BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:	)	
	)	
ESTATE OF WALTER P. WIGGER	)	
	)	OAH No. 15-1280-TAX
Mining License Tax	)	
(Tax Years 2006, 2007, 2008)	)	

DECISION

I. Introduction

The Department of Revenue, Tax Division, assessed a mining license tax plus penalty and interest on Walter Wigger for sales by Mr. Wigger of tailings to M&M Constructors (M&M). Mr. Wigger's estate argued that Mr. Wigger did not owe the tax.

The mining license tax applies to a person "prosecuting or attempting to prosecute, or engaging in the business of mining in the state."[1] The tailings Mr. Wigger sold to M&M were the product of a dredging operation carried out by United States Smelting, Refining and Mining Company (USSR&M). The tailings were personal property when they were produced and when they were sold by Mr. Wigger. Mr. Wigger's sale of tailings originally stacked and stockpiled by USSR&M did not constitute mining or engaging in the business of mining. Therefore, Mr. Wigger did not owe mining license tax for these sales.

II. Facts

This case stems from the sale of tailings by Mr. Wigger to James McGlinchy of M&M in 2006, 2007, and 2008. Mr. Wigger lived in Fairbanks and was involved in the construction industry there from 1938 until his death in 2015.[2] When Mr. Wigger moved to Fairbanks, the Fairbanks Exploration Company (F.E. Co.) was conducting placer gold mining operations in the Fairbanks area on behalf of USSR&M using floating dredges.[3] F.E. Co. and USSR&M operated in the area from the mid-1930s until 1964.[4] By 1964, "mining costs made it uneconomical to continue operations."[5]

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1 AS 43.65.010(a).

2 Agency Record at 1, n. 1; Agency Record at 87 (Affidavit of Wigger at 1).

3 Affidavit of Metz at 2 (attached to Wigger's opening brief).

4 Affidavit of Metz at 2; Agency Record at 87 (Affidavit of Wigger at 1); *U.S. Smelting, Refining and Min. Co. v. Wigger*, 684 P.2d 850, 852 (Alaska 1984).

5 *U.S. Smelting, Refining and Min. Co. v. Wigger*, 684 P.2d at 852.

In 1960, USSR&M granted the state a right-of-way for a highway over mining claims USSR&M owned.[6] The right-of-way agreement reserved mineral and mining rights to USSR&M, as well as "[t]he right to receive and use or sell or otherwise dispose of any gravel taken from any of the above-listed mining claims . . . No such gravel shall be so taken or be so used by said Grantee or others without the prior permission in writing of the Grantor, and payment for such gravel shall be made to Grantor by Grantee on a mutually agreed basis."[7]

In addition to land it owned, USSR&M held mining leases on other parcels, including parcels originally owned by Clara and L.N. Jesson. In 1963, the state brought a condemnation action against 18.894 acres of land, Clara and L.N. Jesson's heirs (the "Jesson heirs), and USSR&M.[8] The state sought the right to remove gravel from the roadbed of what was to become the Parks Highway.[9] The state removed 144,448 tons of gravel, which was valued by a special master at ten cents a ton. The state deposited $14,444 with the court. USSR&M claimed those funds based on its interest as a mineral lessee and in turn paid royalties to the Jesson heirs for the gravel taken. [10]

In 1972, Mr. Wigger bought land from several of the Jesson heirs.[11] In 1980, Mr. Wigger filed suit against Alaska Gold, a successor to F.E. Co. and USSR&M. He sought to have USSR&M's mining lease for the lands Mr. Wigger purchased from the Jesson heirs terminated and to quiet Mr. Wigger's title in the property originally owned by the Jessons. He did this in part because one of the successors to F.E. Co. and USSR&M had been taking tailings (or "gravel") off the land without paying Mr. Wigger.[12] Mr. Wigger prevailed. The court held that "the lease terminated in 1964 when the lessee ceased mining in the leased land and in the Ester Creek area because, on an objective standard, precious metals could no longer be profitably mined."[13]

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6 Agreement and Right-of-Way Deed recorded April 28, 1960, Book 112, Page 24 at 1 (Attachment to Wigger Reply).

7 *Id* at 3.

8 Attachment to Wigger's Opening Brief: court file in *State of Alaska v. 18.894 Acres of Land Situate in the Fourth Judicial District et al.,* 4FA-63-00164CI ("Condemnation action") at 1(Complaint at 1).

9 Condemnation action at 17 (Declaration of Taking at 2).

10 Condemnation action at 47 (Statement in Support of Motion).

11 *U.S. Smelting, Refining and Min. Co. v. Wigger*, 684 P.2d at 852.

12 *Id*.

13 *Id.* at 856 - 857.

In 1986, Mr. Wigger bought more land, this time from Alaska Gold. He paid $991,667 for this property.[14] The parties agreed that the purchase price for "the properties" "was established by placing a value on the tailings reserves of $500,000.00 and a value on the remainder of Alaska Gold Company interest in the real property at $491,667.00."[15]

The land that Mr. Wigger purchased from USSR&M and the Jessons had previously been mined by USSR&M, which had left large quantities of dredge tailings.[16] Mr. Wigger sold tailings "from time to time."[17] He paid real property taxes to the Fairbanks North Star Borough based on the purchase price of the USSR&M property less the value placed on the tailings reserve.[18] He paid federal income taxes on his income from the sale of tailings, deducting a basis of one dollar per cubic yard for approximately twenty years, until his sales from the USSR&M property totaled 500,000 cubic yards.[19]

In 2006, 2007, and 2008, Mr. Wigger sold M&M tailings for $3.00 per cubic yard, the going price for dredge tailings in Fairbanks at that time.[20] M&M reported its purchases to the division on a form designated "Schedule D. Royalties Paid." M&M reported Wigger as the lessor, and gave the total amount paid to Mr. Wigger in each of the three years in the box marked "total royalties paid."[21]

Based on these reports, in 2009, the division informed Mr. Wigger that, as the owner of property where mining operations were being conducted, he was required to have a mining license and file tax returns.[22] Mr. Wigger responded that he was not engaged in the business of mining, and that the tailings were personal property.[23]

Mr. Wigger and the division did not arrive at a meeting of the minds about the tax. Mr. Wigger filed suit in Superior Court in 2012. In 2013, the court remanded the matter to the division for an administrative hearing, and retained jurisdiction to hear any appeal resulting from that administrative hearing.[24]

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14 Agency Record at 104 - 108 ("Agreement for Purchase of Property Settlement of Claims and Use of Property" dated February 19, 1986).
15 Agency Record at 112 ("Further Agreement" dated February 21, 1986).
16 Agency Record at 87 (Affidavit of Wigger at 1).
17 *Id.* at 89.
18 *Id.*
19 *Id.*
20 Agency Record at 85, 89 (Affidavits of McGlinchy and Wigger).
21 Agency Record at 21 - 23 (Schedule Ds).
22 Agency Record at 18, 213 (Sept. 1, 2009 letter from Whiteside to Wigger).
23 Agency Record at 214 - 215.
24 Agency Record at 69 - 76 (Order in 4FA-12-01171CI).

In October 2014, the division held an informal conference on the matter.[25] Mr. Wigger argued to the division that the sales to M&M were not taxable because the tailings were personal property. In August 2015, the division issued its informal conference decision. It concluded that the tailings were real property, upholding its finding that Mr. Wigger owed $14,703 in taxes, $6,584 in interest, and a $3,676 penalty for failure to timely file for 2006, 2007, and 2008.[26]

The estate appealed the informal conference decision to the Office of Administrative Hearings under AS 43.05.241. The hearing in this matter was conducted on the written record and the briefs, with oral argument held on June 17, 2016. Barry Donnellan represented the Estate of Walter Wigger (estate). Assistant Attorney General Jessica Alloway represented the Department of Revenue, Tax Division.

III. Discussion

This matter is heard de novo under AS 43.05.435. The estate has the burden of proof on questions of fact.[27] The standard of proof is the preponderance of the evidence.[28] Previous administrative decisions, unless reversed or overruled, have the force of legal precedent.[29] However, findings of fact made in a previous case are not binding in this case.

Since 1913, Alaska has had a mining license tax.[30] Alaska's mining license tax has been described as an occupation tax, as opposed to a property tax. Specifically, the tax "is not laid on the land containing the ore, nor on the ore after removal, but on the business of mining the ore, which consists in severing it from its natural bed and bringing it to the surface where it can become an article of commerce and be utilized in the industrial arts."[31]

The fundamental question in this matter is whether the sales of tailings by Mr. Wigger to M&M were subject to the mining license tax under AS 43.65.010 - 43.65.060. Under AS 43.65.010(a), "[a] person prosecuting or attempting to prosecute, or engaging in the business of mining in the state shall obtain a license from the department." Mr. Wigger did not obtain a license, and the estate contests the assessment of the mining license tax on Mr.

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25 Agency Record at 164.
26 Agency Record at 6.
27 AS 43.05.455(c).
28 AS 43.05.435(1); AS 43.05.455(c).
29 AS 43.05.475(a).
30 *Territory of Alaska by Olson v. Hawkins*, 9 Alaska 573, 582 (D. Alaska, 4th Div. 1939).
31 *In the Matter of Tip, Inc.*, Department of Revenue Decision No. 83-25, 1983 WL 15149 *5 (August 1, 1983), *citing Olson v. Hawkins*, 9 Alaska 573, 583 (D. Alaska, 4th Div. 1939), *quoting Oliver Mining Co. v. Lord,* 262 U.S. 172, 176 - 177 (1923) (*overruled* on other grounds).

Wigger. Mr. Wigger argued persuasively that he did not mine the tailings, and that he was not engaging in the business of mining when he sold the tailings to M&M.

A. Wigger did not mine the tailings

The mining license tax statutes in effect between 2006 and 2008 define "mining" as

> an operation by which valuable metals, ores, minerals, asbestos, gypsum, coal, marketable earth, or stone, or any of them are extracted, mined, or taken from the earth; 'mining' includes the ordinary treatment processes normally applied by mine owners or operators to obtain the commercially marketable product, but does not include the extraction or production of oil and gas.[32]

The estate argued that Mr. Wigger was not mining, and that it was USSR&M that mined the tailings. USSR&M's placer gold mining operation involved removing the "muck overburden," thawing the gold-bearing gravel beneath it, running that gravel through a dredge to extract the gold, and stacking the tailings.[33] USSR&M dredged the area where Mr. Wigger's property is located years before Mr. Wigger bought the property.[34] It stacked the tailings on a layer of "fine-grained, sand-sized material known in mining circles simply as 'fines.'"[35] The tailings stayed stacked on the fines until they were sold to M&M. Mr. Wigger did not mine them from the earth, and he did not process them to obtain a commercially marketable product. The tailings were marketable as mined and stacked by USSR&M.

B. Wigger did not receive royalties on the sale of the tailings

The division argues that Mr. Wigger was in the business of mining under 15 AAC 65.010(a)(2).[36] Under that paragraph, a person "owning a mining property and receiving lease or royalty payments based on production from that property" is engaged in the business of mining.[37] It is undisputed that Mr. Wigger owned the land where the tailings he sold to M&M were stacked.

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32 AS 43.65.060(2). This definition was amended in 2012 in sec. 2, 28 SLA 12 (CSHB298(FIN)).

33 *See* Boswell, John C. *History of Alaskan Operations of United States Smelting Company* (Mineral Industries Research Laboratory, University of Alaska Fairbanks, 1979), Figure 3-1 "Operation of United States Smelting and Refining Mining Company" (p. 78 is attached to Wigger's Reply Brief, the entire publication is available at https://scholarworks.alaska.edu/han-dle/11122/2209). "Fig. 3-1 is a diagrammatic cross-section showing the sequence of operation through the principal mining phases in the Fairbanks area." *Id at 15.* Note that Fig. 3-1 is not actually numbered, but must refer to the diagram appearing at the bottom of page 78 after figure 2-19 and before Fig. 3-2 on p. 79.

34 Affidavit of Metz at 2; Wigger Reply at 5.

35 Affidavit of Metz at 3.

36 Division Response at 7, 10.

37 15 AAC 65.010(a)(2).

The division argued that "production occurred at the time that a contractor physically removed and separated the gravel tailings from the mining property."[38] The division cited as authority AS 43.65.060(6), which defines "production" as "the date on which initial shipment of products from mining operations is made." The estate, on the other hand, argued that the initial shipment of tailings took place shortly after dredging operations commenced in the mid-1930s, and that "all mining of tailings became taxable before 1940. The properties of concern herein were dredged in 1947. So, applying the statute cited by DOR, mining license taxes on the tailings fell due as they were mined."[39] Neither party cited case law or other authority besides the definition in AS 43.65.060 to support their interpretation of the term "production" as used in 15 AAC 65.010(a)(2). The statutory definition does not really address the question whether loading tailings and driving them away from a property constitutes mining, or whether the same tailings could have been produced twice -- once when they came out of the dredge, and once when they were loaded for removal by M&M. This issued was raised in *In re Eagan*, which held that extraction is not "a required element of 'mining'" for purposes of Alaska's mining license tax.[40] However, this question does not need to be addressed here, because Mr. Wigger has shown that he did not receive a lease or royalty payment from M&M.

The division asserted that Mr. Wigger "received a lease or royalty payment based on production from his mining property."[41] Mr. Wigger affied, however, that "I never asked for and never received a royalty on the sale of tailings."[42] The division may have drawn the conclusion that royalties were paid based on the Schedule D tax forms filed by M&M, showing sums described as royalties and paid to Mr. Wigger over the course of three years. However, Mr. McGlinchy of M&M subsequently affied that his payments to Mr. Wigger were documented in his returns on the form that "seemed to be the most suitable at the time for the purpose at hand. But, the form itself may have created a false impression." Mr. McGlinchy went on to state that "I did not pay royalty to Wigger and I did not engage in any activity on Wigger's property that could in any way be regarded as quarrying or mining."[43] Mr. McGlinchy's affidavit stated that he has "extensive experience quarrying aggregate," and

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38 Division Response at 10.
39 Wigger Reply at 10.
40 *In re Eagan*, OAH No. 11-0091-TAX at 5, available at http://aws.state.ak.us/officeofadminhearings/Documents/TAX/LFLP/TAX110091.pdf.
41 Division Response at 10.
42 Agency Record at 89 (Affidavit of Wigger at 3).
43 Agency Record at 85 (Affidavit of McGlinchy at 2).

knows "the difference between quarrying aggregate in an original operation and loading dredge tailings stockpiled in the course of a prior placer mining operation." Finally, Mr. McGlinchy explained that a typical mining royalty for aggregate is ten percent of the value of the product. He paid three dollars a yard. If Mr. McGlinchy had owned the right to mine the tailings and was paying royalty to Mr. Wigger, the tailings would have had to have a value of $30 a yard.[44] This is inconsistent with the market for tailings in the Fairbanks area. The explanation in Mr. McGlinchy's affidavit supports Mr. Wigger's claim that he was receiving a cash price for the tailings, not a royalty payment.

The mining license tax statute anticipates one specific situation where a person might receive mineral royalties: "[t]he lessor of a mine operated under a lease is considered to be engaged in mining within this chapter, and the royalties received by the lessor are considered to be the net income of the lessor's mining operations."[45] Furthermore, "[t]axes upon royalties shall be paid by the taxpayer receiving the royalties and no deduction, excepting depletion, is allowed."[46] However, in this case, the only evidence of payment of a royalty is the set of Schedule D forms completed by M&M. M&M has since repudiated its description of those payments to Mr. Wigger as royalties. The division has not produced any evidence of an agreement between Mr. Wigger and M&M that M&M would "produce" the tailings and pay Mr. Wigger a royalty for that privilege.

The division's informal conference decision in this matter found that "the tailings were considered real property under Alaska law for the tax periods at issue and as such qualified as mined materials. Mr. Wigger received income from selling the tailings. That income is subject to tax no matter what title the income is given."[47] However, the nature of the payment from M&M to Mr. Wigger does matter for purposes of 15 AAC 65.010(a)(2). The division's argument that Mr. Wigger was engaged in the business of mining under that paragraph depends on Mr. Wigger's receipt of "*a lease or royalty payment* based on production from his mining property."[48] With no showing that there was a lease or an agreement for the payment of royalties between Mr. Wigger and M&M, taking all of the available evidence into consideration, it is more likely than not that the payments M&M

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44 *Id.*
45 AS 43.65.010(d).
46 AS 43.65.010(h).
47 Agency Record at 3.
48 Division Response at 10.

made to Mr. Wigger were for the purchase of tailings at three dollars a cubic yard, not lease or royalty payments.

C. The tailings were personal property when stacked

The division asserts that Mr. Wigger engaged in the business of mining when he allowed M&M to "remove gravel tailings from his property in exchange for money."[49] Based on the decision in *In re Eagan,* the division argues that whether a property owner engages in mining by selling tailings from gold mining that occurred years earlier depends on the intent of the miner who produced the tailings.[50]

Like this case, the *Eagan* case involved the assessment of the mining license tax on the sale of tailings originally produced by USSR&M to M&M. That case established that "the sale of personal property from mining-related land is not 'mining' under the mining license tax laws," and "whether [the] activity was mining, rather than the sale of a product, depends on whether the tailings were personal property when M&M purchased and removed them."[51]

The *Eagan* decision drew on an earlier Alaska Supreme Court decision, *Hayes v. Alaska Juneau Forest Industries*.[52] According to the *Eagan* decision, "[t]he *Hayes* decision acknowledges that dumping of the tailings and using them as real property converts them into real property, while stockpiling the tailings for other uses preserves them as personal property."[53]

The tailings in this case are not like those at issue in *Hayes.* The tailings in *Hayes* were from a hardrock gold mining operation on a mountain. The tailings were dumped on adjacent tidelands until the tidelands were full, and then on submerged lands under Gastineau Channel under permits from the War Department. "In time, a considerable acreage of real property was created well above high water which came to be in some demand for industrial uses."[54] In contrast, the tailings in this case were from a placer gold mining operation around a creek. Mr. Wigger explained the difference as follows:

> Dredge tailings, which are produced in a placer mining operation, are vastly different from tailings produced in hardrock mining operations. In particular, tailings produced in a placer mining operation are

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49 Division Response at 1.
50 Division Response at 1 - 2.
51 *In re Eagan*, OAH No. 11-0091-TAX at 5.
52 748 P.2d 332 (Alaska 1988).
53 *In re Eagan*, OAH No. 11-0091-TAX at 6.
54 *Hayes,* 748 P.2d at 333, *quoting State v. A.J. Industries*, 397 P.2d 280, 281 (Alaska 1964).

> deposited close to their points of extraction from the earth. Tailings produced in a hardrock mining operation are transported and deposited some distance from their points of extraction from the earth.[55]

The *Hayes* court observed that "[w]here mine tailings are deposited for purpose of disposal, the tailings are considered realty."[56] In *Hayes,* the court relied on the conclusion from an earlier case that the tailings at issue were not abandoned, and that the dumping of tailings was done primarily for purposes of disposal.[57] Furthermore, it noted that the tailings in that case had been used as fill "to create land" which supported a tank farm, a radio station, a beam station, a warehouse, a dock, a boat ramp, and storage yards.[58] So, in *Hayes,* the court relied on an earlier finding that the tailings were dumped with the intent of disposing of them, as well as the observation that they were actually being used as real estate in order to conclude that the tailings in that case were real property rather than personal property.

Under *Hayes,* the intent of the person depositing the tailings is relevant to the determination of whether the tailings are real property or personal property. In *Eagan*, neither party presented evidence of USSR&M's intent when it deposited the tailings on the property.[59] So, the Administrative Law Judge looked at the fact that USSR&M used a quitclaim deed when it sold the land under the tailings to Mr. Eagan's parents, and inferred that USSR&M regarded the sale to the Eagans as a sale of real property, not personal property.[60]

In this case, unlike the *Eagan* case, we have indirect evidence of USSR&M's intent at the time it stacked the tailings. Specifically, according to Mr. Wigger, "[i]n all the time I resided in the Fairbanks area there has been a demand for tailings in the construction industry. USSR&M and its successors in interest catered to that demand by selling tailings produced during their mining operations."[61] Since Mr. Wigger moved to Fairbanks in 1938, this statement certainly covers the period during which his lands were dredged, in the mid-

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55 Agency Record at 88 (Affidavit of Wigger at 3).

56 *Hayes,* 748 P.2d at 336, *citing Steinfeld v. Omega Copper Co.,* 141 P. 847, 848 (Ariz. 1914) among others.

57 *Hayes,* 748 P.2d at 336, *quoting State v. A.J. Industries,* 397 P.2d 280, 284 (Alaska 1964).

58 *Id.*

59 *In re Eagan* at 6 ("Neither party presented evidence establishing U.S. Smelting's intent when it deposited the tailings on this property").

60 *Id* at 8 ("Had the tailings been considered personal property, a different sort of transfer and restriction mechanism than a quitclaim deed would have been expected").

61 Agency Record at 87 - 88 (Affidavit of Wigger at 1 - 2). Note that in *Eagan*, the decision relied partly on a statement by Mr. Eagan "that there was little or no market for tailings at the time his parents purchased the property" to conclude that "the lack of a market for tailings in the 1950s and 1960s would make it less likely that the tailings were stockpiled or impounded as personal property." *In re Eagan*, OAH No. 11-0091-TAX at 6.

1940s. Also, in the 1960 highway right-of-way agreement, executed while USSR&M was still mining, USSR&M reserved the right to sell tailings. The affidavit of Paul Metz indicates that a market for tailings existed when USSR&M mined the tailings. Mr. Metz's affidavit states that "[t]ailings are of particular value to the local construction industry because of the prevalence of permafrost and frost susceptible soils around Fairbanks. In fact, tailings played, and continue to play, a major role in the local economy."[62] Although USSR&M's primary focus may have been on mining gold, the tailings were a valuable byproduct. This evidence points to the conclusion that USSR&M intended to stockpile the tailings as it mined them, and sell them as the market permitted.

Regarding the tailings stacked on the land Mr. Wigger purchased from the Jesson heirs, the ownership of the land and mineral rights is more complex. The division argued that if the tailings condemned by the state were personal property, "then USSR&M would not have owed a royalty to the Jesson heirs."[63] The estate argues that "[h]ad the Jesson heirs owned the tailings as realty, the State of Alaska would have paid the entire condemnation price to them." According to the estate, USSR&M paid eight percent of the condemnation price to the Jesson heirs as royalty on the production of the tailings taken by the state.[64] Neither of these arguments directly address the intent of USSR&M at the time it stacked the tailings on the property; at best, they reveal something about how the state perceived a complex land ownership situation.

However, USSR&M's briefing in the condemnation action suggests that USSR&M regarded the tailings as personal property that had already been separated from the land. Specifically, USSR&M's attorney wrote:

> [h]ere we are concerned with lands that have once been mined for their mineral content of gold. This mining has been accomplished by the dredging method which has entirely obliterated the original soil surface of the land as effectively as open-bed mining; and left in its place stacks of gravel, rock and other washed earth debris.[65]

This description is further evidence that USSR&M treated the tailings as personal property when it stacked them.

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62 Affidavit of Metz at 2.
63 Division Response at 14 - 15.
64 Wigger Reply at 5.
65 Condemnation action at 53 (Statement in Support of Motion by USSR&M requesting disbursement of funds filed April 19, 1968 at 2).

Reconstructing the intent of USSR&M from the available evidence -- decades after the tailings were mined -- it is more likely than not that USSR&M intended to treat the tailings as personal property when USSR&M stacked them.

D. The tailings did not become real property

The *Eagan* decision concluded that the tailings Eagan sold were real property because the Eagans purchased "land containing unconfined tailings resting directly on the land and mixing with the local soils. As a matter of fact, the tailings were physically part of the land."[66] Furthermore, photographs of the property submitted as exhibits by Mr. Eagan showed "tailings heaped on the ground and generally commingled with the land."[67] The evidence presented in this case leads to a different conclusion about the tailings sold by Mr. Wigger.

The tailings at issue in this case were not resting directly on the land or mixing with the local soils when they were stacked. They passed through the dredge and were neatly stacked on land owned or leased by USSR&M adjacent to where they were mined.[68] They were stacked on fines, not on soil on the ground. As Mr. Wigger explained:

> All tailings produced by USSR&M were neatly stacked by floating dredges near the points where they were extracted from the earth. The tailings not yet sold are still stacked exactly as they were at the time of production. The tailings are not mixed with realty. Instead, they lie on top of fine tailings (often referred to as "dredge sands" or "fines" produced at the same time as the coarse tailings of concern herein. There exists a distinct dividing line between the dredge sands and the overlying coarse tailings.[69]

So, the tailings in this case were stacked and remain on top of fines produced in the dredging process. Paul Metz confirms this:

> The processing of the earth materials excavated by the dredge discharged the clay and silt particles downstream. That was standard practice at the time. Because the fines contain no clay or silt, the tailings do not mix with the fines. The dividing line between the tailings and the fines is as sharp now as when the tailings were produced.[70]

Finally, James McGlinchy of M&M affied that "[t]he most readily available source of raw aggregate in the Fairbanks area is the dredge tailings produced during placer mining

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66 *In re Eagan*, OAH No. 11-0091-TAX at 5.
67 *Id.* at 8.
68 Agency Record at 88 (Affidavit of Wigger at 3).
69 *Id*.
70 Affidavit of Metz at 1, 3.

operations decades ago. Such dredge tailings were deposited in discrete stacks on a horizontal surface of finer material."[71] The evidence in this case indicates that the tailings Mr. Wigger sold to M&M rested on, and remained distinct from, a layer of finer sand-like material generally referred to as "fines." The tailings were not mixed with the fines, or with clay, or silt, and were not "generally commingled with the land." The tailings did not become real property by commingling with the land.

The *Eagan* decision noted that the tailings in that case were "unconfined."[72] *Eagan* used a hypothetical example to illustrate the difference between "confined" and "unconfined," positing that if Mr. Eagan's parents had purchased tailings "bundled in burlap sacks, stacked on pallets, those tailings likely would be personal property, having been separated from the real property."[73] *Eagan* did not hold that all tailings not bagged and stacked on pallets are real property.[74] *Eagan*, through the burlap bag example, illustrates that tailings that are obviously segregated can readily be identified as personal property. Tailings piled on the ground, on the other hand, present a more difficult case for distinguishing between personal and real property than tailings in bags. In *Eagan*, Mr. Eagan failed to establish that the tailings he sold to M&M had remained segregated from the real property. Here, however, the estate has succeeded in showing the requisite segregation.

Confining tailings was not practical or common practice when the tailings were mined, and would be cost-prohibitive today.[75] The gist of the *Eagan* decision is that tailings need to be segregated from the earth, not commingled with the topsoil, in order to retain their status as personal property. That the tailings in this case were not confined in sacks or cribbing does not show that the tailings were real property. Rather, as the affidavits of Mr. Wigger and Mr. Metz show, the tailings in this case were clearly segregated from what was below by a layer of fines when they were stacked and remained segregated.

When Mr. Wigger bought the tailings and the land from USSR&M, the purchase did not convert the tailings from personal property to real property. Before the sale, Alaska

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71 Agency Record at 85 (Affidavit of McGlinchy at 1).

72 *In re Eagan*, OAH No. 11-0091-TAX at 5.

73 *Id.*

74 *See* Response at 15.

75 *See* Affidavit of Metz, esp. at 3 ("Retaining structures are simply not used due to the large areas of the material sites that provide sufficient storage capacity without the potential for the commingling of the classified material or the commingling of material with different ownership."); Second Affidavit of McGlinchy at 2 ("Tailings are sold in quantities often exceeding 100,000 cubic yards at a time. Tailings, as that term is used in Fairbanks, are never put in sacks. . . . I cannot conceive of any circumstance in which it would be cost effective to put a ton of tailings costing $2.00 into a sack costing a minimum of $15.00.")

Gold Company had the property appraised. The appraisal estimated the value of the acreage at $473,000 and the value of the tailings at $626,000.[76] The agreement for purchase of the property did not distinguish between the value of the real property and the value of the tailings; it just listed a purchase price of $991,667.[77] However, a "further agreement" signed by the parties on February 21, 1986 clarifies that the purchase price was "established by placing a value on the tailing reserves of $500,000 and a value on the remainder of Alaska Gold Company interest in the real property at $491,667." Mr. Wigger clearly regarded these tailings as personal property when he bought them.

After the purchase, Mr. Wigger continued to treat the tailings as personal property. The Fairbanks North Star Borough initially assessed the property at the total purchase price. Mr. Wigger requested that the borough subtract the value of the tailings from the assessed value, and the borough agreed. Also, Mr. Wigger deducted his basis in the tailings from his income from sales of tailings on his federal tax returns.[78]

The tailings were treated as personal property by USSR&M, which stockpiled them on the land as it dredged, and sold tailings during its operations in the area. The tailings were treated as personal property by USSR&M's successor, Alaska Gold, which had the tailings appraised separately from the underlying land and signed an agreement with Mr. Wigger setting a separate value on the tailings. Mr. Wigger continued to treat the tailings as personal property after he bought them.

The tailings in this case started out as personal property and were never converted to real property. Therefore, they remained personal property at the time of sale to M&M. Consequently, under the rule set out in *Eagan*, Mr. Wigger was not engaging in the business of mining by selling those tailings, and did not owe the mining license tax on those sales.

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[76] Certificate of Lisa Behr and Appraisal of 630.422 Acres Land and Tailings, Ester, Alaska for Alaska Gold Company at 47 - 51 (attached to Wigger's Reply Brief).

[77] Agency Record at 104 (Agreement for Purchase of Property Settlement of Claims and Use of Property, signed February 21, 1986, at 1).

[78] Agency Record at 89 (Affidavit of Wigger at 3).

IV. Conclusion

Mr. Wigger was not mining or engaging in the business of mining when he sold tailings to M&M. Therefore, the division's assessment of the mining license tax on these transactions was erroneous. The division's informal conference decision is reversed.

DATED: December 15, 2016.

Signed
Kathryn L. Kurtz
Administrative Law Judge

NOTICE

This is the hearing decision of the Administrative Law Judge under AS 43.05.465(a). Unless reconsideration is ordered, this decision will become the final administrative decision 60 days from the date of service of this decision.[79]

A party may request reconsideration in accordance with AS 43.05.465(b) within 30 days of the date of service of this decision.

When the decision becomes final, the decision and the record in this appeal become public records unless the Administrative Law Judge has issued a protective order requiring that specified parts of the record be kept confidential.[80] A party may file a motion for a protective order, showing good cause why specific information in the record should remain confidential, within 30 days of the date of service of this decision.[81]

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 43.05.480 within 30 days after the date on which this decision becomes final.[82]

[This document has been modified to conform to the technical standards for publication.]

[79] AS 43.05.465(f)(1).
[80] AS 43.05.470.
[81] AS 43.05.470(b).
[82] AS 43.05.465 sets out the timelines for when this decision will become final.