

UNITED STATES v. RICHARD N. STONE, ET AL.

IBLA 91-367

Decided June 18, 1996

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer prohibiting placer mining on six mining claims. CAMC 234902-CAMC 234904, CAMC 234907-CAMC 234909.

Affirmed.

1. Mining Claims: Rental or Claim Maintenance Fees: Generally--Mining Claims: Determination of Validity--Rules of Practice: Appeals: Dismissal

As a general rule, failure to maintain mining claims in conformity with the law during the pendency of an appeal of a decision which ruled on the validity of such claims renders the appeal moot.

2. Mining Claims: Powersite Lands--Mining Claims Rights Restoration Act--Res Judicata--Rules of Practice: Evidence--Rules of Practice: Hearings

Proceedings under sec. 2(b) of the Mining Claims Rights Restoration Act, 30 U.S.C. § 621(b) (1994), are quasi in rem in nature and, therefore, are not determinative of rights under other locations. However, under the principles of res judicata, issuance of an order prohibiting placer mining, based on a finding that the potential benefits of placer mining would not offset the likely detriment suffered by other uses of the land, would properly impact upon subsequent locations of the same land by the original locator such that the locator would bear the affirmative burden of showing that new evidence derived since the last hearing had altered the balance in favor of placer mining.

3. Act of August 11, 1955--Mining Claims: Powersite Lands--Mining Claims: Special Acts--Mining Claims Rights Restoration Act--Powersite Lands--Withdrawals and Reservations: Powersites

To determine whether mining would substantially interfere with other uses of powersite lands within the meaning of the Mining Claims Rights Restoration Act,

30 U.S.C. § 621 (1994), the Department is required to engage in a weighing or balancing of the benefits of mining against the injury mining would cause to other uses of the land. Mining may be allowed where the benefits of placer mining outweigh the detriment which placer mining causes to other uses. The party seeking to restrict or prohibit placer mining bears the initial burden of presenting a prima facie case, after which the burden to overcome this showing then shifts to the mining claimant, who bears the ultimate burden of establishing by a preponderance of the evidence that the benefits resulting from placer mining outweigh the injuries caused by mining to other uses of the land.

APPEARANCES: Lawrence A. McHenry, Esq., Phoenix, Arizona, for appellants; Burton J. Stanley, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Richard N. Stone, Jr., Elaine E. Nielsen, Rodney A. Nielsen, and Timothy A. Nielsen have appealed from a decision of Administrative Law Judge Harvey C. Sweitzer, dated July 9, 1991, prohibiting placer mining on six claims which they had located in Riverside County, California. For reasons discussed below, we affirm.

On March 19, 1990, appellants located a series of eight placer mining claims in Riverside County. Of these, six claims were determined to be located wholly or partially within a powersite withdrawal. These claims were identified as the Four Winds Placer (CAMC 234902), Tim's Terrace (CAMC 234903), Tumble Weed Canyon (CAMC 234904), Rick's River Placer (CAMC 234907), Tobys Trench (CAMC 234908), and Rod's Ravine (CAMC 234909). By letter dated May 14, 1990, the California State Office, Bureau of Land Management (BLM), notified the claimants that a hearing would be held, pursuant to section 2(b) of the Mining Claims Rights Restoration Act of August 11, 1955, 30 U.S.C. § 621(b) (1994), for the purpose of ascertaining whether placer mining operations within the area of the withdrawal would substantially interfere with other uses of the land within the claims.

The hearing was held by Judge Sweitzer on September 27, 1990. Thereafter, on July 9, 1991, as noted above, Judge Sweitzer entered an order prohibiting placer mining on all six claims based primarily on his conclusion that mining would have a deleterious effect on the Stephens' kangaroo rat and its habitat and that, counterbalancing this adverse impact, appellants had only shown speculative mineral values (Decision at 4-5). Appellants timely appealed from this decision, alleging error in the Judge's conclusions.

On October 5, 1992, while the instant appeal was pending, Congress adopted the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (1992 Act), P.L. 102-381, 106 Stat. 1378-79. Under the provisions of this Act, all mining claimants were required to an annual rental fee of \$100 per claim or request and qualify for a small miner exemption from the rental fee requirement on or before August 31, 1993, for each of the assessment years beginning on September 1, 1992, and September 1, 1993. Failure to either submit the required rentals or apply and qualify for the small miner's exemption was deemed to "conclusively constitute an abandonment of the unpatented mining claim, mill or tunnel site by the claimant." 106 Stat. 1379. The continuing viability of the instant appeal was, thus, dependent upon compliance with the rental fee legislation. As the Board subsequently discovered, appellants failed to comply.

On June 26, 1995, a notice of appeal was filed by Richard N. Stone, Jr., Elaine E. Nielsen, and Rodney A. Nielsen, from a decision of the California State Office, BLM, dated May 23, 1995, declaring eight placer mining claims null and void. This appeal is presently pending before the Board and is docketed as IBLA 95-562. Information gleaned from a review of that case disclosed that six of the claims involved in the 1995 appeal are relocations of the six claims which are the subject of the appeal herein. A note to the file, dated June 21, 1995, indicated that the required filings under the rental fee legislation had not been made with respect to the claims located in 1990, rendering them invalid and apparently leading to the relocation of new claims in 1993.

By order dated December 13, 1995, the Board recounted the above facts, noted that failure to maintain the claims which were the subject of the hearing before Judge Sweitzer would appear to have rendered any appeal from his decision moot, and directed appellants to show cause why the instant appeal should not be dismissed on that basis.

On April 15, 1995, we received appellants' response. This response was almost totally directed to rearguing the correctness of Judge Sweitzer's decision, contending that subsequent events raised serious questions as to the veracity of certain Government witnesses who had testified before Judge Sweitzer. However, not only did this response not contravene the assertion that the claims which are the subject of the instant appeal had been declared abandoned and void, it actually admitted these facts. Appellants further admitted that it was this declaration of invalidity which had caused them to relocate new claims, adding that they had believed those new claims were also covered by Judge Sweitzer's prohibition, though they now questioned whether such was the case. ^{1/} See Response at 5-6. Notwithstanding the foregoing, appellants requested that the Board not dismiss the appeal.

^{1/} We would point out, however, that regardless of any conclusions which might be drawn from our discussion of the effect of a 30 U.S.C. § 621(b) (1994) proceeding on subsequently located claims, claimants in IBLA 95-562

[1] It is clear under our precedents that, as a general rule, failure to maintain mining claims in conformity with the law during the pendency of an appeal of a decision which ruled on the validity of such claims renders the appeal moot. See, e.g., United States v. Mineco, 130 IBLA 314, 318 (1994); United States v. Ballas, 87 IBLA 88, 92 (1985). However, we recognize that, as appellants's response suggests, where the appeal involves an order prohibiting placer mining issued under 30 U.S.C. § 621(b) (1994), an appeal might remain viable if an adverse decision therein would apply to subsequently relocated claims.

The Board has noted in the past that mining claim contests are not in personam but rather are quasi in rem. See, e.g., Robert D. McGoldrick, 115 IBLA 242, 244 n.3 (1990); United States v. Oneida Perlite Co., 57 IBLA 167, 191, 88 I.D. 772, 785 (1981); United States v. Gibson, 16 IBLA 246, 250 (1974); United States v. United States Borax Co., 58 I.D. 426, 430 (1943). It has also been held that proceedings under section 5 of the Surface Resources Act, Act of July 23, 1955, 30 U.S.C. § 613 (1994), were also in rem or quasi in rem in nature. ^{2/} See Solicitor's Opinion, M-36616 (May 12, 1961). Thus, these proceedings determine the rights flowing from the specific location (the rem) rather than the rights personal to the locators. Questions remain, however, whether proceedings under the Mining Claims Rights Restoration Act should also be deemed quasi in rem proceedings and, if so, whether and to what extent the issuance of an order prohibiting placer mining with respect to one claim would impact upon a subsequent claim located over the same ground by the same individual or group of individuals.

[2] Insofar as the first issue is concerned, it seems clear that proceedings under section 2(b) of the Mining Claims Rights Restoration Act, 30 U.S.C. § 621(b) (1994), are quasi in rem in nature. Thus, the Act provides in relevant part:

The locator of a placer claim under this chapter, however, shall conduct no mining operations for a period of sixty days after the filing of a notice of location pursuant to section 623

fn. 1 (continued)

have no present right to placer mine those claims. While appellants filed a notice of appeal in that case, they failed to seek a stay in the effect of the decision below, as they might have pursuant to 43 CFR 4.21(b). Thus, the determination of invalidity entered in that case is in effect pending this Board's decision, and appellants are possessed of no rights to mine the property until such time as the Board may enter a decision reversing the State Office's determination in the matter.

^{2/} For our present purposes, the distinction between an in rem proceeding, i.e., one instituted directly against the property, and a quasi in rem proceeding, i.e., one brought against a defendant personally though the real object is to deal with a particular property, is of no moment.

of this title. If the Secretary of the Interior, within sixty days from the filing of the notice of location, notifies the locator by registered mail or certified mail of the Secretary's intention to hold a public hearing to determine whether placer mining operations would substantially interfere with other uses of the land included within the placer claim, mining operations on that claim shall be further suspended until the Secretary has held the hearing and issued an appropriate order. The order issued by the Secretary of the Interior shall provide for one of the following: (1) a complete prohibition of placer mining; (2) a permission to engage in placer mining operations upon the condition that the locator shall, following placer operations, restore the surface of the claim to the condition in which it was immediately prior to those operations; or (3) a general permission to engage in placer mining. No order by the Secretary with respect to such operations shall be valid unless a certified copy is filed in the same State or county office in which the locator's notice of location has been filed in compliance with the United States mining laws. [Emphasis supplied.]

30 U.S.C. § 621(b) (1994).

The entire thrust of the Act is directed towards regulation of placer mining activities on specific claims rather than determining whether placer mining operations can be allowed in specific areas. Thus, the only placer operations suspended by notification of the Secretary's intention to conduct a hearing are those occurring on such specific claims as are designated by the Secretary in the notice. Moreover, an order of prohibition is required to be filed in the same state or local office in which the claim's notice of location had been filed. It seems clear that, while the focal point of hearings under section 2(b) of the Mining Claims Rights Restoration Act is clearly on the impact that placer operations would have on the land included within a mining claim, the scope of any order prohibiting placer operations is limited to the specific claims examined in the hearing and does not attach to the land itself as a general prohibition of placer mining activities. Thus, subsequent locations would not generally be affected by orders prohibiting placer mining operations on previously located claims.

The above discussion does not end the matter, however. Quite apart from the determination that, as a general matter, an order prohibiting placer mining with respect to one claim is not determinative as to rights arising from subsequent locations, this case presents the more specific question of whether and to what extent an order prohibiting placer mining operations on a particular claim would apply to other claims subsequently located over the same ground by the same locators. And, so far as this question is concerned, we must conclude that, under principles of res judicata and its corollary, administrative finality, issuance of an order prohibiting placer mining would impact upon subsequent locations filed over

the same land by the same locators ^{3/} since such an order is necessarily premised on a finding that the potential benefits which might be derived from placer mining operations on the land would not offset the likely detriments to other uses of the land. See United States v. Milender, 86 IBLA 181, 204, 92 I.D. 175, 188 (1985) (Milender I).

In Helit v. Gold Fields Mining Corp., 113 IBLA 299, 97 I.D. 109 (1990), we examined the applicability of the doctrine of res judicata in the context of mining locations made subsequent to a contest determination that the land involved was nonmineral in character. Therein, relying on prior Departmental precedents (see, e.g., Shire v. Page, 57 I.D. 252 (1941); Gorda Gold Mining Co. v. Bauman, 52 L.D. 519 (1928)), the Board held that a final determination rendered after a hearing as to the mineral character of the land in one proceeding "is binding as res judicata between the parties to the contest as to the status of the lands at the date of the hearing." Id. at 311, 97 I.D. at 115. While such a determination would not be completely preclusive of subsequent locations by the mineral claimant, the claimant would be required to show that exploration and development since the time of the last hearing had disclosed mineral values sufficient to support a finding that the land was mineral in character. ^{4/}

Similarly, we hold that, in any hearing conducted pursuant to section 2(b) of the Mining Claims Rights Restoration Act, 30 U.S.C. § 621(b) (1994), involving placer locations made by claimants subsequent to the issuance of an order under section 2(b) prohibiting placer mining operations on the same lands under earlier claims held by the same parties, which order was based on a determination that the evidence failed to show that the benefits to be obtained from placer mining outweighed the detriments which would be suffered by other values, the mining claimants have the affirmative burden of showing how new evidence derived since the last hearing has altered the balance in favor of allowing placer operations.

In view of the foregoing, dismissal of the instant appeal would not be appropriate since, notwithstanding the fact that the underlying claims have not been maintained in conformity with the law, the decision rendered by

^{3/} While we recognize that not all of the locators in the 1990 locations involved in this appeal participated in the 1993 locations, all of those involved in the 1993 locations were colocators in the claims involved in this appeal.

^{4/} The Helit decision continued:

"In the absence of a showing of substantial evidence of mineral discovery not previously disclosed, the filing of new locations for the same ground which was the subject of a prior contest hearing which resulted in a finding that the land was nonmineral in character would leave the locator vulnerable to a charge that the claims were not located or held in good faith. See United States v. Prowell, 52 IBLA 256, 260 (1981)."
Id.

the Administrative Law Judge could adversely affect appellants with respect to their new locations or future new locations. Accordingly, we will examine the arguments pressed by appellants in this appeal.

At the hearing before Judge Sweitzer, two witnesses appeared on behalf of BLM. Robert M. Waiwood, a mineral examiner with the California Desert District Office, testified that he had examined the claims to determine how development would reasonably proceed on the claims. After discussing the basic geology of the area and previous mining for manganese, limestone, and possibly tungsten on the claim sites, he postulated that mining activities on the claims for placer materials such as gravel or gold would be limited to deposits of less than 5 acres, thus obviating the need for BLM approval before engaging in such ventures (Tr. 15-17). Waiwood also observed that, although the land could be reclaimed after surface disturbing activities, such reclamation would not return the land to its present condition because, due to the angular nature of the material on the claims, material replaced after removal would no longer support the soil necessary to sustain plant growth (Tr. 18-19).

Michael J. Blymyer, a wildlife biologist with the Palm Springs-South Coast Resource Area Office, addressed BLM's concerns about the effect of surface disturbing activities on the Stephens' kangaroo rat, a Federally-listed endangered species found only in Riverside County (including sec. 26, T. 5 S., R. 4 W.) and northern parts of San Diego County (Tr. 24, 42). He described the Stephens' kangaroo rat as a nocturnal, burrowing animal which feeds on seeds of weed species such as filaree, an annual forb growing in the locale covered by the mining claims.

Blymyer pointed out that the claims were within the Kabian Park Study Area (Exh. 7), an area selected by Riverside County and participating municipalities for scrutiny as a possible Stephens' kangaroo rat preserve for inclusion in a permanent habitat conservation plan currently under development. He explained that, while the areas of known Stephens' kangaroo rat occupation depicted in Exhibit 7 only included part of the claims at issue, ^{5/} he and experts with the U.S. Fish and Wildlife Service (FWS) believed that the remaining BLM land embraced by the claims also

^{5/} Blymyer noted that previous BLM inventories of the land indicated that the Stephens' kangaroo rat was actually present on the Four Winds Placer, Tim's Terrace, Rick's River, and Tobys Trench claims (Tr. 30). He testified that, although the remaining two claims, Tumble Weed Canyon and Rod's Ravine, had not been surveyed during previous examinations because professional opinion at that time considered those sites too vegetated and steep to support the Stephens' kangaroo rat, more recent information revealed that those areas did indeed have potential for supporting the species. He noted that the Stephens' kangaroo rat typically uses dirt roads such as those visible on photographs of the claims as movement corridors between habitat areas (Tr. 30-32; Exhs. 4, 5).

constituted potential Stephens' kangaroo rat habitat (Tr. 25-26), a conclusion which he supported by noting that BLM and other Governmental agencies had designated the land covered by all six claims as Stephens' kangaroo rat habitat (Tr. 32-34; Exhs. 7 to 9). He expressed his view that surface disturbing activities on the claims at issue would detrimentally impact the Stephens' kangaroo rat by directly destroying any animals present by collapsing their burrows, by interfering with animal movements, and by diminishing vital forage (Tr. 24-25, 35). In response to questioning by Judge Sweitzer, Blymyer admitted that he had never actually seen any animals on the claims since they are nocturnal creatures. He did assert, however, that he had personally observed burrows made by the Stephens' kangaroo rat on lands included within parts of the claims (Tr. 38, 39).

In response to the Government's presentation, three of the claimants testified with respect to their planned activities on the claims. Timothy A. Nielsen stressed the importance claimants placed on environmental concerns and their extensive, personal involvement with endangered species (Tr. 44-47).

Richard N. Stone, Jr., testified that, although land had not been fully explored due to the pendency of the hearing and his uncertainty as to its outcome, his research had led him to believe that gold existed on the claims (Tr. 47-48). He acknowledged in response to questioning by Judge Sweitzer that previous mining on the claims had been limited to infrequent panning on the Rick's River placer claim, which had produced a total of less than one gram of gold, but he explained that the claimants had ceased all activities once they had been notified of the hearing as they did not want to be in the position of possibly doing something wrong (Tr. 49-50). Stone further indicated that the claimants intended to conduct a small, family business type of mining endeavor focussing on bentonite and gold, though he admitted that he did not know whether bentonite occurred on the claims (Tr. 51-52).

Rodney A. Nielsen, who also represented the interest of his wife Elaine E. Nielsen, testified that his entire family had participated in panning for gold on the claims but that, despite their belief that more gold existed, they had curtailed their mining activities until after the hearing because they did not want to violate any laws. He also emphasized his family's willingness to work with BLM to assure that the area was reclaimed to at least equal, if not better, condition than before mining activities (Tr. 54-55).

In his decision, Judge Sweitzer framed the sole issue as whether placer mining on the challenged claims, conducted pursuant to existing laws and assuming proper operations, would so substantially interfere with other uses of the land that such mining should be prohibited. Consistent with the Board's decision in United States v. Milender, 104 IBLA 207, 95 I.D. 155 (1988) (Milender II), he noted that the Government, as the party seeking to restrict or prohibit placer mining, bore the initial burden of

presenting a prima facie case, after which the burden then devolved on the claimants to overcome that showing by a preponderance of the evidence.

After reviewing the evidence presented at the hearing, Judge Sweitzer balanced the potential detrimental effects of permitting placer mining on the claims against the potential benefits of such activity. He found that BLM had established that the claims were located on land inhabited or habitable by the Stephens' kangaroo rat, that the habitat for those animals was very limited, that mining on the claims would disrupt the surface of the land, and that the disturbed land could not be restored to its original condition insofar as habitation by the Stephens' kangaroo rat was concerned, a result which he deemed inconsistent with the purposes of the Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1994). In contrast to these deleterious effects on the Stephens' kangaroo rat and its habitat, the Judge determined that any benefits from mining the claims were speculative. Accordingly, Judge Sweitzer, having concluded that BLM had established by a preponderance of the evidence that legal and normal placer mining activities on any and all of the claims would substantially and unreasonably conflict with legitimate uses of the land included therein, and that the detriments caused by a prohibition of mining on the claims would clearly be more than outweighed by the benefits to the general public from other uses of the land, ordered that placer mining be prohibited on all six claims.

On appeal, claimants challenge the sufficiency of the evidence to sustain the Judge's factual and legal conclusions. 6/ Appellants assert that

6/ Appellants filed two appeal submissions, the original pro se statement of reasons (SOR) and a subsequent brief prepared by counsel. The original SOR essentially argues that the only other uses of the land properly considered in determining whether placer mining should be restricted or prohibited are powersite uses, and that placer mining may not be prohibited as long as the land can be restored to a condition suitable for powersite purposes.

We find neither of these arguments meritorious. As Board precedent makes abundantly clear, land uses other than powersite uses must be weighed in deciding the propriety of permitting or prohibiting placer mining on lands subject to a powersite withdrawal. See, e.g., United States v. McEwen, 129 IBLA 99, 100 (1994) (benefits of the land for recreational use); United States v. Brown, 124 IBLA 247, 253 (1992) (benefits of the land for recreational use); Milender II, 104 IBLA 207, 220, 95 I.D. 155, 163 (1988) (benefits of the land for silviculture); United States v. Mineral Economics Corp., 34 IBLA 258, 259 (1978) (benefits of the land for dove nesting habitat). Therefore, Judge Sweitzer properly considered the use of the land for Stephens' kangaroo rat habitat in evaluating whether placer mining should be prohibited on the claims. The issues raised in the brief submitted by counsel are addressed in the text of our decision.

Judge Sweitzer improperly admitted and weighed testimony and exhibits concerning the presence of the Stephens' kangaroo rat and its habitat on the lands in their mining claims without requiring independent verification or appropriate foundation. They contend that the lack of supporting documentation, surveys, studies, or testimony by other Stephens' kangaroo rat experts fatally undercuts the Judge's acceptance of the testimony of BLM's witnesses that the Stephens' kangaroo rat and its habitat exist on the claims. Appellants criticize the Judge's failure to take judicial notice that the Secretary of the Interior has not designated critical habitat for the Stephens' kangaroo rat. They further assert that BLM initiated the hearing before it had adequate information substantiating a conflict between the claims and the use of the land for the Stephens' kangaroo rat or its habitat, that no Governmental body has designated any portion of sec. 26 as Stephens' kangaroo rat habitat, and that the draft South Coast Resource Management Plan (RMP) (Exh. 8) designates the lands at issue as available for exchange or disposal. In short, appellants maintain that the Government's submissions were insufficient to meet its burden of establishing by a preponderance of the evidence that placer mining should be prohibited on the claims.

Appellants also question Judge Sweitzer's balancing of the benefits of placer mining against the injury mining would cause to other uses of the land. They dispute the Judge's determination that mining would have a deleterious effect on the Stephens' kangaroo rat and its habitat, insisting that, given the insufficiency of the evidence to establish that either the Stephens' kangaroo rat or its habitat occur on lands within sec. 26, no substantial competing use for the land exists. While acknowledging that little gold has been discovered on the claims, appellants contend that the restrictions on mining imposed by the Mining Claims Rights Restoration Act, 30 U.S.C. § 621(b) (1994), placed them at a distinct disadvantage in their attempts to show that the benefits of placer mining outweigh the detriments. In any event, appellants submit that, in light of BLM's failure to show that placer mining will substantially interfere with the Stephens' kangaroo rat or its habitat or any other use of the land, the possibility that the claims might contain a profitable gold mining opportunity justifies permitting placer mining on this land.

In response, BLM asserts that appellants' objections to the lack of foundation and supporting documentation for the evidence concerning the presence of the Stephens' kangaroo rat on the lands in sec. 26 presented to and weighed by the Judge should have first been raised before the Judge during the hearing and, therefore, are untimely. BLM avers that it had available to it numerous studies concerning the existence of the Stephens' kangaroo rat in the area, but saw no need to present additional and cumulative information at the hearing in view of the admittance, without objection, of Blymyer's testimony and Exhibit 7.

BLM also discounts appellants' attempt to interject the concept of critical habitat into this case, arguing that critical habitat for the

Stephens' kangaroo rat has no relevance here because BLM's witnesses testified as to the actual habitat of the Stephens' kangaroo rat. According to BLM, the fact that the lands embraced by the claims have been identified as available for disposal under the draft RMP does not undermine the soundness of Judge Sweitzer's decision, since any proposal to dispose of land occupied by the endangered Stephens' kangaroo rat would trigger BLM's obligation to consult with FWS pursuant to 16 U.S.C. § 1536 (1994) and could not proceed absent that agency's approval. BLM concludes that the Judge's decision is based upon virtually uncontradicted evidence and must be affirmed.

[3] Our review of the record establishes that Judge Sweitzer's decision was fully in accord with both the evidence presented at the hearing and applicable law. As Judge Sweitzer noted, under 30 U.S.C. § 621(b) (1994), determination of whether or not placer mining would substantially interfere with other uses of lands within powersite withdrawals necessarily requires the balancing of the benefits likely to be obtained from mining against the injury likely to be caused to other uses of the land. See, e.g., United States v. Brown, 124 IBLA 247, 252 (1992); Milender II, supra at 218, 95 I.D. at 161. The record developed before Judge Sweitzer establishes not only that the Stephens' kangaroo rat would inevitably be injured by placer mining, conducted pursuant to existing laws and regulations, but also that appellants had failed to establish that there are any values which might reasonably be anticipated to accrue from mining.

In this regard, appellants' arguments with respect to whether or not the land is classified as critical habitat for the Stephens' kangaroo rat are beside the point. The evidence was uncontradicted that the claims not only contained habitat which was suitable for the Stephens' kangaroo rat but that the rat was actually present in areas of the claims (Tr. 32-34). The evidence was equally clear that normal placer mining operations would adversely affect the species (Tr. 24-25). 7/ Balanced against this were

7/ We recognize that appellants expressed the intent to mine carefully and limit excavations to a 5-gallon bucket of minerals extracted each month from the soil. See Contestees' Post-Hearing Brief at 1. The test applied in determining whether to permit placer mining operations, however, does not limit consideration to the specific mining method a claimant states he or she intends to use but rather requires advertence to all methods which a miner could reasonably use to extract minerals. The reason for this is that, under section 2(b), the Secretary has only a single opportunity to grant or deny a general permission to placer mine. See, e.g., United States v. Bennewitz, 72 I.D. 183, 188 (1965). Once he exercises the discretion invested in him by the statute to permit placer operations, his options under the Mining Claims Rights Restoration Act, supra, have been exhausted. Should operations thereafter proceed differently and more destructively than those proposed by the claimant at the hearing, so long as those operations were, themselves, legal, the Secretary would be powerless to intervene. It is because of this reality that the standard for

mineral values so minimal (less than 1 gram (Tr. 49)) that it was scarcely possible that Judge Sweitzer could rule in any fashion other than he did.

We are aware that appellants apparently ceased all activities on the claims once they were informed that the Secretary intended to conduct a hearing under the Mining Claims Rights Restoration Act. While we can appreciate their efforts to comply with the law, the simple fact of the matter is that mining claims are not supposed to be located until after a prospector has discovered evidence sufficient to support a finding that a discovery of a valuable mineral deposit has been made. See, e.g., United States v. Knoblock, 131 IBLA 48, 114, 101 I.D. 123, 158 (1994); United States v. White, 118 IBLA 266, 319-20, 98 I.D. 129, 157-58 (1991). As we noted in our decision in Knoblock:

It is a truism long recognized that, despite the mandates of the law, individuals often locate mining claims at the first indication of value, long before evidence has been collected which might justify the development of the claims. So long as discovery ultimately occurs while the land remains open to mineral entry, the Government will not concern itself with the order in which the acts of location and discovery have transpired. Cole v. Ralph, 252 U.S. 286 (1920). But, where the Government has determined to withdraw land from the operation of the mining laws, only such claims already containing a discovery are excepted from the force of this action, since only such claims possess rights as against the United States. Any individual who locates a claim prior to making a discovery runs the risk that the Government will withdraw the land before a discovery can be completed and put all his efforts to naught. But this is a risk no different than that assumed by those who, mindful of the statutory requirement that discovery precede location, refrain from staking a claim until such time as a discovery has been shown to exist.

Id. at 114-15, 101 I.D. at 158-59.

In the context of claims located on powersite lands, this means that a claimant should, prior to location of the claim, acquire sufficient information as to the mineral values which he expects to realize to withstand a Government challenge to his right to conduct placer operations thereon (assuming such operations are contemplated). Moreover, since the Act requires the Department to initiate the hearing process within 60 days

fn. 7 (continued)

evaluating the potential effect of placer mining on other land use values is "the extent to which legal, normal operations, subject to regulatory restraint, might interfere with such uses" and cannot be limited to an evaluation of the impact of the mining method proposed by the contestee. See Milender I, supra at 198, 92 I.D. at 185.

after a claim is filed under the Act, claimants must expect that any challenge to their right to conduct placer mining operations will follow hard upon their filing and should be prepared, at that time, to show the benefits they believe that placer mining could bring. This, appellants clearly were not in a position to do at the hearing.

In light of the foregoing, there can be little doubt that the decision of Judge Sweitzer was fully in accord with the evidence and the controlling case law. In their response to the Board's order to show cause, however, appellants asserted that events occurring subsequent to the hearing have established that BLM does, indeed, intend to exchange the lands involved for other lands in the Steele Peak ACEC (area of critical environmental concern). Appellants suggest that Judge Sweitzer was misled by statements made by BLM witnesses into assuming that the parcels would be retained in BLM ownership and that this misapprehension may have directly led to his decision prohibiting placer mining. There are two problems with this assertion.

First of all, the documentary exhibits which were before Judge Sweitzer clearly indicated that the preferred BLM management alternative included consideration of exchanging the Federal lands involved herein for other lands occupied by the Stephens' kangaroo rat on Steele Peak. See, e.g., Exh. 8 at 2-24. There is no indication that Judge Sweitzer was, in any way, misled on this point. Secondly, to the extent that appellants believe that they have discovered new evidence, it is well established that such evidence may not be considered by the Board as if it had been introduced at a hearing. Rather, it may only be used to determine whether ordering an additional hearing would be warranted. See United States v. Memmott, 132 IBLA 283, 287-88 (1995); United States v. Whittaker (On Reconsideration), 102 IBLA 162, 164 (1988). Such a hearing would be totally unwarranted herein since the underlying claims have already been statutorily abandoned and any such newly-discovered evidence would be admissible in any future hearing with respect to subsequently located claims. We decline to order such a hearing and will not further consider the evidentiary proffer made by appellants. On the basis of the record made with respect to the claims presently before us, the decision of Judge Sweitzer was clearly correct.

Therefore, 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.

James L. Burski
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

