

JONATHAN Z. HEROD ET AL.

IBLA 90-90

Decided December 13, 1991

Appeal from a decision of the Colorado State Office, Bureau of Land Management, declaring lode mining claims C MC-235814 through C MC-235871 null and void ab initio.

Reversed in part, set aside in part, and remanded.

1. Act of June 25, 1910--Mining Claims: Lands Subject to--Mining Claims: Withdrawn Land--Public Lands: Classification--Segregation--Withdrawals and Reservations: Effect of

A BLM decision declaring lode mining claims null and void ab initio because they were located on land withdrawn by the President on Oct. 12, 1910, pursuant to sec. 1 of the Act of June 25, 1910, ch. 421, 36 Stat. 847, will be reversed if it cannot be shown that the claims were located solely for nonmetalliferous minerals.

2. Mining Claims: Lands Subject to--Mining Claims: Withdrawn Land--Public Lands: Classification--Segregation--Withdrawals and Reservations: Effect of

A BLM decision declaring lode mining claims null and void ab initio because they were located on land subject to a Nov. 23, 1910, General Land Office coal-land classification order will be set aside if BLM has not afforded the claimant an opportunity to dispute the coal-land classification.

APPEARANCES: Jonathan Z. Herod, pro se, and for the SRL Association.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

On behalf of himself and the SRL Association, Jonathan Z. Herod has appealed from a September 22, 1989, decision of the Colorado State Office, Bureau of Land Management (BLM), declaring the SRL Nos. 1 through 58 lode mining claims, C MC-235814 through C MC-235871, null and void ab initio because the claims had been located on land closed to mineral entry. 1/

1/ The notice of appeal identifies the members of the SRL Association. There is nothing in the record to indicate that Herod is entitled to represent these individuals (see L. H. Grooms, 70 IBLA 228, 229 n.1 (1983)).

On July 22, 1979, the SRL Association located the SRL Nos. 1 through 58 lode mining claims in secs. 7-11, 14-18, T. 7 N., R. 95 W., sixth principal meridian, Moffat County, Colorado. Notices of location were filed with BLM on September 6, 1989, pursuant to section 314(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(b) (1988). The location notices state that the claims were located for "[g]old and all valuable [m]inerals."

The stated basis for BLM's decision was that the land on which the claims were located had "been 'withdr[awn]' * * * from all forms of location and entry under the general mining laws * * * for coal development" pursuant to "Executive Order of October 12, 1910, and General Land Office [GLO] Order of November 23, 1910." Herod and the SRL Association appealed from this decision. In their statement of reasons (SOR) for appeal they contend that BLM misconstrues the effect of the orders referred to in its September 1989 decision and should not have declared the claims null and void ab initio because the land was not withdrawn from mineral entry by those orders. Appellants claim that the October 1910 Executive Order

was a "temporary, single-purpose order to obtain sufficient data for the reclassification and reappraisal of lands that may overlay a commercial coal deposit," and that the order lapsed in the absence of any action by

the Department and, thus, is "without force and effect" (SOR at 3). They assert that the November 1910 GLO Order was a land classification and not

a withdrawal and claim that their contention is supported by the fact that active mining claims have existed on that land for a long period of time and the "surface and mineral management status maps" published by the Geological Survey do not show the land to be withdrawn from mineral entry. Id.

The record indicates that not all of the land located by the SRL Association was affected by both the October 1910 Executive Order and the November 1910 GLO Order. The master title plat for T. 7 N., R. 95 W., depicts the land affected by each of these orders. Based on the description of the claims in the location notices, which tied the claims to the system of public land surveys, it is apparent that some of the claims are subject to the October 1910 Executive Order, 2/ some to the November 1910 GLO Order, 3/ and some appear to be subject to both. 4/ See also Exh. "C" attached to the SOR.

fn. 1 (continued)

However, under 43 CFR 1.3(b)(3)(iii), he is entitled to practice before the Department on behalf of the SRL Association (see Resource Associates of Alaska, 114 IBLA 216, 218 (1990)). His representation is limited to himself and the association, and the SRL Association is considered a party to this appeal.

2/ The claims subject only to the Executive Order are SRL Nos. 4, 5, 8, 9, 12, and 13.

3/ SRL Nos. 1, 3, 6, 7, 10, 11, 14, 15, 18, 19, 22, 23, 26, 27, 30, 31, 34, 35, 38, 39, 42, 43, 46, 47, 50, 51, 54, 55, and 58 are subject only to the GLO Order.

4/ SRL Nos. 16, 17, 20, 21, 24, 25, 28, 29, 32, 33, 36, 37, 40, 41, 44, 45, 48, 49, 52, 53, 56, and 57 are subject to both.

The record also contains a copy of the October 1910 Executive Order. That order consists first of a letter to the Secretary of the Interior from the Acting Director, GLO, dated October 8, 1910. The Acting Director stated that the lands described in his letter had been classified "partly as coal," but that "the data are not sufficient for proper reclassification and reappraisal," and recommended that the lands be "withdrawn pending further field examination." He then set out a recommended order, which stated that the lands

are hereby withdrawn from settlement, location, sale or entry, and reserved for further examination and classification with respect to coal value, subject to all of the provisions, limitations, exceptions, and conditions contained in the Act of Congress entitled "An Act to authorize the President of the United States to make withdrawals of public lands in certain cases," approved June 25, 1910, and the Act of Congress entitled "An Act to provide for agricultural entries on coal lands," approved June 22, 1910.

(Oct. 8, 1910, Letter at 1). 5/ The Secretary referred the recommended order to the President and recommended approval. The order was approved by the President on October 12, 1910.

Section 1 of the Act of June 25, 1910, ch. 421, 36 Stat. 847 (commonly known as the Pickett Act), which was referred to in the October 1910 Executive Order, authorized the President to "temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States * * * and reserve the same for * * * classification of lands, or other public purposes to be specified in the orders of withdrawals." 36 Stat.

847 (1910). 6/ The Act also provided that "such withdrawals or reservations shall remain in force until revoked by [the President] or by an Act of Congress." Id. Section 2 of the Pickett Act, ch. 421, 36 Stat. 847, provided in pertinent part that "all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation,

5/ The Act of June 22, 1910, ch. 318, 36 Stat. 583, provided that public lands withdrawn or classified as coal lands or valuable for coal would be subject to certain forms of agricultural entry, i.e., entry by individuals under the homestead and desert-land laws, selection by a state under the Carey Act, and withdrawal by the Secretary under the Reclamation Act with a view to obtaining or passing title. See, e.g., Elihu C. Harrison, 39 L.D. 614, 616 (1911). Because the Act of June 22, 1910, does not affect mineral entry on lands withdrawn or classified as coal lands or valuable for coal, we need not consider it further.

6/ Section 1 of the Pickett Act was codified at 43 U.S.C. § 141 (1970), and was subsequently repealed by section 704(a) of FLPMA, 90 Stat. 2743, 2792 (1976). The repeal was made subject to a savings provision, which preserved withdrawals in effect as of Oct. 21, 1976. See 90 Stat. 2786 (1976); David E. Hoover, 99 IBLA 291, 293 (1987).

and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates." ^{7/}

[1] The land withdrawn pursuant to the October 1910 Executive Order was withdrawn by the President in the exercise of his authority under the Act of June 25, 1910. The withdrawn land remained open to entry under the mining laws "so far as the same apply to minerals other than coal, oil, gas, and phosphates" (36 Stat. 847 (1910)). With passage of the Act of August 24, 1912, the withdrawn land remained open to mineral entry for location of metalliferous minerals. See N. W. Brown, 112 IBLA 225, 226 (1989); Western Nuclear, Inc., 55 IBLA 20, 22 (1981); Ralph T. Richards, 52 L.D. 336, 337-38 (1928). The language of the October 1910 Executive Order provided that the withdrawal was "subject to all of the provisions, limitations, exceptions, and conditions contained in the Act of * * * June 25, 1910," including any amendments thereto. See Instructions, 39 L.D. 156 (1910).

Accordingly, after August 24, 1912, the October 1910 Executive Order withdrew the listed lands from location of nonmetalliferous minerals. The withdrawn lands remained open to the location of mining claims for metalliferous minerals. Therefore, mining claims located on lands subject to this withdrawal are not null and void ab initio by reason of the withdrawal if they have been located for metalliferous minerals. See N. W. Brown, supra at 227 n.3. Unless and until it is determined that the claims were located solely for nonmetalliferous minerals, it is improper to declare the claims null and void ab initio. Therefore, with respect to appellants' claims located on land affected only by the October 1910 Executive Order, we must reverse the September 1989 BLM decision declaring the claims null and void ab initio in their entirety. See id. at 227.

[2] We will now address whether the location of mining claims was precluded by the November 1910 GLO Order. To determine the segregative effect of that order, we must examine its wording and applicable statutes and regulations. See Pluess-Staufer (California), Inc., 106 IBLA 198, 199 (1988) (multiple-use classification); J. S. Bowers, 79 IBLA 298, 299 (1984) (small-tract classification); Ronald R. Graham, 77 IBLA 174, 176-77 (1983) (recreation and public purposes classification); Montana Copper King Mining Co., 20 IBLA 30, 35-36 (1975) (classification of land within Flathead Indian Reservation as timber land); Beverly Ellis Caperton, A-28402 (Oct. 13, 1960), at 3-4 (classification as valuable for water-power development).

^{7/} Section 2 of the Pickett Act was amended by the Act of Aug. 24, 1912, ch. 369, 37 Stat. 497, to substitute "metalliferous minerals" for "minerals other than coal, oil, gas, and phosphates." Thus all lands withdrawn under the Pickett Act were thereafter "open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals." 37 Stat. 497 (1912); see 41 L.D. 345 (1912). Section 704(a) of FLPMA further amended section 2 of the Pickett Act to delete the entire phrase opening withdrawn lands to limited mineral entry. As amended, section 2 of the Pickett Act is codified at 43 U.S.C. § 142 (1988).

The November 1910 GLO Order sets out a schedule "of lands classified in accordance with the provisions of paragraph 6 of regulations under the coal land laws approved April 12, 1907 (35 L.D. 665 [(1907)])" (GLO Order at 1). The GLO Order identified "non coal lands" (class 1 lands) and instructed the register and receiver to mark the plats "[r]estored coal lands." Other lands were identified by stating a price or by stating they were "minimum price" lands.

The coal-land law referred to in the GLO Order is the Act of March 3, 1873, ch. 279, 17 Stat. 607 (Coal Land Laws). The Coal Land Laws and their implementing regulations provided generally for the entry and sale of "coal lands." 35 L.D. at 667. Paragraph 6 of the regulations provided that the Commissioner, GLO, would notify the local land offices regarding the price at which coal lands would be offered for sale. In particular, it stated that these offices would

from time to time be furnished with schedules and maps (1) showing lands known to lie without ascertained coal areas and open to entry under the general land laws, according to the character of each particular tract; (2) showing lands known to contain workable deposits of coal, whereon prices will be fixed upon information derived from field examination; and (3) showing lands containing coal of such character as may, from their location at a distance from transportation lines, be sold at the minimum price fixed by the statute as herein stated.

Id. Paragraph 6 of the regulations further provided that "[l]ands listed in classes 2 and 3 are subject to entry under the coal-land laws only, unless shown by the applicant to be of such character as to be subject to entry under some other law." Id. at 668.

What is evident from the April 1907 regulations is that classification as coal lands does not automatically withdraw the lands from mineral entry. The regulations provide for three coal-land classifications. Class 1 coal lands are identified as being outside known coal areas (e.g., restored coal lands) and open to entry under the general land laws, including the general mining laws. Class 2 and 3 coal lands are closed to every form of entry except coal entries until an applicant shows that the lands are of such character as to be subject to entry under some other law.

The November 1910 GLO Order identified lands under all three coal-land classifications. Lands considered to lie "without ascertained coal areas," i.e., class 1 coal lands, were referred to as "[n]on coal" on the schedule of classified lands. None of the lands subject to the mineral locations now before us were designated "[n]on coal." All of the lands in question were designated either "[m]inimum price" (class 3) or at a fixed price ranging from \$15 to \$30 per acre (class 2). The minimum price had been designated by statute and depended upon the proximity of the land to a completed railroad. See 17 Stat. 607 (1873). Subsequent to promulgation of the April 1907 regulations, the distinction between class 1, 2, and 3 coal lands was abolished and land was classified as coal land or non-coal land. See Regulations, 37 L.D. 653 (1909).

The history of the Department's interpretation of the Coal Land Laws indicates that a coal-land classification does not totally preclude the location of mining claims. In 1925, the First Assistant Secretary held, rather broadly, in Arthur K. Lee, 51 L.D. 119, 122, that "land classified as coal and valuable therefor is not subject to location, entry, and patent under the general mining laws of the United States." Under his interpretation the land must be not only classified as coal, but it had to be "valuable therefor." See Ohio Oil Co. v. Kissinger, 58 I.D. 753, 757 (1944); Ralph T. Richards, *supra* at 338; John McFayden, 51 L.D. 436, 439 (1926).

The following year, the Lee rule was tempered in Empire Gas & Fuel Co., 51 L.D. 424 (1926). In this case the First Assistant Secretary held that "no locations * * * under the mining laws, sought to be initiated after the date of the [coal-land] classification, can be recognized by the Department as the lawful bases for the entry and patent thereof" unless "the propriety of the classification * * * as valuable for coal shall be successfully challenged." *Id.* at 428. He affirmed GLO's rejection of the patent application for the placer mining claims because, despite evidence submitted on appeal challenging the coal-land classification, "no showing sufficient to warrant the overturning of [the] classification ha[s] been made." *Id.* As phrased in John McFayden, *supra* at 439, the patent applicant is "entitled, before the outright rejection of his application, to an opportunity to show, if he could, that such classification was, in fact, erroneous."

In Ohio Oil Co. v. Kissinger, *supra* at 757, the Assistant Secretary held that, when a coal-land classification is "only presumptively valid and open to challenge by the mineral claimants," GLO could not declare an oil placer mining claim void "without giving [the claimants] an opportunity to dispute the classification." See also Meritt N. Barton, 6 IBLA 293, 301, 79 I.D. 431, 435 (1972); Metalliferous Mining Locations Within a Petroleum Reserve, Solicitor's Opinion, 63 I.D. 346, 350 (1956). The Assistant Secretary modified a lower decision declaring the claims void and remanded the case to afford the claimants an opportunity to dispute the coal-land classification. ^{8/} Following a hearing, the Solicitor concluded that the land was valuable for coal, that it had been properly classified as coal land at the time of location of the claim, and that the claim was therefore invalid. See Ohio Oil Co. v. Kissinger, 60 I.D. 342, 344, 357 (1949).

When the coal-land classification involved in this case was issued, mining claim locations were considered incompatible with entries of classified coal land under the Act of March 3, 1873, because both contemplated ultimate acquisition of title to the land. See Roos v. Altman, 54 I.D. 47, 49 (1932). This fact makes the conclusion in Lee and the other cases discussed *supra*, that, so long as a coal-land classification persisted, the affected land was not also open to mineral entry understandable. However, when the Mineral Leasing Act, as amended, 30 U.S.C. §§ 181-287 (1988), was passed in 1920, coal deposits were made subject to permit and lease rather

^{8/} The Department has also initiated contest proceedings before declaring a mining claim invalid because it was located on land which was classified as coal land. See United States v. Constant, A-27779 (Dec. 30, 1958).

than purchase, and for some time thereafter, mining claim location was viewed as precluded if the land was known to be valuable for coal or subject to permitting and leasing for the exploration and development of coal. See 30 U.S.C. § 193 (1988); The Effect of Mining Claims on Secretarial Authority to Issue Prospecting Permits for Coal and Phosphate, Solicitor's Opinion, 84 I.D. 442, 444, 446 (1977); Jebson v. Spencer, 61 I.D. 161, 164 (1953). However, when the Multiple Mineral Development Act, 30 U.S.C. § 525 (1988), was passed in 1954, it contained a provision at section 5 that mining claims were thereafter locatable on lands "which at the time of location are * * * included in a permit or lease issued under the mineral leasing laws [or] * * * known to be valuable for minerals subject to disposition under the mineral leasing laws." Thus, land known to be valuable for coal but not formally classified as coal land would not be closed to location of mining claims. 9/

A portion of the land subject to appellants' mining claims was classified as coal land (either class 2 or 3) pursuant to the November 1910 GLO Order. As noted supra, under the April 1907 regulations, this classification had the effect of closing that land to mineral entry unless the entryman could demonstrate to the satisfaction of the Department that the classification should be changed. There is no evidence that appellants sought to challenge this classification of the land, either prior to, at the time of, or after the association filed copies of its location notices for recordation with BLM. Nevertheless, before the mining claims may be declared invalid because the land was classified as coal land, BLM must afford the claimants an "opportunity to dispute the classification" (Ohio Oil Co. v. Kissinger, 58 I.D. at 757). 10/ Thus, that portion of BLM's decision finding appellants' lode mining claims null and void ab initio because they had been located on lands identified as class 2 or 3 coal lands in the November 1910 GLO Order must be set aside and remanded to afford the claimants an opportunity to dispute the coal-land classification. 11/ See id.

9/ The Board has no authority to overturn the November 1910 classification, even though it might be considered anachronistic. See Ronald R. Graham, supra at 177. However, BLM does have the power to do so if deemed appropriate.

10/ It might be argued that a contest proceeding must be initiated before invalidating a mining claim because it conflicts with a coal-land classification (which is subject to challenge), because the attempt to invalidate a claim for this reason is akin to an attempt to invalidate a claim for lack of discovery or to effectively preclude the claimant's right to mine. See Bruce W. Crawford, 86 IBLA 350, 376, 92 I.D. 208, 222 (1985). However, due process may be afforded in this case by a proceeding before BLM. See Circle L, Inc., 36 IBLA 260, 263-64 (1978).

11/ Some of appellants' mining claims were located partially on land subject to the November 1910 GLO Order. If a portion of a claim is on land open to mineral entry the claim cannot be deemed null and void ab initio in whole or in part, even if it were ultimately determined that a portion of the claim is located on land closed to mineral entry. See James N. McDaniel, 105 IBLA 40, 43 (1988); Timberline Mining Co., 87 IBLA 264, 265 (1985).

For those mining claims located on land subject to the November 1910 GLO Order and the October 1910 Executive Order, having found it to have been an error to have declared the claims null and void if located on lands subject to either of the orders, we must also conclude that it was error for BLM to declare those claims located on lands subject to both to be null and void ab initio. See N. W. Brown, supra at 227; Ohio Oil Co. v. Kissinger, 58 I.D. at 757. That portion of the September 1989 BLM decision relating to those claims is reversed as to the Executive Order and set aside as to the GLO Order.

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 reversed in part and set aside in part, and the file is remanded to BLM for further action consistent herewith.

R. W. Mullen
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge