

PHELPS DODGE CORP.

IBLA 89-91

Decided July 3, 1990

Appeal from a decision of the Arizona State Office, Bureau of Land Management, declaring mining claims A MC 289505 through A MC 289523 null and void ab initio.

Reversed.

1. Classification and Multiple Use Act of 1964--
Courts--Mining Claims: Lands Subject To--Public
Lands: Classification--Public Lands: Disposals Of: Generally--
Segregation

The Federal District Court injunction issued in National Wildlife Federation v. Burford, 676 F. Supp. 280 (D.D.C. 1986), aff'd, 835 F.2d 305 (D.C. Cir. 1987), cert. granted sub nom., Lujan v. National Wildlife Federation, 58 U.S.L.W. 3449 (U.S. Jan. 16, 1990) (No. 89-640), is without effect as to land for which BLM issued a purported Oct. 29, 1981, termination of classification, when the classification had in fact automatically terminated pursuant to sec. 4 of the Classification and Multiple Use Act of 1964 prior to the effective date of the injunction.

2. Classification and Multiple Use Act of 1964--Mining Claims: Lands Subject To--Public Lands: Classification--Public Lands: Disposals Of: Generally--Public Records--Segregation

Pursuant to the Classification and Multiple Use Act of 1964 the segregative effect of a disposal classification for a tract of land larger than 2,560 acres terminated automatically 2 years after publication of the notice of proposed classification, unless a continuance was obtained. This Board will not apply the "notation" or "tract book" rule in a manner which thwarts this clear congressional intent.

APPEARANCES: Jerry L. Haggard, Esq., and H. Barry Holt, Esq., Phoenix, Arizona, for appellant.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Phelps Dodge Corporation (Phelps) has appealed an October 17, 1988, decision of the Arizona State Office, Bureau of Land Management (BLM), declaring null and void ab initio mining claims A MC 289505 through A MC 289523. ^{1/} The appealed decision states that the lands were closed to mineral entry pursuant to the injunction ordered in National Wildlife Federation v. Burford (NWF), 676 F. Supp. 280 (D.D.C. 1986), aff'd, 835 F.2d 305 (D.C. Cir. 1987), cert. granted sub nom., Lujan v. National Wildlife Federation, 58 U.S.L.W. 3449 (U.S. Jan. 16, 1990) (No. 89-640).

Notice of proposed classification for exchange (A-450) pertaining to the subject lands was published at 31 FR 15493 (Dec. 8, 1966) pursuant to the Classification and Multiple Use Act of September 19, 1964 (CMUA), P.L. 88-607, 78 Stat. 986, as amended by P.L. 90-213, 81 Stat. 660 (1967) (formerly codified at 43 U.S.C. §§ 1411-1418 (1970)). Notice of classification for exchange (A-450) was published at 33 FR 4528 (Mar. 14, 1968) pursuant to CMUA. Both notices segregated the described lands from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, except private exchanges. Both notices stated that the described land constitutes 14,593.10 acres of public land.

The subject lands were segregated and classified pursuant to CMUA which required the Secretary to review public lands and determine which were suitable for disposal and which were suitable for retention in Federal ownership. 43 U.S.C. § 1411 (1970). A decision to classify a tract of land in excess of 2,560 acres for sale or other disposal required public notice, including, inter alia, publication in the Federal Register. 43 U.S.C. § 1412 (1970). Section 4 of CMUA provided in part:

Lands classified for sale or other disposal shall be offered for sale or such other disposal within two years of the date of publication of the proposed classification and if not so offered for sale or other disposal the segregative effect shall cease at the expiration of two years from the date of publication. The proposed classification or proposed sale or other disposal may be continued beyond the two-year period if notice of such proposed continuance, including a statement of necessity for continued segregation, is submitted to the President of the Senate

^{1/} The claims are lode claims located in S½ SE¼ of sec. 1 and NE¼ of sec. 12, T. 6 S., R. 26 E., and SE¼ of sec. 7 and N½, SE¼ of sec. 18, T. 6 S., R. 27 E., Gila and Salt River Meridian, Graham County, Arizona. The subject claims were located between July 18 and Aug. 10, 1988, and the notices of location were filed with BLM on Oct. 13, 1988. Notices of location for A MC 289500 through A MC 289504 and A MC 289524 through A MC 289528 were simultaneously filed, but were not included in the appealed decision. The record contains a copy of a second decision also dated Oct. 17, 1988, declaring null and void ab initio A MC 289524 through A MC 289528; however, Phelps has apparently not appealed that decision.

and the Speaker of the House of Representatives and published in the Federal Register not more than ninety days nor less than thirty days prior to the expiration of the two-year period specified herein; and thereupon the segregative effect shall be extended for such additional period as is specified in the notice, not exceeding two years, unless Congress or the Secretary of the Interior terminates the segregation at any earlier date.

43 U.S.C. § 1414 (1970). 2/ Nonetheless, BLM published a document with an effective date of October 29, 1981, purportedly terminating classification A-450. 46 FR 49649 (Oct. 7, 1981).

In response to a suit filed by NWF, a preliminary injunction, dated February 10, 1986, was issued by the district court in NWF. 3/ Pursuant to the injunction, terminations of classifications occurring since January 1, 1981, under the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1784 (1982), were suspended pending further action by the court.

In its statement of reasons (SOR) on appeal, Phelps argues the NWF injunction has no effect on the subject mining claims. Appellant contends the injunction only applies to classifications in effect on January 1, 1981, and, therefore, has no effect on the CMUA segregation which terminated automatically no later than December 8, 1970. Phelps also contends the notation rule does not operate to segregate the subject lands from mineral entry. 4/

[1] Lands which have been closed to entry under some or all of the public land laws remain closed to entry until formally opened; the mere passage of time cannot serve to open lands closed to entry. Harry J.

2/ The regulation outlining procedures for disposal classifications of more than 2,560 acres states that:

"The segregative effect of a classification for sale or other disposal will terminate in one of the following ways:

"(1) Disposal of the lands;

"(2) Publication in the Federal Register of a notice of termination of the classification;

"(3) An Act of Congress;

"(4) Expiration of 2 years from the date of publication of the proposed classification without disposal of the land and without the notice of proposed continuance as prescribed by the Classification and Multiple Use Act; or

"(5) Expiration of an additional period, not exceeding 2 years, if the required notice of proposed continuance is given."

43 CFR 2462.4(c).

3/ The injunction was also published at 51 FR 5809-10 (Feb. 18, 1986).

4/ Appellant presents various other reasons it believes the NWF injunction does not have the effect claimed by BLM. Given our finding below, it is unnecessary to address those other arguments.

Ayala, 99 IBLA 19 (1987). The case before us, however, involves not the mere passage of time but the passage of time coupled with a statute clearly specifying that the passage of time does serve to terminate the segregative effect of the classification. 43 U.S.C. § 1414 (1970); Buch v. Morton, 449 F.2d 600, 607 (9th Cir. 1971).

The statute alone was adequate to formally terminate the classification and open the land to entry 2 years after the notice of proposed classification, unless the continuance described in the statute was obtained. The record contains no evidence that the continuance described in CMUA was obtained. However, pursuant to the statute the maximum time for a continuance was 2 years, 43 U.S.C. § 1414 (1970). Thus, even if the continuance were obtained, the segregative effect must necessarily have terminated no later than December 8, 1970.

Although BLM issued its purported termination of the relevant classification in 1981, we find the BLM termination was without effect as the clear wording of the statute was adequate to formally open the lands to mineral entry. The NWF injunction clearly does not apply to terminations of classifications which occurred before January 1, 1981, and therefore does not reinstate the segregation set forth in A-450.

[2] Furthermore, we find that the "notation" or "tract book" rule does not justify the declaration that appellant's claims are null and void ab initio. 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); Shiny Rock Mining Corp., 75 IBLA 136, 138 (1983). However, it is clearly erroneous to apply the notation rule where to do so thwarts the will of Congress. John J. Schnabel, 90 IBLA 147, 150 (1985); B. J. Toohey, supra at 96-97, 92 I.D. at 335. Thus, we find that the notation rule is not a basis for declaring appellant's claims null and void ab initio.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the BLM decision of October 17, 1988, is reversed.

John H. Kelly
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge