Notation Rule

On July 1, 2016 I received a response from BLM Land Law Examiner, Barbara Yoppke regarding my questions about Homesteads and settlement claims vs withdrawals. She stated that the applicant must have staked the claim on the ground, occupied and filed an application with BLM causing notation of the BLM records (serial page/MTP) Once the notation is made, the land is considered segregated. I believe the notation requirement to segregate the land will not void the appropriately filed homestead entry.

She provided an IBLA case (Joe R. Young IBLA 2007-34) for the proposition that a notation on the BLM records can segregate lands from the public domain even if the notation is erroneously made or the segregative effect is void, voidable or has terminated or expired. I think she cites this case suggesting that the converse is also true. That if an applicant stakes, occupies and develops a homestead claim, files the appropriate applications and pays the appropriate fees at BLM, if BLM neglects to make the homestead entry on the records, then the land has not been segregated from the public domain.

Joe R. Young states the following:

> In Michael L. Carver, 163 IBLA 77, 84 (2004), we discussed the notation rule and its consequences for the location of mining claims and other entries on public lands:
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> Where public land records have been noted to show that a parcel of land is not open to entry under the public land laws, the parcel is not available for entry until such time as the notation is removed and the land is restored to entry, even if the original notation was made in error. William Dunn, 157 IBLA 347, 353 (2002), and cases cited. Pursuant to that rule, if a notation on the public land records indicates that land is closed to entry, the land is closed to entry even if the notation was erroneously made, or the segregative effect is void, voidable, or has terminated or expired. B. J. Toohey, 88 IBLA 66, 77-81, 92 I.D. 317, 324-26 (1985), aff'd sub nom. Cavanagh v. Hodel, No. 86-041 Civil (D. Alaska (Mar. 18, 1988)); Shiny Rock Mining Corp., 75 IBLA 136, 138 (1983). [4/] [Emphasis added.]
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> 4/ We also explained the rationale for the notation rule in Carver: "The notation rule is founded on the concept of providing fair notice to the general public of the availability of public domain lands and so to give to all the public an equal opportunity to file entries or mining claims. See Margaret L. Klatt, 23 IBLA 59, 63 (1975). Thus, a party checking public land records is entitled to rely on a notation that lands are not available so that no other party will be able to enter those lands. The rule is described as 'the salutary rule that land segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration is noted upon the records of the local land office.' California & Oregon Land Co. v. Hulen, 46 L.D. 55, 56 (1917); see also B. J. Toohey, 88 IBLA at 77-85, 92 I.D. at 324-28." 163 IBLA at 84.

In a concurring opinion, another IBLA judge said the following:

> It is difficult in general to argue against the recognized beneficial effects of this long-recognized rule, asserted as necessary for the orderly administration of the land laws. See, e.g., Martin Judge, 49 L.D. 171, 172 (1922); George E. Conley, 1 IBLA 227, 230 (1971). This Board has often acknowledged that "[t]he notation rule, * * * insofar as the public is concerned, strives to give to all the public an equal opportunity to file * * *." Margaret L. Klatt, 23 IBLA 59, 63 (1975). But despite the laudable goal of equal treatment for the public, in this case the rule has treated all citizens equally unfairly. It has functioned to create a de facto closure of the public lands to all entry for forty-three years, based upon egregious agency inaction. Surely there is a better way to ensure fair entry onto the public lands.

While this makes clear the effect of an erroneous notation that closes lands to entry, I don't believe it can be suggested that a homesteader's rights would be voided as a result of a BLM employee's failure to note the homestead entry on the BLM records.

Citing Hillstrand v. State (Alaska Supreme Court 1964)

> In the case of Hastings & Dakota R. R. v. WhitneyFN3 it was said that to effect an entry on public lands under the Homestead Act, it is necessary that one make an affidavit setting forth the facts which entitle him to make an entry, that he make a formal application, and that he make payment of the money required. And in McLaren v. FleischerFN4 the court said that for one to enter land under the Homestead Act he must make, subscribe and file in the proper land office the affidavit required by lawFN5 and pay the requisite fees.
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> To read the Hastings and McLaren cases, supra, to mean that there can be no entry-no inceptive right-until there has been strict technical compliance with the requirements of a regulation as to filing affidavits, is to ignore those cases which declare that in the administration of the Homestead Act the law deals tenderly with those who in good faith go upon public land with a view of making a home thereon.FN8 One who, in response to the invitation of the Homestead Act, actually settles on public lands in an honest effort to acquire a home is to be dealt with leniently and not subjected to the loss of his toil and efforts through any mistake or neglect of the government.FN9
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> FN8. Ard v. Brandon, 156 U.S. 537, 542-545, 15 S.Ct. 406, 39 L.Ed. 524, 526 (1895).
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> FN9. Great Northern Ry. v. Reed, 270 U.S. 539, 546-547, 46 S.Ct. 380, 70 L.Ed. 721, 725 (1926). See Tarpey v. Madsen, 178 U.S. 215, 219-222, 20 S.Ct. 849, 44 L.Ed. 1042, 1044-1045 (1900); St. Paul, M. & M. Ry. v. Donohue, 210 U.S. 21, 33, 28 S.Ct. 600, 52 L.Ed. 941, 946 (1908). Schmidt v. Stillwill, 1 Land Dec. 151 (1882); Massey v. Malachi, 11 Land Dec. 191 (1890); Knoble v. Orr, 27 Land Dec. 619 (1898).

Citing the 2015 Alaska Supreme Court Case, Luke v. Sykes

> Under the now-repealed homestead laws, a party established a claim to land not when the federal authorities allowed entry but rather when the party took the steps necessary to have entry recognized. " '[Entry] means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim' in the appropriate land office."[24] In Walker's case, that "inceptive right" was acquired

> when he filed his application for entry. Completing the application requirements and "fil[ing] his application in the United States Land Office" was "all that [an applicant] could possibly do to . . . [make] a lawful homestead entry."[25] At that point, the lands at issue became "subject to individual rights of a settler. . . . [T]he portion covered by the entry [was] then segregated from the public domain . . . and until such time as the entry may be cancelled by the government or relinquished, the land [was] not included in grants made by Congress under [RS 2477].
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> [24] *Hillstrand v. State*, 395 P.2d 74, 76 (Alaska 1964) (alteration in original) (quoting *Chotard v. Pope*, 25 U.S. 586, 588 (1827)).
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> [25] *United States v. 348.62 Acres of Land in Anchorage Recording Dist.*, 10 Alaska 351, 364 (D. Alaska 1943); *see also Hastings & D.R. Co. v. Whitney*, 132 U.S. 357, 363 (1889) ("Under the homestead law three things are needed to be done in order to constitute an entry on public lands: First, the applicant must make an affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made, the land is entered."); *Ault v. State*, 688 P.2d 951, 954 (Alaska 1984) (quoting *348.62 Acres*, 10 Alaska at 359).

Making the notation on the BLM records that a homestead has been validly entered and so segregating the land from the public domain was not a task that could be completed by the homestead applicant. It could only be performed by BLM. Given the above cited Alaska law and the federal cases they cite, it is apparent that the failure to make the homestead entry notation on the BLM records would not void the valid homestead entry and its segregation from the public domain.