cone, A-28823 (August 18, 1961). Since by his own admission Shimmel had done nothing other than to file his notice of location and to visit the land, without making any improvements or commencing any business on the land, appellant's application for the land was properly filed [at 245].

Thus the filing and recording of a notice of location does not, of itself, close the land from further filing or appropriation. 4/ If the person filing the notice of location has not established his right to the land because he has done nothing at all or what he had done is not enough, others may establish a superior right by occupancy or filing.

Here, as we have seen, Collins never satisfied the requirements of a trade and manufacturing site. He had not filed an acceptable application to purchase within the requisite 5-year period ending in 1969 and he failed to file one when ordered to do so by the State Office.

As a result his trade and manufacturing site was deemed canceled as of December 21, 1971. When the decision that Collins had not earned a right to a trade and manufacturing site became final, it established that Collins had not gained any right to the land. Consequently, the land was then, if not sooner, open to the initiation of other rights. The State by thereafter amending its application to include these lands gained a right superior to Klatts' later filing and indeed segregated the land from such filing.

The dissent would bring a recorded notice of location within the scope of the notation rule. That rule enshrines the longstanding administrative practice of the Department that an entry of record, whether void or voidable, segregates the land it covers from further appropriation until it is canceled of record. State of Alaska, 6 IBLA 58, 68, 79 I.D. 391, 396 (1972), and cases cited.

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

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4/ Boyd E. Keeling, A-31075 (February 2, 1970), David G. Marks, A-31082 (January 27, 1970), also held that the mere recording of a notice of location did not bar the initiation of other claims to the same land.

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.

A notice of location, as we have seen, has a much lesser effect. The recording of a notice of location, of itself, does not establish rights in the land. If the "locator" has done nothing on the land, the land remains open to others to establish superior rights by occupancy or filing as the case may be. No one can rely upon the record itself for assurance that the land is not open to other appropriation. The only way another person desirous of obtaining the same land can assure himself that the land is or is not open to other appropriation is to inspect the land and judge for himself whether the "locator" has established any right by occupying and improving it. If what he sees on the land satisfies him that no such rights have been established, he may occupy the land himself and file his own notice, or in proper circumstances, file an application for the land at the outset.

The situation, then, is the antithesis of that on which the notation rule is predicated. The record itself cannot be relied upon to assure a later applicant that the land is not open to appropriation. A recorded notice of location cannot, of itself, assure all who see it that the land is then not subject to appropriation and that it must be canceled before any one else can appropriate the land.

It seems an odd application of the notation rule to hold that it is not applicable if the locator has done nothing more than file but that it is applicable if the locator has occupied and improved the land. In either case the record is identical. It is only the facts outside the record--on the land itself--which would determine whether the land is subject to appropriation. In such circumstances the notation rule cannot assure that all the public have equal opportunity to file and is not applicable.

The dissent also takes exception to the State Office's conclusion that "mere settlement" does not "sever the land covered thereby from public domain."

The State Office's conclusion is a restatement of a well-established rule. The rule and related cases are thoroughly discussed in Alvin R. Jones, 5/ 45 L.D. 184 (1916), which held that a state indemnity selection could be filed for land which was in an existing settlement. After first finding that Jones's later abandonment of the land deprived him of a preference right based on his settlement, the Department stated:

> * * * The remaining question presented by the motion is whether the State's selection and the timber and stone application, both of which were filed on the date the township plat was filed in the local office, are valid in view of Jones's settlement on the land at that time.
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> Under section 2276, Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796), States may select "unappropriated" lands as indemnity for school land losses. Mere settlement on public lands does not amount to an appropriation thereof, but only confers a preference right thereto which is lost unless followed up by appropriate entry. D. A. Cameron (37 L.D., 450), and Thompson et al. v. Craver (25 L.D., 279). During such time the land is subject to selection, in the absence of other objection, or even to settlement, subject to the right of entry being awarded the first settler pursuant to his preference right, provided he continues to comply with the law.
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> The decisions of the Supreme Court of the United States in the case of St. Paul, Minn. & Man. Ry. Co. v. Donohue (210 U.S., 21), and of this Department in the cases of Frank et al. v. Northern Pacific Ry. Co. (37 L.D., 193, 502), and De Long v. Clarke (41 L.D., 278), wherein it was held that the selections were invalid because the land embraced therein was in the actual occupancy of bona fide settlers, although the settlers subsequently abandoned their claims to the land, are based upon entirely different statutes from the one now under consideration. In the case first mentioned, the indemnity privilege of the railway company was limited by the act of August 5, 1892 (27 Stat., 390), to land to which at the time of

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5/ Quoted with approval in Ganus v. State of Alabama, 46 L.D. 265 (1917):

"A mere settlement claim upon public land is not such an appropriation as will prevent school indemnity selection thereof; and where the settler abandons his claim the pending school selection application attaches."

> selection "no right or claim had attached or been initiated" in favor of another. In the Frank cases the right of selection was limited by act of March 2, 1899 (30 Stat., 993), to agricultural land "not reserved, and to which no adverse right or claim shall have attached or have been initiated at the time of making such selection." The De Long case involved a forest lieu selection which under the act of June 4, 1897 (30 Stat., 36), could only be made of "vacant land open to settlement."
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> In the cases of State of California v. Turner (26 L.D., 669), and Thomas J. Creel (30 L.D., 244), involving State school indemnity selections of land covered by valid settlement claims, wherein it was held that the lands were not subject to such selections, it will be observed that the settlers made homestead entries for the respective tracts claimed by them and the important element of abandonment involved herein was not present in those cases. By the doctrine of relation the rights of a settler upon making entry attach as of the date of settlement, cutting off all intervening claimants, but if entry is not perfected the settlement claim does not defeat a subsequent State school indemnity selection.
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> In the case of State of Washington v. Mack (39 L.D., 390), the State's school indemnity selection of land embraced within a homestead entry based upon settlement prior to survey was upheld, the entry being relinquished while the selection was still pending [at 185-86].

Thus, the State Office properly concluded that all the land in sec. 24 was open to filing of a state selection.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed. 6/

Martin Ritvo
Administrative Judge

6/ Since we find the lands were open to the State selection when the State filed its amended selection, we need not consider whether, if they were not, the filing of a State selection would have segregated the lands from other appropriation. See State of Alaska,

We concur:

Newton Frishberg
Chief Administrative Judge

Anne Poindexter Lewis
Administrative Judge

Joan B. Thompson
Administrative Judge

Edward W. Stuebing
Administrative Judge

Joseph W. Goss
Administrative Judge

fn. 6 (continued)
73 I.D. 1, 8 supra; Gonzales v. Udall, Civil No. A-1-28-68, D. Alaska, June 30, 1972; appeal dismissed November 30, 1972, reversing John Gonzales, A-30604 (September 26, 1968).

ADMINISTRATIVE JUDGE FISHMAN, CONCURRING IN PART AND DISSENTING IN PART:

I agree with the majority decision insofar as it affirms the rejection of Allan D. Klatt's homestead application AA-8296, and Margaret L. Klatt's homestead application AA-8295 for land formerly in trade and manufacturing site claim A-061259, on the ground that the lands were at the time of appellants' applications segregated therefrom by the reassertion of Alaska State selection A-061778 on June 16, 1972. Lands not subject to State selection at the time of the State's initial filing will be segregated in favor of the State upon the reassertion or amendment of the selection at a time when the lands have become subject to State selection. Udall v. Kalerak, 396 F.2d 746, 748 (9th Cir. 1968), cert. denied, 393 U.S. 1118 (1959), aff'g State of Alaska, 73 I.D. 1 (1966); Dell M. Husted, A-30932 (December 5, 1968). I agree that, contrary to appellants' argument, lands subject to State selection are segregated upon the filing of the State's application, not upon notation of the application. 43 CFR 2627.4(b).

I must dissent, however, from the application of this rule, and affirmance of the State Office decision, regarding the SW 1/4 NE 1/4, and SW 1/4 NW 1/4 of section 24, T. 12 N., R. 4 W., S.M., for which appellant Margaret Klatt applied. I would hold that this tract had not been segregated in favor of the State because the lands were not subject to State selection on October 26, 1964, when the original filing occurred, nor on June 16, 1972, when the State filed its amended application.

In short, my position is that Richard Collins' trade and manufacturing site, properly noticed and improved, precluded segregation of the land in favor of the State selection until it was canceled of record, and, since appellant Margaret Klatt filed the first application for the land subsequent to that notation, she is entitled to have her application considered on its merits.

The State of Alaska is authorized to select only lands that are "vacant, unappropriated, and unreserved at the time of their selection * * *." Alaska Statehood Act § 6(b), 72 Stat. 339, 340, 48 U.S.C. notes prec. § 21 (1970) (emphasis added). As the District Court construed the Statehood Act in Gonzales v. Udall, Civ. No. A-128-68 (D. Alaska, June 21, 1972), rev'g John Gonzales, A-30604 (September 26, 1968):

> * * * To the extent that the regulations of the Department of the Interior (43 CFR 2013.9-4 (1970) edition) [now 43 CFR 2091.6-4]; 43 CFR 76.16 (1963 edition) [now 43 CFR 2627.4(b)]) provide that an application for selection by the State segregates the lands applied for from all appropriations based

> upon application or settlement and location, such segregative effect must apply only to those public lands which are vacant, unappropriated and unreserved at the time of filing of the application to select, by reason of such statutory limitation.

I would hold that Richard P. Collins' trade and manufacturing site A-061265 rendered the land not "vacant, unappropriated, and unreserved."

Collins filed his notice of location on May 6, 1964, asserting settlement on February 8, 1964. In the notice he asserted that he had "already placed fuel tanks, building materials and some household goods in the area for storage." A statement by Clifton C. Rollins stated that Collins "has used this area, since his entry for the storage of building materials, machinery and equipment used in the course of his cannery. * * * [He] also uses this area for the storage of company vehicles during the `off' season. * * *" (Emphasis added.) On his amended application to purchase Collins asserted that the improvements on the property, including land fill, outdoor freezer boxes, a 20' by 60' warehouse and a 19' x 40' warehouse, were worth from $10,000 to $20,000. On his original application to purchase filed March 6, 1969, he asserted the value of his improvements as $10,000. After two appeals from conditional rejections of his purchase applications, Collins' claim was "canceled" on December 21, 1971. The cancellation, however, was not noted on the serial register page until July 11, 1972, and not entered in the historical index until July 29, 1972, both dates after the State's reassertion.

According to the Board's holding in State of Alaska, 6 IBLA 58, 69, 79 I.D. 391, 396 (1972), notations in the land records must be construed in pari materia in order to determine the land status at the time of appellant Margaret Klatt's homestead application.

The notation rule applies whenever the claim, lease or entry of record precludes the type of disposition of the land the subsequent "premature" application requests, not just when the notation has explicitly segregative effect under 43 CFR Subpart 2091. E.g., Duncan Miller, 66 I.D. 388, 392 (1959) (oil and gas lease of record), and cases cited therein. See also Martin Judge, 49 L.D. 171, 172 (1922). If a duly initiated trade and manufacturing site location precludes State selection of that land, then the notation of the trade and manufacturing site location on the land records is, under the notation rule, notice to the public that State selection of the land is precluded, because the land is not "vacant, unappropriated, and unreserved" within the meaning of the Alaska Statehood Act.

The majority argues that the notation rule fails to serve its purpose if one record notice of location appropriates the

land and another does not. In Elmer F. Garrett, 66 I.D. 92 (1959), the Department held that land within a (relinquished) oil and gas lease extension application was not subject to new filings until rejection of the extension application was posted, and that lands for which no extension application was filed were subject to filings the day after termination of the lease, without posting, even though extension applications themselves were not posted. Thus the availability of the land could be determined only outside the land records by finding out whether an extension application had been filed; the lease date by itself could not be relied on. Similarly, reference to facts outside the land records--improvements on the ground--is necessary here to determine whether or not the land is or is not "vacant and unappropriated," for State selection or, see below, Alaska homestead purposes.

In Peter Pan Seafoods, Inc. v. Shimmel, 72 I.D. 242, 245 (1965), the Department canceled the notice of location of a trade and manufacturing site and allowed a subsequent soldiers' additional homestead entry:

> * * * Since [the locator] had done nothing other than to file his notice of location and to visit the land, without making any improvements or commencing any business on the land, [the homesteader's] application for the land is properly filed.

The converse is that the homestead application would not have been acceptable were there improvements or a business being conducted on the site. See 43 U.S.C. § 270 (1970); 43 CFR 2567.0-8.

In these circumstances, the only way a homestead or other applicant would know when land claimed and improved under the Alaska settlement law was available for homestead application and State selection would be upon notation of cancellation of the settlement claim. This is the equality of opportunity to file which the notation rule seeks to establish. 1/ I would hold that

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1/ In light of the fact that the notation rule is a rule of fairness designed to afford equality of opportunity among conflicting applicants for public land, we note that according to the Collins case file, Lester Klatt, father of appellant Margaret Klatt, examined the file once on March 27, 1971, and again on April 6, 1972, after the "cancellation" of the Collins' trade and manufacturing site but prior to the State's amended filing and before the notation of the cancellation decision on the historical index and master title plat.

In Loran John Whittington, A-28823 (August 8, 1961), the Department emphasized that the prior settlement claim had been canceled of record, so that the land was available for other acquisition.

if the claim itself precludes State selection (or homestead application), the notation of the claim must be canceled to open the land. I am led to examine why I would hold that Collins' trade and manufacturing site location of record precluded State selection of this land.

The Department has consistently read the words "vacant" and "unappropriated" to mean not subject to any good faith settlement and improvement evidencing a claim under the public land law. Helphrey v. Coil, 49 L.D. 624 (1923) (land improved and occupied is appropriated and not subject to homestead entry); DeLong v. Clarke, 41 L.D. 278 (1912) (defining "vacant" lands); Aztec Land & Cattle Co. v. Tomlinson, 35 L.D. 161 (1906); Kern Oil Co. v. Clarke, 30 L.D. 550, 568 (1901); Thomas J. Creel, 30 L.D. 244 (1900) (defining "unappropriated"); California v. Turner, 26 L.D. 669 (1898) (settlement, residence and improvement defeat selection right to "unappropriated" land). See also Cosmos Exploration Co. v. Gray Eagle Oil Co., 112 F. 4, 13 (9th Cir. 1901), aff'd on other grounds, 190 U.S. 301 (1903); Donley v. Van Horn, 193 P. 514 (C.A. Cal. 1920).

Good faith settlement and improvement of public land, which will be credited by the Department under the Trade and Manufacturing Site Act, 43 U.S.C. § 687a (1970), because the claimant has protected his settlement by the timely filing of a notice of location, thus renders the land so located not "vacant and unappropriated" public land within the meaning of the Alaska Statehood Act. According to the land records on the date appellant Margaret Klatt's homestead application was filed, the State's application did not affect these lands, as they were not in 1964 or in June 1972 "vacant and unappropriated" public lands subject to State application.

The State Office concluded that "mere settlement" does not "sever the land covered thereby from public domain," and does not create any right in the settler when it is not supported "by the acts of constructive settlement, occupancy and appropriation required to perfect the claim," citing Navajo Tribe of Indians v. State of Utah, 12 IBLA 1, 80 I.D. 441 (1973); Vernard E. Jones, 76 I.D. 133 (1969); Andrew J. Billan, 36 L.D. 334 (1908); and Alice Whetstone, 10 L.D. 263 (1890). 2/

2/ Navajo Tribe concerned a school section grant to which title vested in the State without application or approval. The Board held that at the crucial date: (a) tribal aboriginal title had been extinguished; and (b) the facts showed no allotment claim or settlement--no "right initiated or held" under federal law--that precluded the vesting of title on that date under Cramer v. United States, 261 U.S. 219 (1923). Navajo Tribe v. State of Utah, supra at 45,

Alice Whetstone, supra, held that an abandoned settlement could not be asserted against a school selection by a subsequent homestead applicant. This case has been overruled by implication. First, St. Paul, Minneapolis & Manitoba Ry. Co. v. Donohue, 210 U.S. 21, 40 (1908), held that prior settlement could be asserted by a subsequent, unrelated applicant to defeat a premature selection. Second, in Frank v. Northern Pacific Ry. Co., 37 L.D. 193 (1908), adhered to, 37 L.D. 502 (1909), the Department held that Donohue, wherein the settler had, after selection, entered the land and then relinquished the entry, was not distinguishable from the Frank situation--abandonment without entry. "The selector is only entitled and will only be accorded a judgment upon the merits of its selection when proffered." Frank v. Northern Pacific Ry. Co., supra at 505.

The majority asserts that Alvin R. Jones, 45 L.D. 184 (1916), demonstrates that Collins' settlement did not defeat the State's selection. In Jones, the Department held that a State school indemnity selection, limited to "unappropriated" land by statute, was not defeated by a subsequently abandoned settlement. In the same case, however, the Department held that the same abandoned settlement did defeat a timber and stone application, limited to land not containing "the improvements of any bona fide settler." Alvin R. Jones, supra at 186, quoting the Act of June 3, 1878, 20 Stat. 89.

Further, in distinguishing the Donohue and Frank cases, discussed above, from the school indemnity selection at issue, the Department in Jones emphasized the importance of examining the language of the statute granting the selection right, and the nature of the claim asserted against the selection, in determining the viability of the selection. Such an analysis leads to the

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fn. 2 (continued)
166-67, 80 I.D. at 462, 552. That case thus involved no duly initiated settlement claim.

Andrew J. Billan, supra, like Navajo Tribe, construed a school land grant which vested title to designated sections in the State of Oklahoma, without application or approval. The Department noted that for lands settled at the time of the grant, because the statute reserved such lands to the State, title would vest upon the expiration or abandonment of the settlement claim. Andrew J. Billan, supra at 338, citing Water & Mining Co. v. Bugbey, 96 U.S. 165 (1877). The statutory grant of certain designated lands, as opposed to the creation of the right to apply for unspecified lands, distinguishes these cases. Further, Billan notes that if such a settlement claim had been recorded, "the grant would have been defeated even though the claim were never perfected." Andrew J. Billan, supra at 339 (emphasis added).

conclusion that Saint Paul, Minneapolis & Manitoba Ry. Co. v. Donohue, supra; Frank v. Northern Pacific Ry. Co., supra; and Delong v. Clarke, supra, control in the case at issue rather than Alvin R. Jones, supra, and the cases cited therein. First, Collins did not abandon, as did Jones, and second, Collins' activity was in furtherance of a duly initiated claim, not the squatter's settlement that "only confers a preference right" when the land is opened, as found in Jones.

Just as important as the nature of the trade and manufacturing site itself, however, is the meaning of the Statehood Act's limiting clause--"vacant, unappropriated" land. I would hold that Collins' claim was more than "mere settlement," it was an "appropriation," and in the alternative I would find that the land in Collins' claim was not "vacant."

In Vernard E. Jones, supra at 137, cited by the State Office and the majority, the Department held that the acceptance of a notice of location gives the Alaskan settler no rights by itself, and is not a bar to a subsequent finding that no rights were established by settlement. As with Jones' homesite settlement claim, applicants for public land are regularly subject to the jurisdiction of the Department to determine that the land at issue was not available for such application or disposition. Robert B. Ferguson, 9 IBLA 275 (1973) (oil and gas lease canceled); Mickey G. Shaulis, 11 IBLA 116 (1973) (mining claim declared null and void ab initio). Jones, however, means that if the land is open to settlement, then rights are established by settlement and improvement, which the Department will credit if a notice of location was timely filed. Compare Vernard E. Jones, supra at 140, with Donald Richard Glittenberg, 15 IBLA 165 (1974) (filing of notice of location without actual settlement and occupancy gives the locator no right to purchase), and Kennecott Copper Corp., 8 IBLA 21, 79 I.D. 636 (1972) (use and occupancy without the filing of a notice of location gives the locator no right to purchase).

None of these cases establish what the majority holds, namely, "If the person filing the notice of location has not established his right to the land because he has done nothing at all or what he had done is not enough, others may establish a superior right by occupancy or filing." It is unclear what "enough" means, but the majority apparently requires satisfaction of all the requirements for a trade and manufacturing site, or an acceptable application to purchase before a superior right is established. 3/

3/ Under this construction of the Act of May 14, 1898, as amended, 43 U.S.C. § 687a et seq. (1970), an Alaska homesite settler improving the claim and residing on it for 2 years would be cut off by a State selection, because he has earned no right to purchase until he has

However, in Donald J. Thomas, 22 IBLA 210 (1975), the Board held that a headquarters site locator who had begun to improve his claim at the time of withdrawal could not have his claim canceled without notice and an opportunity for hearing. Such protection against the effect of a withdrawal is only due to a settler whose allegations of improvement, if proven, would constitute a valid existing right excepted from a withdrawal, whether or not such improvements would prove a right to purchase. See Martha J. Jillson, 6 IBLA 150 (1972) (right to hearing). See also James Milton Cann, 16 IBLA 374 (1974) (Alaska settlement claim as valid existing right); Solicitor's Opinion, 55 I.D. 205, 210 (1935). And a valid existing right renders land "appropriated" for State selection purposes. See State of Alaska, supra at 69, 79 I.D. at 396. 4/

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fn. 3 (continued)
completed 3 years of residence. 43 CFR 2563.0-3. Similarly, a withdrawal or State selection would cut off a trade and manufacturing site locator who had built his shop or store but had no receipts on the withdrawal date.

Such a holding also files in the face of the State's filing itself, which declared that it was not intended to cover "any prior valid rights, claims, or patented lands." Whether or not Collins had a prior valid right, he did have a prior valid claim. Such a renunciation by the State was honored in State of Alaska, supra, and Norman A. Twitty, A-30016 (September 26, 1963).

4/ "Thus reading the two records in pari materia, it would seem that the 1962 application of the State did not affect the lands at issue, since the lands in issue were appropriated by the record of the homestead entry and were not subject to application by the State." (Emphases added.) State of Alaska, supra at 69, 79 I.D. at 396. The only difference between this case and State of Alaska is that the appropriation of record here is a trade and manufacturing site location. If the trade and manufacturing site location notation does not preclude State selection just as did the homestead entry notation in State of Alaska, (because it was a presumably valid existing claim renounced by the State in its filing and because land within a duly initiated and improved settlement claim is not "vacant and unappropriated,") then the land in Collins' trade and manufacturing site location was segregated in 1964 by the original State filing, and the State Office was in error in saying that the land was segregated only by the 1972 amended State filing.

The majority claims that because the 1972 State filing segregated the land, consideration of the effect of the 1964 filing is unnecessary. However, the majority does not merely dispute the notation rule aspect of this dissent, and in the opinion establishes a rule that would apparently segregate the land in favor of the State since 1964.

Collins' improvements in this case were significantly more valuable and complete at the time of State selection than those in Thomas at the time of withdrawal. On the authority of Donald J. Thomas, supra, and the inapplicability of Vernard E. Jones, supra; Donald Richard Glittenberg, supra; and Kennecott Copper Corp., supra, I would hold that the improvement and use of Collins' site, protected by a properly filed notice of location, rendered the land so located "appropriated" until the claim was canceled of record. See Whitten v. Read, 53 I.D. 453, 468 (1931) (possession and improvements under color of title defeat school land indemnity and forest lieu selections).

I further maintain that the term "vacant" in the limiting clause of the Statehood Act has independent meaning, and even if the land in Collins' site was "unappropriated," it was not "vacant." In Lucy S. Ahvakana, 3 IBLA 341, 344 (1971), the Board indicated that if allegations of Native use and occupancy at the time of State selection are properly documented, the land is not "vacant" and subject to State selection, citing State of Alaska v. Udall, 420 F.2d 938, 940 (9th Cir. 1969), cert. denied, 397 U.S. 1076 (1970). See also Edwardsen v. Morton, 369 F. Supp. 1359, 1374-75 (D.D.C. 1973). The issue in Ahvakana, similar to Collins' subsequent failure to prove up his claim, was whether subsequent abandonment by the Native nullified the effect of prior use and occupancy. The Board held, Lucy S. Ahvakana, supra at 344:

> * * * We wish to emphasize that even if the [Native] allotment application is not found to be allowable, the [Native] use of the land may be sufficient to bar the State selection application pro tanto.

I conclude that Collins' $10,000 plus in improvements rendered the land not "vacant" as the term has been construed by this Board and the Ninth Circuit Court of Appeals. As Collins' claim precluded the filing of a segregative State selection for the land in that claim, I conclude that Collins' claim so precluded an effective State selection until canceled of record.

In addition, I note that Glittenberg and Thomas dealt with the Alaskan settler's rights vis-a-vis a withdrawal, not a State selection. The Department has a policy to protect against State selection settlement rights that would not withstand the effect of a withdrawal. Compare Herman Joseph, 21 IBLA 199 (1975) with Archie Wheeler, 1 IBLA 139, 141 (1970). Thus, even if Collins' claim might not have constituted a "valid existing right" excepted from a withdrawal, it still rendered the land not "vacant and unappropriated" for the purpose of State selection.

For these reasons I would find the cases cited by the State Office and the majority not controlling in this conflict between

a State selection application and a duly initiated prior settlement right. In sum, settlement and occupancy, and the filing of a notice of location to protect that settlement, may not establish rights in the settler against the United States. But the effect of settlement and a notice of location, duly noted on the land records, on parties other than the United States, must be determined by reference to the terms of the grant or right subsequently asserted against the properly recorded settlement claim. See The Yosemite Valley Case, 82 U.S. (15 Wall.) 77, 87 (1872), quoted in Russian-American Packing Co. v. United States, 199 U.S. 570, 578 (1905).

The subsequent notation of the cancellation of the notice of location, and the determination that the law was not fully complied with, do not alter the fact that the land was not "vacant and unappropriated" at the time of the State's filings. Frank v. Northern Pacific Ry. Co., supra at 505; California v. Turner, supra; see Hastings & Dakota R.R. Co. v. Whitney, 132 U.S. 357, 360-64 (1889). "[W]hether 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 * * *." State of Alaska, supra at 67, 79 I.D. at 395.

The lands in trade and manufacturing site location A-061265 were, in my opinion, thus open to homestead application when appellant Margaret Klatt applied for them. 5/ I would reverse the decision rejecting her application insofar as it applies to the SW 1/4 NE 1/4, and SW 1/4 NW 1/4 section 24 for the reasons detailed above.

Frederick Fishman
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

5/ The State of Alaska, served with these appeals, has not appeared in these cases. The record contains no assertion that these lands are segregated in favor of the State selection on any other basis.