UNITED STATES DEPARTMENT OF THE INTERIOR
Walter J. Hickel, *Secretary*
Mitchell Melich, *Solicitor*

DECISIONS OF THE UNITED STATES DEPARTMENT OF THE INTERIOR

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PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1969 to December 31, 1969. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable Walter J. Hickel served as Secretary of the Interior during the period covered by this volume; Mr. Russell E. Train served as Under Secretary; Messrs. Hollis M. Dole, Carl L. Klein, Harrison Loesch, James R. Smith and Dr. Leslie L. Glasgow served as Assistant Secretaries of the Interior; Mr. Lawrence H. Dunn served as Assistant Secretary for Administration; Mr. Mitchell Melich served as Solicitor of the Department of the Interior and Mr. Raymond C. Coulter as Deputy Solicitor.

This volume will be cited within the Department of the Interior as "76 I.D."

Walter J. Hickel

Secretary of the Interior

TABLE OF DECISIONS REPORTED

cording to the guidelines and within the limits set out in this opinion.[6]

2. The appeal is dismissed as to all other matters.

ROBERT L. FONNER, *Member.*

I CONCUR:

SHERMAN P. KIMBALL, *Member.*

VERNARD E. JONES

A-30975 *Decided June 30, 1969*

Alaska: Homesites—Settlements on Public Lands

Rights to public land in Alaska may be acquired through settlement upon, and occupancy and improvement of, land as a homesite without prior approval of the Bureau of Land Management, but the filing of a notice of location of settlement in the appropriate land office is required in order to receive credit for any occupancy or use of land; however, the filing does not in itself establish any rights in a settler but serves only as notice that such rights are claimed, and the acceptance of a notice of location for recordation by a land office is not a bar to a subsequent finding that no rights were established in the attempted settlement.

Alaska: Homesites—Act of June 8, 1906—Settlements on Public Lands—Withdrawals and Reservations: Generally

The Antiquities Act of June 8, 1906, which authorizes the reservation by Presidential proclamation of public lands containing historic landmarks, historic and prehistoric structures and other objects of historic or scientific interest and which authorizes the issuance of permits for archaeological exploration does not itself effect a withdrawal of any lands from the operation of the public land laws, and the fact that land contains objects of possible historical or scientific interest or is included in a permit does not create a withdrawal of the land which constitutes a proper basis for refusing to accept for recordation a notice of location of a homesite claim on such land in Alaska.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Vernard E. Jones has appealed to the Secretary of the Interior from a decision dated March 13, 1968, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of the Bureau's Alaska State Office vacating an earlier decision which acknowledged his notice of location of a homesite claim and holding the notice of location to be unacceptable for recordation.[1]

[6] Insofar as the special Bonneville authority is not utilized.

[1] In the same decision the Office of Appeals and Hearings affirmed a decision of February 6, 1968, whereby the Alaska State Office held the notice of location of a homesite claim on adjacent land in the same section, Anchorage AA 346, of Hollis E. Justis to be unacceptable upon the same grounds relied upon in refusing recognition of appellant's claim. Justis did not appeal from the Bureau's decision, and the decision has become final as to him.

On July 22, 1966, appellant filed his notice of location, Anchorage AA 85, pursuant to section 5 of the act of April 29, 1950, 48 U.S.C. sec. 461a (1958), describing therein, by metes and bounds, a tract of land in unsurveyed sec. 6, T. 2 N., R. 28 W., Seward Mer., Alaska. Appellant stated in his notice that settlement was made on July 17, 1966. On September 20, 1966, the Anchorage district and land office acknowledged appellant's claim, stating that:

> Our records show that the lands are subject to settlement or occupancy. Your notice of location is therefore recognized as of the date filed.

On October 20, 1966, Joseph McGill and Grant H. Pearson, members of the Alaska State legislature, protested to the Director, Division of Lands, State of Alaska, against allowance of appellant's homesite claim, asserting that:

> The location where his homestead is staked in [sic] on the old Russian Church that was built in 1896. The old Indian graveyard is located near this church and is also on the area staked.
>
> It is very important that these Historical remains be protected and we highly recommend that this homestead be disallowed.

The matter was referred to the Bureau of Land Management where it was treated as a protest. By a decision dated February 6, 1968, the State Office vacated the acknowledgment of appellant's claim, and it declared appellant's notice of location of settlement or occupancy to be unacceptable, after reporting that:

> A field investigation shows that the subject lands are within the old Kijik Native Village which contains the ruins of an old Russian Orthodox church, archaeological deposits, and between two and three hundred Native graves.
>
> Jurisdiction over ruins, archaeological sites, historic and prehistoric monuments and structures, objects of antiquity, historic landmarks, and other objects of historic or scientific interest, shall be exercised, under the act of June 8, 1906 (34 Stat. 225; 16 U.S.C. 431–433), by the Secretary of the Interior over all lands owned or controlled by the Government of the United States, which are not under the jurisdiction of the Secretary of Agriculture or the Secretary of the Army.
>
> * * * * * * *
>
> Additionally, Public Land Order 2171, dated August 3, 1960, provides that public lands customarily used by Indians, Eskimos, and Aleuts as burial places for their dead are withdrawn from all forms of appropriation under the public land laws and reserved under the jurisdiction of the Secretary of the Interior as cemeteries for use in connection with the administration of the affairs of the Natives.
>
> The order is effective immediately with respect to those native cemeteries delineated as such on the plat of survey, and as to others upon the filing of an accepted plat of survey designating an area as a cemetery.

In appealing to the Director, Bureau of Land Management, appellant asserted that he actually settled on the property on May 17, 1966, that he spent six months there in 1966, that he cut logs for a cabin by hand and floated them down the lake to the cabin site to build a cabin,

and that, at great expense, he had completed his cabin prior to the State Office's decision of February 6, 1968. He denied that he was destroying grave markers as had been reported, asserting that when he "finally found the few very old crosses" he "put them in an upright position with the intention of putting a wire around this small area." He also denied the accuracy of reports that there are 200 to 300 graves in the area, estimating that "there would be at the most six or ten," and he stated that any archaeological findings or objects of antiquity on the land had been "sought after and dug for by the people from the University of Manatoba [sic]." He also criticized the Bureau for waiting nearly two years after the filing of his notice of location before determining that the notice was not acceptable, and he requested a hearing to ascertain the facts of the case.

In affirming the action of the State Office, the Office of Appeals and Hearings observed that the land claimed by appellant was not surveyed at the time of his settlement,[2] that, normally, it is not until after lands have been surveyed that objects on the ground are identified and noted on Bureau records, and that those who make settlement claims on unsurveyed lands must assume the risk that the lands are unreserved. The Office of Appeals and Hearings found that a report from an assistant professor, Department of Anthropology, University of Manitoba, stated that archaeological studies were carried out in the area of appellant's claim between June 15 and September 1, 1966. It further observed that a report from a Bureau of Land Management natural resources specialist, dated June 12, 1967, indicated that the allowance of appellant's homesite would be incompatible with the protection and preservation of the archaeological and historical values of the Kijik site and recommended that the claim be rejected in accordance with the provisions of the Antiquities Act of 1906, 16 U.S.C. sec. 431 *et seq.* (1964). The provisions of the act and of the Departmental regulations thereunder (43 CFR, Part 3), the Office of Appeals and Hearings held, made it unmistakably clear that even injury to antiquities may be severely punished, and it concluded that the determination that homesites were incompatible with the 1906 law was correct. At the same time, it denied appellant's request for a hearing, finding that, in view of the unequivocal language of the 1906 act, no useful purpose would be served by a hearing.

In appealing to the Secretary, appellant contends that the Bureau of Land Management, having been fully advised of all the facts, allowed him to file on the land in question and should now be estopped from taking any action to prevent him from obtaining a patent, that there have been, in fact, no graves officially established on the property but only the location of five or six old crosses, that the only right of the

[2] So far as the record discloses, the land remains unsurveyed at this date.

United States to withdraw this land from the public domain would be under Public Land Order No. 2171, which withdrew public lands for the protection of Indian cemeteries, and that the refusal of the United States to issue a patent at this time would deprive appellant of property without due process of law. Again, appellant requests that he be granted a hearing or an opportunity for oral argument.

The reasons offered by the Bureau for its action in this matter and the reasons advanced by appellant for his appeal from that action suggest some misapprehension on the part of both parties with respect to the nature of a notice of location or settlement in Alaska and the effect of its filing in a land office. Both parties appear to have viewed appellant's notice of location as the equivalent of an application for land which, in the view of the Bureau, was subject to rejection upon a determination by that agency that the land applied for should not be disposed of in the manner contemplated in the filing of the notice and which, in appellant's view, upon its approval by the land office, authorized his entry upon the land. Such is not the nature of a notice of location.

Except in Alaska, appropriation of, or entry upon, the public domain under the nonmineral public land laws is authorized only after application has been filed, the land applied for has been classified as suitable for the desired usage, and entry has been formally allowed. A determination by this Department that a tract of land has a greater value for some use other than that proposed by an applicant constitutes sufficient grounds for rejection of the application. In Alaska, however, such a determination is not a prerequisite to settlement upon the public lands. If land is vacant and unappropriated, that is, if no prior rights have been established and if the land has not been withdrawn or otherwise closed to operation of the public land laws, any person who is qualified to enter under those laws may, without seeking or obtaining permission from the land office, occupy or settle on a tract of land and, through compliance with one of the applicable laws, establish in himself rights in the land which will ultimately entitle him to receive patent to the land. It is immaterial in such a case that, in the view of the land office, the land may have greater value for some other purpose and that it may be, in fact, wholly unsuited to the type of settlement or occupancy that was made.[3]

Although prior approval by the land office is not needed in order to settle upon land in Alaska, a settler is required by the act of April 29, 1950, 48 U.S.C. secs. 371, 461a (1958), within 90 days after settling upon land, to file in the appropriate land office a notice of location or settlement. The purpose of such notice is to provide the land office with

[3] The Classification and Multiple Use Act of September 19, 1964, 43 U.S.C. §§ 1411–1418 (1964), vests the Secretary of the Interior with a temporary authority to classify public lands, including those in Alaska, for certain types of disposal or retention, pursuant to criteria stated in the act. The statements made in the text above are to be read with this qualification in mind.

information needed for the administration of public lands and to allow the settler to receive credit for his occupancy and use of the land, the statute expressly providing that, unless notice is filed in the time and manner prescribed, credit will not be given for occupancy maintained prior to the filing of notice of location or an application to purchase. The filing of a notice of location, however, does not establish any rights in 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 the law under which the settler seeks to obtain title. See *Anne V. Hestnes*, A–27096 (June 27, 1955); *Loran John Whittington, Chester H. Cone*, A–28823 (August 18, 1961); *Albert L. Scepurek*, A–28798 (March 27, 1962).

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 G. 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.

The Department has provided by regulation (43 CFR 2233.9–2(e)) for the return of the service charge required for recording a notice of location where the notice is not acceptable for recordation because the described land is not subject to the form of disposition specified in the notice, and the Department has held it proper to reject a notice of location where the establishment of rights by the alleged settlement is barred by the existence of prior rights in the same land or the unavailability of land for the particular type of entry attempted. See, *e.g.*, *Anne V. Hestnes*, *supra; Eugene T. Meyer*, A–27729 (December 17, 1958); *Edward W. Harrington*, A–27823 (June 15, 1959); *Bessie G. Stevens*, A–28039 (August 25, 1959); *Charles G. Forck et al.*, *supra; William R. C. Croley*, A–30673 (May 11, 1967).

The action of the State Office in vacating its earlier acceptance of applicant's notice of location and in declaring the notice to be unacceptable was proper, then, if, at the time of settlement, the land was closed to such settlement. We turn now to an examination of the premises for the Bureau's determination that the land was closed to settlement.

As previously noted, the State Office based its conclusion that the land in question was not subject to settlement upon the findings that:

(1) The land contains ruins, archaeological deposits and graves which are protected by the Antiquities Act of June 8, 1906; and

(2) Public Land Order No. 2171 of August 3, 1960, withdrew from all forms of appropriation under the public land laws public lands which were customarily used by Indians, Eskimos and Aleuts as burial places for the dead.

The Office of Appeals and Hearings discussed only the first finding; we commence with an analysis of the second.

As the State Office found, Public Land Order No. 2171, 25 F.R. 7533 (1960), withdrew "tracts of public land in Alaska customarily used by Indians, Eskimos, or Aleuts as burial places for their dead" from all forms of appropriation under the public land laws, and it provided that the withdrawal should be effective

> immediately with respect to those native cemeteries in Alaska which are delineated as such upon the approval and accepted plats of survey, and with respect to other native cemeteries in Alaska, upon the filing in the Land Office having jurisdiction of the area, of an accepted plat of survey designating an area as a cemetery, and the notation thereon of the character of such cemetery as a native cemetery.

The record clearly indicates that no plat of survey has been filed which delineates any native cemetery on the land in question. Thus, we cannot conclude from the present record that the land was withdrawn under Public Land Order 2171 on July 17, 1966, when appellant initiated his settlement.

Turning then to the other basis for refusal to accept appellant's notice, section 2 of the act of June 8, 1906, 16 U.S.C. sec. 431 (1964), authorizes the President of the United States, in his discretion, "to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments" and to "reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."

Sections 3 and 4 of the act, 16 U.S.C. sec. 432 (1964), provide for the granting of permits "for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity" and for the publication of rules and regulations by the heads of the administering governmental agencies for the purpose of carrying out the provisions of the act.

Section 1 of the act, 16 U.S.C. sec. 433 (1964), makes it a crime, punishable by fine and imprisonment, to "appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Gov-

ernment of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which such antiquities are situated."

Section 2 of the act is the only section which on its face speaks of a reservation of lands but it provides for accomplishing this by a Presidential proclamation designating the reserved land as a national monument. This, of course, has not been done here.

As for sections 1, 3, and 4, nothing in the express language of those sections has anything to do with the reservation of lands. Can it be implied that they effect a reservation of lands containing historic ruins or objects of antiquity? We think not.

The Antiquities Act was the subject of a *Solicitor's opinion* dated February 1, 1928, 52 L.D. 269, which considered several questions raised by the Department archaeologist. One question was whether land included in a homestead entry was subject to the issuance of an archaeological permit. The answer was that at least until the entryman earned equitable title to the land it remained subject to the jurisdiction of the Department and therefore to the issuance of permits. Until that time, ruins and other objects of antiquities on land in an entry belonged to the United States. Another question was whether the Department could retain permanent jurisdiction over archaeological remains "included in present unperfected claims *and future entries*" (italics added). The answer was that jurisdiction would terminate with the issuance of patent.

The opinion is significant in that it appears to accept the fact that land subject to the Antiquities Act can also be subject to public land laws, such as the homestead law, providing for the entry and patenting of such land. This is particularly indicated by the question as to whether jurisdiction under the Antiquities Act could be retained over land to be included in future entries. Implicit in the answer was the conclusion that land subject to the act is not thereby withdrawn or reserved from future entry under the homestead law. Such land only remains subject to the issuance of permits under the act until patent issues or equitable title is earned by the entryman.

This view also appears to be reflected in the terms of permits issued under the Antiquities Act. The permit issued on April 25, 1966, to the University of Manitoba to conduct archaeologic investigations, excavations, and collections in the area in question [4] provided that

(a) This permit shall not be exclusive in character and the United States reserves the right to use, lease, or permit the use of said land or any part thereof for any purpose. * * *

[4] The permit covered "Department of the Interior lands lying within one mile of the shore lines of Lake Clark and Lake Iliama, Alaska * * *." Appellant's claim falls easily within those limits.

Although this is not as broad a statement as would be one that the land in the permit remains subject to disposition under the public land laws, it does evince an understanding that the Antiquities Act itself has no segregative effect.

As the record does not show that the land in question has been withdrawn as an historic site or that it was withdrawn for any other purpose at the time of appellant's settlement, we cannot conclude that it was proper to refuse to accept appellant's notice of location.

It does not follow, of course, that we are ruling that appellant has established rights in himself through his acts of settlement. Inasmuch as the land embraced in appellant's homesite claim apparently was included in the site of Kijik Village, it may be that there are vested rights in the former villagers or their descendants which would preclude the obtaining of any rights through settlement on the land in 1966.

Because of unresolved conflicts involving questions of native rights in Alaska the Secretary of the Interior recently withdrew all unreserved public lands in the State from all forms of appropriation and disposition under the public land laws except locations for metalliferous minerals (Public Land Order No. 4582, 34 F.R. 1025). The withdrawal was made for the express purpose of determining and protecting the rights of native Aleuts, Eskimos and Indians, and it suspended action on pending applications until January 1, 1971, except in special circumstances. This withdrawal does not preclude the acknowledgement of appellant's claim that he has occupied the land in question since July 17, 1966.[5] However, should it be determined that appellant's settlement was preceded by the establishment of rights in others, appellant's homesite location would necessarily have to be declared null and void. If, on the other hand, the land is found to have been vacant, unappropriated and unreserved on July 17, 1966, appellant is entitled to credit for his acts of occupancy and use after that date.

In view of the conclusions reached here we find no issue presently ripe for determination which calls for a hearing, and appellant's request for a hearing is denied.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is reversed, and the case is remanded to the Bureau of Land Management for action consistent with this decision.

ERNEST F. HOM,
Assistant Solicitor.

[5] Although appellant asserted in his appeal to the Director that he actually settled on the property on May 17, 1966, that assertion was made long after the expiration of 90 days following the date of settlement, and appellant is entitled only to recognition of the occupancy which he claimed within that period.