

BOYAD TANNER ET AL.

IBLA 88-283

Decided March 28, 1990

Appeal from a decision of the Nevada State Office, Bureau of Land Management, declaring the Tanner Nos. 1 through 5 placer mining claims null and void ab initio. N MC 408678 through N MC 408682.

Affirmed.

1. Airports--Applications and Entries: Relinquishment--Mining Claims:
Lands Subject To--Segregation

BLM properly declares a placer mining claim null and void ab initio where, at the time it was located, the affected land was segregated from mineral entry by the filing of an application for a public airport lease, even though such application had later been relinquished.

APPEARANCES: Boyad Tanner, et al., pro sese.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Boyad Tanner and others (appellants) have appealed from decisions of the Nevada State Office, Bureau of Land Management (BLM), dated February 10, 1988, declaring the Tanner Nos. 1 through 5 placer mining claims, N MC 408678 through N MC 408682, null and void ab initio. ^{1/} According to copies of certificates of location filed for recordation with BLM on May 27, 1987, the mining claims were located by appellants on March 26, 1987, on the NW¹/₄ and NW¹/₄ SW¹/₄ sec. 15, NE¹/₄ and SE¹/₄ sec. 16, and W¹/₂ E¹/₂ sec. 21, T. 13 S., R. 70 E., Mount Diablo Meridian, in Clark County, Nevada.

In its February 1988 decisions, issued individually to each of the locators of the subject mining claims, BLM declared the claims null and

^{1/} The appeal was filed jointly by Boyad Tanner, Mark C. Peterson, Donald I. Starr, Laron Wardle, Harold Anderson, Bette L. Hanchett, Lynda S. Mangan, and Karen J. Custer, all of whom were the locators of the subject mining claims.

void ab initio because they had been located at a time when the land was closed to mineral entry. BLM ruled that the lands had been "segregated on August 21, 1985 by an application for Airport Lease N-42565 under the authority of the Act of May 4, 1928," and that, since the claims were located subsequent to the segregation of the lands, no rights were created by their locations. 2/

The record indicates that the lands encompassed by the subject mining claims were included in an application for a public airport lease (N-42565) filed by the City of Mesquite (the City) on August 21, 1985. Notice of the filing of the application was published in the Federal Register: "The application was filed on August 21, 1985, and on that date the land was segregated from all other forms of appropriation under the public land laws" (51 FR 6322 (Feb. 21, 1986)).

It was not until May 19, 1987, that BLM published a notice in the Federal Register that the City's airport lease application had been withdrawn (52 FR 18748). The notice stated that "the segregative effect of the airport lease application is hereby removed upon publication of this notice in the Federal Register" (52 FR 18749 (May 19, 1987)). Therefore, the record indicates that the land encompassed by the subject mining claims was, as a matter of public record, covered by the City's airport lease application on March 26, 1987, the date set out on the certificates of location as the date of location.

Appellants argue that, at a March 26, 1987, meeting of the City's council, they learned that the City "would submit a letter to the * * * [BLM] dated March 26, 1987, in which it would relinquish the [airport lease] application and restore the land to other use" (Statement of Reasons (SOR) at 1, emphasis in original). Appellants further state:

At the time of the meeting with the City of Mesquite we were cognizant of the fact that the BLM would need to formally release the properties. However, there was no indication that we could not post a claim on the properties and wait the necessary time until the properties had been formally released by the BLM. * * * In accordance with [this] * * * understanding, we staked the properties on March 26, 1987, and held all further action on the properties in abeyance until we had learned from the * * * [BLM] that the properties had been released by the BLM (SOR at 2).

Finally, appellants state that, after learning that the "properties had been released," they filed copies of their certificates of location with the county recorder and BLM on, respectively, May 20 and 27, 1987.

2/ BLM's decision also noted that the lands remained closed. This statement was in error, as, on May 19, 1987, BLM published a notice in the Federal Register that the City's airport lease application had been withdrawn, expressly stating that "the segregative effect of the airport lease application is hereby removed upon publication of this notice in the Federal Register" (52 FR 18749 (May 19, 1987)).

[1] The filing of an application for a public airport lease pursuant to the Act of May 24, 1928, as amended, 49 U.S.C. §§ 211-213 (1982), "segregates the affected land from appropriation under the public land laws, including the mining laws, in accordance with Departmental regulations." Good Roads District No. 1, 25 IBLA 123 (1976); Albert Lindemuth, A-26429 (Oct. 14, 1952). 3/ At the time of the filing of the City's airport lease application, 43 CFR 2911.2-3 (1984) expressly provided: "The filing in the proper office of an application for a lease of lands under the Act of May 24, 1928, * * * shall segregate the lands described in the application from all appropriation." 4/ See also 43 CFR 2091.2-2 (1984). That segregative effect was also expressly noted in the notice of the filing of the City's airport lease application published in the Federal Register on February 21, 1986 (quoted above).

It is well established that, where an applicable regulation provided that the filing of a selection application would segregate the land from appropriation under the public land laws, a mining claim located while the land remained segregated is properly declared null and void ab initio by BLM. Vernon F. Miller, 110 IBLA 20, 22 (1989); B. W. Copeland, 75 IBLA 87, 88 (1983); Essex International, Inc., 15 IBLA 232, 240-41, 81 I.D. 187, 191

3/ In Good Roads District No. 1, the Board ruled that, although the filing of the application segregated the land from further entry, it was permissible for BLM to issue a free use permit to a qualified applicant for these lands, if the airport lease applicant was a governmental entity and consented to its issuance. Id. at 124. This holding is limited strictly to the permissibility of issuing a free use permit. These circumstances are not present in the instant case.

4/ Effective Dec. 10, 1986, BLM amended the regulations in 43 CFR 2911.2. 51 FR 40807 (Nov. 10, 1986). Under 43 CFR 2911.2-3 (1988), upon receipt of an airport lease application, BLM publishes a notice of realty action in the Federal Register, which has limited segregative effect: "The notice of realty action may segregate the lands or interests in lands to be conveyed to the extent that they will not be subject to appropriation under the public land laws, including the mining laws. The segregative effect of the notice of realty action shall terminate either upon issuance of a document of conveyance or 1 year from the date of publication in the Federal Register, whichever occurs first." See also 43 CFR 2091.3-1(d) (1988). However, the amended regulation applies only to airport lease applications, with respect to which notices of realty action are published in the Federal Register, filed after promulgation of the regulation. See Amelia Marglin Whitson, 101 IBLA 1, 4 (1988). Moreover, no statute or Departmental regulation has been promulgated which specifically provides for termination of the segregative effect occasioned by the filing of an airport lease application prior to Dec. 10, 1986. Therefore, the segregative effect occasioned by the filing of the City's airport lease application will not be deemed to have terminated 1 year after publication of notice of the filing of that application in the Federal Register on Feb. 21, 1986.

(1974), and cases cited. Accordingly, BLM properly declared these claims null and void ab initio.

Appellants dispute this conclusion by pointing out that copies of certificates of location of the claims were not filed for recordation with BLM until the segregation of the land occasioned by the filing of the City's airport lease application had terminated. Indeed, the record confirms that BLM received copies of appellants' certificates of location on May 27, 1987, 8 days after termination of the segregation on May 19, 1987.

However, for purposes of determining whether the subject mining claims were null and void ab initio, the relevant date is not the date copies of certificates of location are filed with BLM or the county recorder, but rather the "date of location" of the claims, meaning the date the claimants initiated their legal interest under State law. John F. Malone, 86 IBLA 85, 87-88 (1985). Filing a copy of a certificate of location with BLM simply notifies BLM of the existence of the claim, as required by section 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982). See United States v. Locke, 471 U.S. 84, 87 (1985). Under the law of the State of Nevada, the "date of location" is that date contained on the notice of location posted on the claims. See Nev. Rev. Stat. § 517.090. In this case, the "date of location" on the notices of location was March 26, 1987.

Appellants suggest that the City relinquished its airport lease application on March 26, 1987, the date of location of the subject mining claims. However, we note that appellants do not state the City filed the relinquishment with BLM on that date. Relinquishments are effective only as of the date they are filed with BLM. See 43 CFR 1825.1(b). While the record itself does not permit us to determine conclusively when the relinquishment was filed, it nevertheless appears certain that it was not filed until after the date of location. Appellants report that, at a March 26, 1987, meeting of the city council of the City, certain city officials stated that a relinquishment would be filed dated March 26, 1987. Appellants state, however, that the meeting occurred at 6 p.m. on March 26. Thus, the meeting occurred after the close of business of BLM offices, so that no relinquishment could have been filed with BLM until after March 26, 1987. Since the City's airport lease application had not been relinquished at the time of location of appellants' mining claims, the land remained segregated from mineral entry, and, thus, the claims were null and void ab initio. See United States v. United States Borax Co., 58 I.D. 426, 443-44 (1943).

In any event, even assuming the relinquishment were filed on or prior to the location of appellants' claims, appellants would still not prevail, as the filing of a relinquishment does not automatically "release" the land to appropriation under the public land laws. Appellants so acknowledge (SOR at 2). Rather, before any such appropriation could occur, BLM was required to accept the relinquishment and officially open the land.

See 43 CFR 1825.1(b) (relinquishment of entries and leases); Pluess-Staufer (California), Inc., 106 IBLA 198, 200 (1988) (classification); Harold E. De Roux, 94 IBLA 350, 351 (1986) (withdrawal); Nick E. Demientieff, 81 IBLA 303, 308 (1984) (entry); R. C. Buch, 75 I.D. 140, 146 (1968) (classification).

The time-honored rule is that land will not be considered open to mineral entry until it has been officially opened by the Department and until the public land records have been so noted. Under that rule, once the filing of an application, which by statute or Departmental regulation has a segregative effect, is noted on the public land records, that segregative effect cannot be deemed removed until relinquishment of that application has likewise been noted on those same records. See David Cavanagh, 89 IBLA 285, 299, 92 I.D. 564, 572 (1985); see generally B. J. Toohey, 88 IBLA 66, 77-85, 92 I.D. 317, 324-26 (1985). In the present case, the filing of the City's airport lease application was noted in the Federal Register. Accordingly, relinquishment of that application must similarly be noted in the Federal Register before we may conclude that the segregative effect occasioned by the filing of the application can be considered removed. That did not occur until May 19, 1987, well after the date of location of the subject mining claims, with publication in the Federal Register of the notice of termination of that segregative effect.

Appellants are mistaken in suggesting that the land was at least open to the "posting" of certificates of location upon the filing of a relinquishment of the airport lease application or before (SOR at 2). Until such time as BLM officially opened the land to appropriation under the public land laws, appellants (and any other person) were precluded from taking any action to initiate a valid claim under the mining laws. Appellants attempted to locate their claims at a time when the affected lands were segregated from mineral entry, and their claims must be deemed null and void ab initio.

Nor, as appellants suggest, could BLM accept their notices of location as applying upon the date that the lands became open to mineral entry. See 43 CFR 2091.1. A subsequent revocation of the segregating action will not retroactively validate locations made while the lands were segregated from mineral entry. Pluess-Staufer (California), Inc., *supra* at 200, and cases cited. Appellants must relocate their claims, subject to intervening rights or withdrawals.

Furthermore, the fact that BLM accepted copies of the certificates of location of the subject mining claims for recordation does not establish that the land was open to mineral entry on the date of location or, more importantly, preclude BLM from later declaring these claims null and void ab initio because the land was not then open. Acceptance did not validate claims which were otherwise invalid at the time of their inception or preclude a subsequent finding that the land claimed was not open to entry. Vernard E. Jones, 76 I.D. 133 (1969), and cases cited.

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Accordingly, 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.

David L. Hughes
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

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