

RAYMOND A. NAYLOR

IBLA 92-557

Decided July 24, 1996

Appeal from a decision of the California State Office, Bureau of Land Management, declaring three placer mining claims null and void, in part. CAMC 123964-CAMC 123965, CAMC 123967.

Affirmed.

1. Administrative Authority: Estoppel–Estoppel

One precondition for the invocation of estoppel against the Government in matters concerning the public lands is the existence of affirmative misconduct on the part of the Government. For a misrepresentation to be affirmative misconduct, it must be in the form of a crucial misstatement in an official written decision.

2. Mining Claims: Lands Subject To–Mining Claims: Placer Claims–Mining Claims: Powersite Lands–Mining Claims Rights Restoration Act

The Mining Claims Rights Restoration Act opened to location lands withdrawn or reserved for power development or power sites, but no lands included in a power project operating or being constructed under a license or permit issued under the Federal Power Act were so opened.

3. Mining Claims: Placer Claims

Lands within a placer mining claim, whether an individual claim or an association claim, must be contiguous.

APPEARANCES: Raymond A. Naylor, Applegate, California, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Raymond A. Naylor has appealed from a decision of the California State Office, Bureau of Land Management (BLM), dated June 29, 1992, declaring null and void, in part, the Liberty Hill Nos. 30, 31, and 33 placer

mining claims. The claims are situated in sec. 18, T. 16 N., R. 11 E., Mount Diablo Meridian, Nevada County, California. 1/

BLM's decision explained that portions of the three claims lie within Power Project No. 2310, an active licensed project operated by Pacific Gas and Electric Company (PG&E). Lands within this project were reserved in 1965 under section 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1994), from entry, location, or other disposal under the laws of the United States until otherwise directed by the Federal Power Commission 2/ or by Congress. Appellant's placer claims were located in 1982 and apparently amended in 1983 and 1992. Amended location notices bearing the caption "P.L. 359" were filed in April 1992.

Public Law 359 is a reference to the Mining Claims Rights Restoration Act of August 11, 1955, 30 U.S.C. § 621 (1994). This Act provides, in part:

SEC. 2. All public lands belonging to the United States heretofore, now, or hereafter withdrawn or reserved for power development or power sites shall be open to entry for location and patent of mining claims and for mining, development, beneficiation, removal, and utilization of the mineral resources of such lands \* \* \* And provided further, That nothing contained herein shall be construed to open for the purposes described

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1/ Location notices for the claims indicate that the Liberty Hill No. 30 claim is situated in the N $\frac{1}{2}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$  sec. 18, excepting lands within patent 3084; the Liberty Hill No. 31 in the N $\frac{1}{2}$  NW $\frac{1}{4}$  NE $\frac{1}{4}$  sec. 18; and the Liberty Hill No. 33 in the S $\frac{1}{2}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$  sec. 18, excepting lands within patent 3084. Appellant estimates that each of the claims has an area of 20 acres, plus or minus. BLM's decision inexplicably places the claims in lot 1 and the N $\frac{1}{2}$  lot 6, sec. 18, a description which includes the Liberty Hill No. 31 claim, but only a small part of the Liberty Hill No. 30 claim, and ignores the Liberty Hill No. 33 claim entirely. The claims appear to be situated in the Tahoe National Forest, and a map accompanying appellant's location notices indicates that the claims are near the probable route of the Donner party.

2/ The reference in the statute to the Federal Power Commission should now be to the Federal Energy Regulatory Commission (FERC). In addition, the record indicates that the lands occupied by the claims were also withdrawn from location by Executive Order of Apr. 29, 1912, and reserved for water power site reserve No. 267. This withdrawal was made pursuant to the Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. § 142 (1976), also known as the Pickett Act (repealed by section 704(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2782). Lands withdrawn from location under the Pickett Act were at all times open to "exploration discovery, occupation, 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."

in this section any lands (1) which are included in any project operating or being constructed under a license or permit issued under the Federal Power Act or other Act of Congress, or (2) which are under examination and survey by a prospective licensee of the Federal Power Commission, if such prospective licensee holds an uncanceled preliminary permit issued under the Federal Power Act authorizing him to conduct such examination and survey with respect to such lands and such permit has not been renewed in the case of such prospective licensee more than once.

BLM held that the above-quoted proviso was applicable in the present case and served to establish that the lands within Project 2310 were not open to location for mining.

In particular, BLM found that a 15-foot wide right-of-way for a 60 K.V. transmission line and powerline carrier crossed the Liberty Hill Nos. 30 and 31, and an 80-foot wide right-of-way for a two-line 115 K.V. transmission line crossed the Liberty Hill No. 33. BLM concluded that those portions of the claims within these project lands were null and void ab initio.

BLM further found that these rights-of-way divided each of the claims into two noncontiguous pieces. Relying on 30 U.S.C. § 36 (1994) and 43 CFR 3842.1-3, BLM determined that lands described in placer mining claims must be contiguous. BLM advised appellant that the contiguity problem could be corrected by filing amended location notices for each claim to exclude the noncontiguous parcels. These excluded parcels could then be filed as separate claims, subject to land availability and the intervening rights of the United States and others.

In his statement of reasons on appeal, Naylor states that he was not informed by BLM of Project 2310 despite the fact that, prior to expending over \$100,000 in development costs, he had inquired and had been assured that there were no withdrawals in the area and that the area was open for location. Naylor further states that "[t]o appellant's knowledge, project 2310 was not duly noted in the BLM records." Appellant does not dispute that the rights-of-way cross his claims, but he asks that the integrity of the claims be maintained and that BLM's decision of June 29, 1992, be vacated.

The gist of appellant's charge appears to be that BLM is now estopped to deny the representations it (or some other entity) allegedly made to appellant regarding the availability of the subject lands for mineral location. The Board has well-established rules governing consideration of estoppel questions. These rules were summarized in Ptamigan Co., 91 IBLA 113, 117 (1986), aff'd sub nom. Bolt v. United States, 944 F.2d 603 (9th Cir. 1991):

First, we have adopted the elements of estoppel described by the Ninth Circuit Court of Appeals in United States v. Georgia-Pa

Four elements must be present to establish the defense of estoppel: (1) The party to ~~the fact, (2) the party must still have a right to be heard;~~ (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Id. at 96 (quoting Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960)). See State of Alaska, 46 IBLA 12, 21 (1980); Harry E. Reeves, 31 IBLA 242, 267 (1977). Second, we have adopted the rule of numerous an extraordinary remedy, especially as it relates to the public lands. Harold E. Woods, 61 IBLA 359, 369 (1982); State of Alaska, supra. Third, estoppel against the government in matters concerning public lands must be based on affirmative misconduct, such as misrepresentation or concealment of material facts. United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978); D.F. Colson, 63 IBLA 121 (1982); Arpee Jones, 61 IBLA 149 (1982). Finally, we have noted that while estoppel may lie where reliance on Governmental statements deprived an individual of a right which he could have acquired, estoppel does not lie where the effect of such action would be to grant an individual a right not authorized by law. See Edward L. Ellis, 42 IBLA 66 (1979).

[1] Upon review of the record, it appears that appellant cannot prevail in demonstrating affirmative misconduct on BLM's part. In James W. Bowling, 129 IBLA 52 (1994), the Board reiterated the requirement that, for a misrepresentation to be affirmative misconduct, it must be in the form of a crucial misstatement in an official written decision. See also Peak River Expeditions (On Reconsideration), 98 IBLA 13, 15-16 (1987); Steve E. Cate, 97 IBLA 27, 32 (1987); Marathon Oil Co., 16 IBLA 298, 317, 81 I.D. 447, 455 (1974). No official, written decision by BLM is cited by appellant in support of its allegations. 3/

[2] A further infirmity exists in appellant's argument. As set forth above, estoppel will not lie when the effect of such action would be to grant an individual a right not authorized by law. The case law

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3/ While the record does contain BLM correspondence, dated June 24, 1992, wherein BLM states that FERC has advised that "there is not an active project in this area," this letter was in reference to the Liberty Hill Nos. 32 and 36 mining claims, neither of which is at issue here.

is clear that placer mining claims partially located on lands not open to appropriation are null and void ab initio to the extent of the conflict. See, e.g., Shiny Rock Mining Corp. v. United States, 825 F.2d 216, 219 (9th Cir. 1987); United States v. Smith Christian Mining Enterprises, Inc., 537 F. Supp. 57, 61 (D. Or. 1981). Since lands within a licensed project were not opened to mining by the Mining Claim Rights Restoration Act, supra, the withdrawal effected by section 24 of the Federal Power Act remains in effect. See Alan Bruce, 133 IBLA 297 (1995) (also involving Project 2310). Thus, to the extent that Naylor's claims lie within the boundaries of Project 2310, they embrace land which is not subject to mineral location, and invocation of estoppel in such circumstances would confer upon appellant a right not authorized by law.

A final reason exists to deny the claim of estoppel. In order to prevail in an estoppel argument, a party must be ignorant of the true facts. United States v. Georgia-Pacific Co., supra. Appellant alleges that he was told that the area was open for location and that no withdrawals were present, but he does not state squarely that he checked the master title plat (MTP) for the township in question. The record on appeal contains the MTP for T. 16 N., R. 11 E., and this plat clearly shows a withdrawal for Power Project No. 2310 in sec. 18. Power Project No. 2310 is also noted on the historical index for this township and on the relevant Forest Service use restriction map. <sup>4/</sup> These documents are available to the public. A mining claimant is responsible for learning the true status of the land on which his mining claims are located. See Edgar Sebastian Roberts, 127 IBLA 217, 219 (1993); Shama Minerals, 119 IBLA 152, 154 (1991); Fairfield Mining Co., 89 IBLA 209, 213 (1985). It is incumbent upon the locator of a mining claim to exercise considerable care in ascertaining the status of the land. See Edward L. Ellis, supra at 72, quoting from Arthur W. Boone, 32 IBLA 305, 308 (1977). The record does not indicate that a diligent effort was undertaken in this regard. <sup>5/</sup>

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<sup>4/</sup> Although correspondence to appellant from the Forest Service, dated July 10, 1992, indicated that BLM's MTP did not show sec. 7, T. 16 N., R. 11 E., to be withdrawn, the plat for the Tahoe National Forest indicated otherwise. In any event, BLM's decision under appeal herein does not affect claims in sec. 7.

<sup>5/</sup> Moreover, it is not essential that PG&E's license be made a matter of record on the land office records at the time of location to have the segregative effect under the law. Foster Mining & Engineering Co., 7 IBLA 299, 311 (1972). The filing of an application for a proposed power project under section 24 of the Federal Power Act, supra, accomplished this fact. The failure of the record to correctly note the land status would, at most, merely prevent the "notation" rule from applying so as to independently segregate the land from entry under the mining laws. It would not affect the underlying substantive status of the land as not open to mineral entry under section 24 of the Federal Power Act, supra. See generally, David Cavanagh, 89 IBLA 285 (1985) and B. J. Toohey, 88 IBLA 66 (1985), aff'd sub nom. Cavanagh v. Hodel, No. A86-041 Civil (D. Alaska Mar. 18, 1988).

Appellant also argues that BLM erred in finding that each of his claims was divided in two by the rights-of-way in Project 2310. Naylor describes the subject rights-of-way as easements and contends that easements give a grantee the right to use the realty of another for a specific use, but do not alter the boundary of a parcel or divide it. Alternatively, appellant disputes BLM's assertion that lands described in placer mining claims must be contiguous. Only association placer claims must be contiguous, appellant states, and nothing in BLM's decision supports a broader holding. Appellant avers that he is not in an association and does not have association placer claims.

Appellant is simply in error in his assertion that the rights-of-way herein did not divide the claims in two. As noted above, lands within a Project 2310 right-of-way corridor were withdrawn from location by section 24 of the Federal Power Act, and nothing in the Mining Claims Rights Restoration Act served to restore the land to mineral location. Any attempt to locate a claim within such corridor is null and void ab initio. Placer mining is not permitted within this corridor and, where such corridor runs through a subsequently-located placer claim, a no-mining zone necessarily occurs that divides the claim in two. Lands within such a "claim" are not contiguous. See, e.g., Seth M. Reilly, 112 IBLA 273, 278-79 (1990); James H. Cosgrove, 61 IBLA 376, 378 (1982).

[3] While appellant relies on the fact that 30 U.S.C. § 36 (1994), which BLM cited in support of its contiguity requirement, refers to association claims, appellant misapprehends the scope and nature of the requirement. Thus, the statute provides, in relevant part:

Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the 9th day of July, 1870, shall exceed one hundred and sixty acres for any one person or [6] association of persons, which location shall conform to the United States surveys.

While it is true that the language of this statute is directed towards requiring contiguity of claims for the purpose of making joint entry as

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6/ The words "person or" which were originally part of the 1870 Placer Act, 16 Stat. 217, were held to have been impliedly repealed by the adoption of Rev. Stat. § 2331, 30 U.S.C. § 35 (1994), which was enacted as part of the Mining Law of 1872, 17 Stat. 91, 94, as amended, 30 U.S.C. § 35 (1994). See U.S. ex rel. U.S. Borax Co. v. Ickes, 98 F.2d 271, 278-79 (D.C. Cir. 1938), cert. denied, 305 U.S. 619.

an association placer, it does not follow that this somehow justifies noncontiguous claims so long as they are only made by an individual entryman. On the contrary, this section clearly presupposes that individual claims must, themselves, consist of contiguous lands and merely seeks to make it clear that only contiguous claims (each of which contain contiguous lands) can be consolidated in a single association placer claim. Were this not the case, 30 U.S.C. § 36 (1994) would make no sense since it would permit multiple claims embracing noncontiguous parcels to be joined in a single association placer claim so long as part of each claim was contiguous to some part of each other claim. Such has never been the understanding of this provision.

Thus, in Tomera Placer Claim, 33 L.D. 560, 561 (1905), Secretary Hitchcock set forth the rationale for the requirement of contiguity. The Tomera placer was an association claim of 120 acres located in a long, narrow shape whose appearance the Secretary likened to a series of ascending steps, some of which shared only a common corner. Secretary Hitchcock noted that section 2320 of the Revised Statutes, 30 U.S.C. § 23 (1994), provides that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located" and that this provision was made applicable to placer claims by section 2329, 30 U.S.C. § 35 (1994). The Secretary continued:

The limits of a mining claim are defined by its exterior boundary lines. \* \* \* But one discovery of mineral is required to support a placer location \* \* \* ; and since such discovery is confined by the statute to the "limits of the claim"—clearly contemplating what may be embraced within one set of boundary lines—it is evident that a claim may not legally be taken in such form as to make necessary two or more sets of boundary lines, defining separate limits. [Emphasis added.]

Addressing the ascending-step form of the Tomera claim, Secretary Hitchcock continued:

There is no provision of the mining laws authorizing a locator, by virtue of a discovery of mineral within the limits of one parcel of ground, to embrace in his location another and entirely different parcel, lying wholly without s having separate and distinct boundaries, merely because the two parcels corner with each other. Tracts so situated are in fact, and in the administration of the mining laws must be considered and treated as constituting, separate and distinct parcels of ground.

The rationale set forth above for a claim shaped like the Tomera placer applies a fortiori to a claim, like Naylor's, that is bisected by a project

right-of-way since the parcels created by the bifurcation do not even corner, much less abut each other. <sup>7/</sup>

BLM correctly determined that the lands within Power Project No. 2310 were not open to mineral entry at the time that the Liberty Hill Nos. 30, 31, and 33 placer mining claims were located and those portions of the claims embracing lands within the project were null and void ab initio. Similarly, BLM was correct in its conclusion that the lands within the power project served to divide the subject claims into noncontiguous parcels which could not properly be embraced within a single placer location. BLM's decision of June 29, 1992, is properly affirmed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the California State Office is affirmed.

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James L. Burski  
Administrative Judge

I concur:

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David L. Hughes  
Administrative Judge

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<sup>7/</sup> A similar conclusion was reached in Stenfield v. Espe, 171 F. 825 (9th Cir. 1909), where the Court of Appeals rejected an attempt of a junior locator to embrace within his location numerous parts of senior claims for the purpose of claiming irregular and noncontiguous fractions of vacant ground lying between the senior claims.

