

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA,)
)
 Appellant/Cross-Appellee)
 vs.) File Nos. 5407 and 5408
)
 ALASKA LAND TITLE ASSOCIATION,)
 et al.,)
)
 Appellees/Cross-Appellant)
 _____)

PETITION FOR REHEARING

Pursuant to Appellate Rule 506, the State of Alaska herewith petitions the court for rehearing on the issue of whether a homestead entry constitutes a "valid existing right" within the terms of PLO 601. The State believes that the court has not had the opportunity to consider statutes, decisions and principles directly controlling on this issue.

At 28 and 29 of Opinion No. 2681 issued May 27, 1983, the court held:

The PLO 601 withdrawal was expressly subject to "valid existing rights." 14 Fed. Reg. 5048 (1949). Homestead entries have been held to give rise to valid existing rights, although those rights may not in all cases take priority over intervening government acts. Here, however, there is no doubt of the intention to except prior homestead entries from PLO 601. As we have noted, PLO 601 was promulgated pursuant to 43 U.S.C. § 141. 43 U.S.C. § 142 states that "there shall be excepted from the force and effect of . . . section 141 . . . all lands which are, on the date of such withdrawal, embraced in any lawful homestead . . . entry"

The foregoing conclusion is based entirely on the assumption that PLO 601 was issued pursuant to 43 U.S.C. § 141. However, as explained below, PLO 601 could not have been issued pursuant to 43 U.S.C. § 141. Rather, PLO 601 was issued pursuant to the implied authority of the President to withdraw public lands for public purposes, as that authority was delegated to the Secretary in EO 9337. Accordingly, PLO 601 was not subject to the exceptions set forth in 43 U.S.C. § 142.

Until October 21, 1976, the President has had implied authority to withdraw public lands for public purposes. Grisar v. McDowell, 73 U.S. 364 (1867); United States v. Midwest Oil

Company, 236 U.S. 459 (1915); Portland General Electric Co. v. Kleppe, 441 F. Supp. 859, 861 (D. Wyo. 1977); Wisnak, Inc. v. Andrus, 471 F. Supp. 1004, 1008 (D. Alaska 1979); Northwest Explorations, Inc., 52 IBLA 87, 88 I.D. 31, 34-35 (1981); 37 Op. Atty. Gen. 433, 434 (1934); 40 Op. Atty. Gen. 73 (1941). 1/

The Pickett Act, enacted in 1910, gave the President express authority to make temporary withdrawals subject to certain conditions. 43 U.S.C. §§ 141-143. The Act did not repeal the President's implied authority to permanently withdraw land for public purposes.

Executive Order 9337 delegated both the Pickett Act authority and the implied authority to withdraw lands:

By virtue of the authority vested in me by the Act of June 25, 1910, Ch. 421, 36 Stat. 847 [Pickett Act], and as President of the United States, it is ordered as follows;

Sec. 1. The Secretary of the Interior is hereby authorized to withdraw or reserve lands of public domain and other lands owned or controlled by the United States to the same extent that such lands might be withdrawn or reserved by the President . . . (emphasis added)

PLO 601 does not limit its operation to the authority delegated to the President pursuant to the Pickett Act:

BY VIRTUE OF THE AUTHORITY VESTED IN THE PRESIDENT AND PURSUANT TO EXECUTIVE ORDER 9337 OF APRIL 24, 1943, IT IS ORDERED AS FOLLOWS:

. . .

. . . The public lands in Alaska . . . are hereby withdrawn from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and reserved for highway purposes:

. . . (emphasis added)

PLO 601 nowhere states that it was issued pursuant to the Pickett Act, nor that the withdrawals are subject to the limitations and exceptions provided in the Pickett Act. In fact,

1/ In 1976, with the passage of the Federal Land Policy Management Act (FLPMA), PL 94-579, October 21, 1976, 90 Stat. 2744, the Congress repealed the first section of the Pickett Act (43 U.S.C. § 141), and expressly repealed the implied authority of the President to make withdrawals of public lands. FLPMA § 704, 90 Stat. 2744, 2792. See House Report 94-1163 at 29, reprinted at 1976 U.S. Code Cong. & Admin. News 6174, 6203.

PLO 601 could not have been issued pursuant to the Pickett Act, because it withdrew the subject lands from entry under the mining and mineral leasing laws. The Pickett Act specifically provided that lands withdrawn pursuant to its provisions were to be "at all times" open to private acquisition under the mining laws. 43 U.S.C. § 142. In addition, PLO 601 was not a temporary withdrawal, as contemplated by the Pickett Act.

In Northwest Explorations, Inc., supra, the Interior Board of Land Appeals held that the fact that a withdrawal expressly withdrew land from appropriation under the mining laws established that the withdrawal could not have been made pursuant to the Pickett Act. 88 I.D. at 34-35.

Since it has been established that PLO 601 could not have been and was not issued pursuant to the Pickett Act, the Pickett Act exception relating to homestead entries does not apply to withdrawals made under PLO 601.

Homestead entries do not in all cases take priority over intervening government acts. Opinion No. 2681 at 28; State's Opposition and Reply Brief at 6-7. As against the United States, a homesteader receives no vested rights until the final certificate is issued. Union Pacific Railroad Co. v. Harris, 215 U.S. 386, 388-389 (1910); Brennan v. Udall, 251 F. Supp. 12, 18 (D. Colo. 1966); St. Joseph & Denver City Railroad Co. v. Baldwin, 103 U.S. 426, 428-430 (1881); Wilbur v. United States et rel Stuart, 53 F.2d 717, 720 (D.C. Cir. 1931).

Thus, as against the United States, a homesteader did not acquire valid existing rights until he had completed all of the requirements of the homestead laws. For these reasons, homestead entries are subject to the withdrawals set forth in PLO 601, as modified and preserved by PLO 757, DO 2665, and PLO 1613.

Respectfully submitted this 6th day of June, 1983.

DELANEY, WILES, HAYES,
REITMAN & BRUBAKER, INC.
Attorneys for State of Alaska

By Eugene F. Wiles
Eugene F. Wiles

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| |) | |
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| _____ |) | |

CERTIFICATE OF COUNSEL

The undersigned counsel has herewith submitted a Petition for Rehearing on the issue of whether a homestead entry is a "valid existing right" within the terms of PLO 601, and therefore excepted from the operation of PLO 601. The undersigned counsel certifies that in his judgment the Petition for Rehearing is well founded, and it is not interposed for delay.

DATED this 6th day of June, 1983.

DELANEY, WILES, HAYES,
REITMAN & BRUBAKER, INC.
Attorneys for State of Alaska

By Eugene F. Wiles
Eugene F. Wiles

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SUBSTITUTION OF COUNSEL

Pursuant to Appellate Rule 517, the State of Alaska hereby substitutes the firm of Delaney, Wiles, Hayes, Reitman & Brubaker, Inc. as its counsel in the above-entitled matter.

STATE OF ALASKA
Norman C. Gorsuch, Attorney General

DATED: June 6, 1983

By _____
Richard B. Kerns

DELANEY, WILES, HAYES,
REITMAN & BRUBAKER, INC.
Attorneys for State of Alaska

DATED: June 6, 1983

By *Marc D. Bond*
Marc D. Bond

IT IS SO ORDERED.

DATED this ____ day of June, 1983.

CLERK OF COURT

By: _____
Deputy Clerk