

HOMESTAKE MINING CO. OF CALIFORNIA
JAMES WILDER

IBLA 94-212, 94-213

Decided October 11, 1996

Appeal from a decision of the California State Office, Bureau of Land Management, approving an application for a confirmatory patent to school grant lands. CACA 31759.

Affirmed as modified.

1. Mineral Lands: Determination of Character of—School Lands: Mineral Lands

In determining whether certain land passed to the State of California pursuant to sec. 6 of the Act of Mar. 3, 1853, ch. 145, 10 Stat. 244, 246, as nonmineral school lands at the time of approval of the survey of the lands in 1875, the question is whether the known conditions were, at that time, such as reasonably to engender the belief that the land contained mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end. If so, such lands were mineral in character and were withheld from the grant.

2. Mineral Lands: Determination of Character of—School Lands: Mineral Lands

School lands granted to the State of California pursuant to sec. 6 of the Act of Mar. 3, 1853, ch. 145, 10 Stat. 244, 246, were presumed to be of the character contemplated by the grant, *i.e.*, nonmineral, and the mere return of certain of those lands as mineral lands by the Surveyor General in 1875 is insufficient to rebut that presumption. However, where the State seeks a confirmatory patent requiring a determination of the character of the land at the time of approval of the survey, such a return is a factor to be considered and, when supported by other evidence, may justify a conclusion that the lands, at that time, were mineral in character.

APPEARANCES: Louis F. Claiborne, Esq., San Francisco, California, for Homestake Mining Company; Charles E. Weller, Esq., Reno, Nevada, for James Wilder; Kenneth R. Williams, Esq., Deputy Attorney General, Sacramento, California, for the California State Lands Commission.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Homestake Mining Company (Homestake) and James Wilder have filed separate appeals from the November 23, 1993, decision of the California State Office, Bureau of Land Management (BLM), approving an application filed by the State of California, State Lands Commission (SLC), for a confirmatory patent to 305.12 acres of land in a granted school section, described as lots 1 through 11, and the NE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 36, T. 12 N., R. 5 W., Mount Diablo Meridian, Napa and Yolo Counties, California. ^{1/}

In accordance with the Federal land disposition program designed to promote education in new states entering into the Union, states were granted land for school purposes. Those lands, referred to as "school lands," usually consisted of secs. 16 and 36 in each township. In accordance with section 6 of the Act of March 3, 1853, ch. 145, 10 Stat. 244, 246, Congress granted secs. 16 and 36 to the State of California for "the purposes of public schools." For sections already surveyed, this grant was immediately effective. For land surveyed subsequent to the enactment of section 6, title did not vest until approval of the survey of the section. See Andrus v. Utah, 446 U.S. 500, 507 (1980); United States v. Wyoming, 331 U.S. 440, 443-44 (1947); George McDevitt, 113 IBLA 287, 289 (1990).

Even where school land grant acts such as the Act of March 3, 1853, did not specifically mention that lands mineral in character were excepted from the grant, sections known to be mineral in character by the time of approval of the survey were excepted. Andrus v. Utah, supra at 508-09. Thus, the only lands transferred to the states were nonmineral lands.

However, on January 25, 1927, Congress passed legislation entitled "An Act Confirming in States and Territories Title to Lands in Aid of Common

^{1/} One of the parties listed in BLM's decision as an adverse party, Scott Kauffman, filed a letter with BLM on Jan. 4, 1994. BLM forwarded that letter to this Board and it was assigned docket number IBLA 94-254. Upon review of that letter, the Board determined that it was an answer to statements made by Homestake and Wilder in their appeal documents and petitions for stay, and not a notice of appeal. By order dated Feb. 4, 1994, the Board dismissed IBLA 94-254 as inadvertently docketed, granted the petitions for stay filed by Homestake and Wilder, placed copies of Kauffman's letter in the Homestake and Wilder appeal files, and completed service of Kauffman's letter. Kauffman has filed additional documents in support of his position that the lands in question were mineral in character at the time the plat of survey was approved on May 10, 1875.

or Public Schools," 44 Stat. 1026, as amended, 43 U.S.C. §§ 870-871 (1994). It is this act under which SLC sought a confirmatory patent. The act

released to the states the in-place school lands that had been previously withheld because of mineral classifications. Although the Act was couched in terms of "extending" the state school land grants to "embrace" mineral lands, the Act was neither retroactive nor self-executing. The existing law governing the time and manner of vesting of title to nonmineral lands was declared to govern the vesting of the Act's grant of mineral lands. Moreover, in honoring existing rights in and to these mineral lands, the Act did not legislatively resolve the question of prior claims to such lands under the federal mining law or the validity of prior dispositions or leases by the United States. [2] * * *.

The 1927 Act did not, therefore, eliminate the problem of establishing mineral ownership through proof of the "mineral" or "nonmineral" character of the land on the effective date of the grant, a task involving events that might have occurred many years earlier and which were extremely difficult or even impossible to prove. In 1934, Congress authorized the Secretary of the Interior, upon application by a state, to cause patents to be issued to the numbered school sections. This Act provided a vehicle for conclusive determination of the facts essential to determine ownership of minerals, and all limitations on the state's title, as well as the date when it vested, are consequently shown in the patent issued to the state pursuant to this Act. [Footnotes omitted.]

3 Am. L. of Mining, § 61.02[3] (2d ed. 1984).

The Act of June 21, 1934, 48 Stat. 1185 (codified at 43 U.S.C. § 871a (1976)), was repealed by the Federal Land Policy and Management Act of 1976 (FLPMA), § 705(a), 90 Stat. 2792. 3/ In a memorandum to the Director, BLM, dated February 13, 1978, the Associate Solicitor, Energy and Resources, in

2/ Subsection (c) of sec. 1 of the 1927 Act, 43 U.S.C. § 870(c) (1994), specifically excepted from operation of the Act any lands included within existing Federal reservations, or subject to or included in any valid application, claim, or right initiated under any of the existing laws of the United States, until cancelled or extinguished. See 43 CFR 2623.2(a). That exception was later qualified in a 1954 amendment to the 1927 Act. See discussion, infra.

3/ The 1934 Act authorized the Secretary to make conclusive determinations regarding the known mineral character of school lands at the effective date of the grant in certain circumstances, including upon application by a state. Margaret Scharf, 57 I.D. 348, 362-64 (1941).

responding to an inquiry regarding whether it was still possible to issue title evidence for granted school sections, explained: "It is clear from the legislative history of FLPMA that the original intent of Congress in repealing the 1934 Act was to transfer its authority to FLPMA; however, Section 208 [43 U.S.C. § 1718 (1994)] of FLPMA as finally enacted does not contain such authority." However, the Associate Solicitor advised that BLM could utilize the authority in 43 U.S.C. § 870(d)(4) (1994) of the 1927 Act, as amended, which had not been repealed by FLPMA, to issue patents to the states for mineral lands.

Subsection (d) was added to the 1927 Act by the Act of April 22, 1954, 68 Stat. 57. Therein, Congress provided that, notwithstanding the language of subsection (c), in-place school lands were granted to the states under the 1927 Act, even though they were, at the time of survey, subject to any lease or leases entered into by the United States, or any application for a lease. Congress further provided that the states would succeed to the position of the United States as lessor. It also stated in subsection (d)(4) of the 1954 Act, as follows:

The Secretary of the Interior shall, upon application by a State, issue patents to the State for the lands granted by this section [section 870] and section 871 of this title, in accordance with section 871a of this title. [4] Such patent shall, if the lease is then outstanding, include a statement that the State succeeded to the position of the United States as lessor at the time the title vested in the State.

30 U.S.C. § 870(d)(4) (1994). Although there is no evidence of any outstanding lease involving the lands in question, SLC nevertheless filed its application for confirmatory patent in this case under that provision, and BLM approved it under that authority.

The official U.S. plat of survey of sec. 36, T. 12 N., R. 5 W., Mount Diablo Meridian, was accepted and approved by the Surveyor General on May 10, 1875. On page 33 of his field notes of the survey completed on December 17, 1874, Deputy Surveyor George Tucker identified the W $\frac{1}{2}$ and the SE $\frac{1}{4}$ of sec. 36 as "mineral land," which he characterized as "more valuable for mineral than agricultural purposes." That land was also shown on the official plat of survey as mineral land. Thus, only the NE $\frac{1}{4}$ of the section was not identified as mineral land. Thereafter, on June 14, 1881, another plat of survey including sec. 36 was approved. That survey lotted out various mining claims and a mill site in the NW $\frac{1}{4}$, SW $\frac{1}{4}$, NW $\frac{1}{4}$

^{4/} As noted in the AMERICAN LAW OF MINING, despite the repeal of the 1934 Act, "it would appear to have continuing significance for the 1927 Act" because of the reference to it in 43 U.S.C. § 870(d)(4) (1994). 3 Am. L. of Mining, § 61.02[3] at n. 50 (2d ed. 1984).

SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$, and the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of sec. 36, and it also lotted out the remaining lands in those quarter sections and quarter-quarter sections into the 11 lots at issue in this case.

In its decision, BLM concluded that, because the 1875 plat of survey showed the 305.12 acres in question as mineral land, it did not pass to the State of California on that date, but that "[l]egal title to the surface and mineral estates remained in the Federal Government until 1927," when it passed to the State under the 1927 Act (Decision at 1). BLM stated that the NE $\frac{1}{4}$ of sec. 36, which was returned as nonmineral in the survey, passed to the State on the date of acceptance of the plat of survey, May 10, 1875. The remaining land in the section, 174.88 acres, was mineral land that was included in mining claims and a mill site, and had been used by the State as base lands for in-lieu selections to indemnify the State for lost in-place grant lands.

BLM's decision recites, and the record shows, that prior to 1927 the State issued two patents purporting to convey all of sec. 36 into private ownership. One patent for 320 acres (the N $\frac{1}{2}$) was issued to the California Quicksilver Company on January 20, 1880. The other patent for 320 acres (the S $\frac{1}{2}$) was issued to one Thomas J. Hall on August 13, 1886. BLM stated that, because there was no authority for the State to acquire school grant mineral lands prior to January 25, 1927, "the fact that the State issued patents which purported to transfer title to Federal land into private ownership has no bearing on the State's application for confirmatory patent" to the 305.12 acres sought (Decision at 3). BLM proceeded to find that title to lots 1 through 11, and the NE $\frac{1}{4}$ SE $\frac{1}{4}$, sec. 36, T. 12 N., R. 5 W., Mount Diablo Meridian, vested in the State on January 25, 1927, and, accordingly, it approved the State's application for confirmatory patent. ^{5/}

In its statement of reasons (SOR), Homestake identifies itself as the successor-in-interest to the two patents issued by the State of California in the 1880's for the lands in sec. 36. Homestake asserts that its title

^{5/} BLM's decision also stated that five post-1927 mining claims (CAMC 39737-CAMC 39741) were filed on the subject lands by Homestake, and BLM held that these filings had no force and effect because they occurred after title passed from the United States to the State of California. On appeal, Homestake clarifies that those claims were not located by it, but by "one or more of the family of Robert Kauff[man]" (SOR at 6). It also asserts that the claims are not located on the subject lands, but on Mineral Lots 44 through 47 on the approved township plat which were mineral lands under claim at the time of approval of the survey. Finally, it contends that the filings "have 'force and effect' because they resulted in valid mining locations that were subsequently patented to Homestake by Patent No. 04-93-0054 on September 28, 1992" (SOR at 6).

to these lands will be prejudiced if a confirmatory patent is issued to SLC since, if the State received title in 1927, it would have had no title to convey when it issued the earlier patents. Thus, Homestake contends that it is the owner of the lands in question, including the minerals, because the State received title to the lands in 1875, upon approval of the survey, and later conveyed such lands to Homestake's predecessors-in-interest.

Homestake asserts that the sole issue before the Board "is whether the subject lands passed to the State under the 1853 Act (as appellants contend) or under the 1927 Act (as the State and respondent Kauffman contend)" (Reply at 5). The thrust of Homestake's argument is that the return of the land as mineral by the Deputy Surveyor is not "sufficient proof to overcome the presumption in favor of the grant to the State" (SOR at 3; Reply at 6). Homestake argues that the mere return of lands as mineral does not have the effect of establishing the lands as mineral in character (SOR at 7).

Homestake asserts that while there is no argument as to the 174.88 acres within sec. 36 which were subject to mineral entries, this did not render the remaining 305.12 acres mineral in character. In support of this argument, Homestake suggests that California's indemnity selections, based on only 174.88 acres in 1895 and 1896, "obviously" demonstrate that the State believed it had obtained title to the acreage here in dispute "under the 1853 Act and, accordingly had no indemnity claim on their account" (Reply at 7).

Homestake cites a January 30, 1891, letter (SOR, Exh. 4) from the Commissioner of the General Land Office to the Register and Receiver, San Francisco, California, concluding that, to the extent a mill site had been located on June 1, 1875, in part on lot 49B in the S $\frac{1}{2}$ of sec. 36, it was to be cancelled because the acreage, being nonmineral in character, had vested in the State, under the 1853 Act, before the mill site was located. Accordingly, Homestake argues, the S $\frac{1}{2}$ of sec. 36 was not regarded as being mineral in character in 1891, despite the May 10, 1875, survey.

Finally, Homestake argues that the doctrines of equitable estoppel and administrative finality should be applied to bar SLC's application.

SLC answers that the patents to Quicksilver and Hall were issued at a time when the State mistakenly believed it had the authority to convey school lands which were mineral in character. SLC contends that the 174.88 acres were used as base for lieu selections because those lands were subject to previously recorded claims. SLC asserts that the State was under no compulsion immediately to use all mineral lands within a section as base for indemnity selections (SLC Response at 12-13).

SLC presents a list of a series of events, covering the period June 1, 1862, through March 30, 1896, including mining claim locations, patent

applications, patent issuances, and mineral surveys, inter alia, which it contends establishes that "[t]here was a great deal of mining activity in the area" and "clearly indicate[s] that the subject property, at the time of the Quicksilver and Hall patents, was mineral in character" (SLC Response at 8). SLC further asserts that "the same individuals who had recorded mining claims or were otherwise involved in mining operations * * * in the area were also applying to the State for a patent. Id. SLC contends that the State, the United States, and Homestake's predecessors-in-interest were all in agreement that the lands were mineral in character.

With respect to the January 30, 1891, letter cited by Homestake, SLC contends that this letter is site-specific and cannot change the official and approved character of sec. 36 as indicated in the 1875 survey.

Contrary to Homestake's position, SLC asserts that the presumption applicable to school grant lands is "that all school lands are presumptively nonmineral in character unless they were identified as mineral in the survey, or there is other evidence of their mineral character" (SLC Response at 10 (emphasis in original)). SLC notes that there were several mining claims on the land when the survey was performed, and the surveyor returned the land as mineral in character. SLC points out that Homestake has failed to provide any evidence that the mineral-in-character determination was ever challenged. Accordingly, SLC contends that the lands were properly presumed to be mineral in character (SLC Response at 10-11).

The other appellant, James Wilder, represents that he is the predecessor-in-interest to Homestake's title to the land at issue and that he has a continuing interest because he retains a net smelter return royalty interest. In his SOR, Wilder adopts the arguments submitted on appeal by Homestake. He suggests, however, that the proper avenue for this appeal would be a state court action to quiet title.

[1] In accordance with the 1853 Act, title to the subject lands passed to the State upon acceptance of the survey in 1875, unless the lands were at that time known to be mineral in character. A later discovery that the lands were mineral in character would not divest the State of title. Abraham L. Miner, 9 L.D. 408, 411 (1889).

In State of California v. Rodeffer, 75 I.D. 176, 179 (1968), the Department stated:

The terms "mineral lands," "lands known to be valuable for minerals," and "lands mineral in character" have been used in the statutes, regulations and decisions relating to the public lands without a perceptible difference in meaning in describing the lands which are excluded from operation of many of the nonmineral public land laws because of known or supposed mineral values. The recognized test for determining whether or not land is properly included in the category described by those terms is whether

the known conditions were, at the time the determination was to be made, such as reasonably to engender the belief that the land contains mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end. Diamond Coal and Coke Co. v. United States, 233 U.S. 236, 240 (1914); United States v. Southern Pacific Company, 251 U.S. 1, 13 (1919); United States v. State of California et al., 55 I.D. 121, 177 (1935), aff'd Standard Oil Co. v. United States, 107 F.2d 402 (9th Cir. 1939), cert. denied, 309 U.S. 654, 673, 697 (1940); Southern Pacific Company, 71 I.D. 224, 233 (1964); John M. DeBevoise, 67 I.D. 177 (1960).

In one of the cases cited above, Diamond Coal & Coke Co. v. United States, 233 U.S. 236, 239-40 (1914), the Supreme Court observed:

There is no fixed rule that lands become valuable * * * only through * * * actual discovery within their boundaries. On the contrary, they may, and often do, become so through adjacent disclosures and other surrounding or external conditions; and when that question arises in cases such as this, any evidence logically relevant to the issue is admissible, due regard being had to the time to which it must relate.

Id. at 249. In Laden v. Andrus, 595 F.2d 482, 488 (9th Cir. 1979), the court first recited the test for determining the mineral character of land and then stated:

The proper inquiry, thus, is not whether the [land] now contains, or ever did contain, a valuable mineral deposit. To paraphrase Diamond Coal & Coke, the relevant issue is whether the known conditions existing in 1901 were sufficient to engender the belief that the [land] contained minerals of a quantity that would render their extraction profitable and justify expenditures to that end.

Id. at 489.

[2] This Department has held in numerous cases that lands granted to a state were presumed to be of the character contemplated by the grant insofar as their then known mineral or nonmineral character was concerned. E.g. Margaret Scharf, 57 I.D. at 356-57, and cases cited therein. Such a presumption exists until the contrary is shown. State of Idaho, 101 IBLA 340, 347, 95 I.D. 49, 53 (1988). The strength of that presumption is evidenced by the following language from State of Utah, 32 L.D. 117 (1903):

A mere mineral return by the surveyor-general, however, does not have the effect to establish the character of the lands as chiefly valuable for minerals, and can not, therefore, in and of itself, operate to take lands out of the grant to the State, as mineral lands. This could only be done by proof clearly showing

that the lands were, at the time when the right of the State would have attached, known to contain valuable deposits of mineral, and to be chiefly valuable on account of those deposits.

See also Circular, 24 L.D. 548, 551 (1891).

That language notwithstanding, SLC asserts, citing Hyppolite Favot, 48 L.D. 114 (1921), that all school lands are presumptively nonmineral in character unless they are identified as mineral in the survey, or there is other evidence of their mineral character. The Favot case involved an "application" by Favot that he be allowed to show the mineral character of certain school lands in California that had been surveyed and the plat approved in 1880. Favot alleged that he had located mining claims on such lands in 1901 and 1903 and placed valuable improvements on the land. The Department dismissed the application stating that it did not have jurisdiction because the lands had passed to the State as nonmineral lands upon approval of the survey in 1880. In affirming that decision, First Assistant Secretary Vogelsang commented on the evidence submitted by Favot on appeal:

All that can be said of such showing is that casual prospecting was done on the land from time to time. A showing as to the extent to which gold was discovered thereon, when or by whom the discoveries were made, whether any claim to the land was asserted at the date when the State's rights attached thereto, or the nature and extent of the mining improvements placed upon the land by the mineral claimant, is not attempted to be made. Nor is the applicant claiming by reason of any discovery of mineral made at that time or prior thereto. The record discloses moreover that no mining claims were shown to be in the section at that date, and it was not returned by the United States deputy surveyor as being mineral in character.

Id. at 117-18.

Since the Favot case affirmed the decision below dismissing for lack of jurisdiction, First Assistant Secretary Vogelsang's comments were merely dicta. Moreover, those comments arguably support the position that the surveyor's return, standing alone, is insufficient to rebut the presumption.

SLC has not correctly stated the presumption. The presumption is that the lands granted were of the character contemplated by the grant (in this case, nonmineral). Previous Departmental precedent establishes that the surveyor's return is, by itself, insufficient to rebut the presumption. The Favot case does not demonstrate otherwise.

To the extent BLM states at page 1 of its decision that the lands in question did not pass to the State in 1875 solely on the basis of the

surveyor's return of these lands as mineral, it is in error. Nevertheless, that error is not determinative of the result of this appeal. To paraphrase from the quote from Laden, supra, the relevant issue in this case is whether the known conditions existing in May 1875 were sufficient to engender the belief that the land in question contained minerals of a quantity that would render their extraction profitable and justify expenditures to that end. If so, the presumption that the lands were nonmineral in character is rebutted; the land was mineral in character and did not pass to the State upon approval of the survey.

Based on the record in this case, including the pleadings filed by the parties, we conclude that the lands in question were mineral in character at the time of approval of the survey in May 1875.

While the surveyor's return of the lands in question as mineral lands is, by itself, insufficient to overcome the presumption that the lands were nonmineral in character, it is a factor to be considered and when supported by other evidence may justify a conclusion that the lands were mineral in character. In this case there is other evidence to support the surveyor's return. Surveyor Tucker did not simply return the entire section as mineral or nonmineral. Instead, he specially identified certain lands as mineral, excluding the NE $\frac{1}{4}$ from that characterization. The exclusion of lands within the section indicates that Tucker had a basis for making such a distinction.

Further, SLC has provided a historical chronology of mining activities in the area, commencing with a June 1, 1862, "Mining Location that covered a 1000 foot wide segment that ran diagonally across Section 36" (SLC Response at 3). The chronology also includes reference to a specific amount of production of quicksilver (mercury) in 1873 from the Reed Mine located in sec. 25, immediately north of sec. 36, as well as a statement that the United States issued a patent on October 17, 1874, to R.F. Knox and Joseph Osborn for the PORPHYRY Quicksilver Mine, partially located in the S $\frac{1}{2}$ of sec. 36. ^{6/}

^{6/} Although the State references supporting documents for these statements in its chronology, it has not placed those documents in the record in this case. Nevertheless, for purposes of our decision, we accept those statements as accurate because they have not been challenged by Homestake or Wilder. Homestake discounts the relevancy of such information, stating:

"No doubt, the Surveyor was influenced by the fact that, prior to his 1874 survey, two quicksilver mines had been located and surveyed which encroached (albeit only very slightly) on the NW $\frac{1}{4}$, and the SW $\frac{1}{4}$ and the SE $\frac{1}{4}$ of Section 36. But that did not justify him in characterizing the whole of those quarter-Sections as mineral and his all-too-easy generalization is worthless."

(Reply at 7).

While Homestake argues that these mining activities in sec. 36 and surrounding areas are not relevant to the lands in question because no mining claims existed on these particular lands at the time of approval of the survey, we find that those activities support Surveyor Tucker's determination. It is reasonable to conclude that such activities existing in May 1875 were sufficient to engender the belief that the land in question contained minerals of a quantity that would render their extraction profitable and justify expenditures to that end. Accordingly, it is proper to conclude that the lands in question were mineral in character on May 1875 and did not pass to the State at that time.

Homestake's reference to and reliance on various subsequent events as evidence of its position that title to the land passed to the State in 1875 are not relevant to our determination.

Homestake asserts that administrative finality should bar the State's application for a patent. As a general rule, the doctrine of administrative finality—the administrative counterpart of the principle of *res judicata*—precludes reconsideration of a decision of an agency official when a party, or his predecessor-in-interest, had an opportunity to obtain review within the Department and no appeal was taken, or an appeal was taken and the decision was affirmed. Ray L. Vergin, 133 IBLA 1, 4 (1995); Orvin Froholm, 132 IBLA 301, 312 (1995); Helit v. Gold Fields Mining Corp., 113 IBLA 299, 308, 97 I.D. 109, 114 (1990). The rule is not absolute, because decisions by administrative officials, as well as those of this Board, are made exercising authority delegated by the Secretary of the Interior. The Secretary, and those exercising his authority, may review a matter previously decided and correct or reverse an erroneous decision. See Gabbs Exploration Co. v. Udall, 315 F.2d 37, 40 (D.C. Cir. 1963).

In this case, there is no prior administrative decision by this Department adjudicating the mineral or nonmineral status of the lands in question. To the extent Homestake is arguing that the 1891 letter from the Commissioner of the General Land Office constituted an adjudication of the status of the entire S½ of sec. 36, we disagree. ^{7/} That letter relates specifically to lot 49B, which was located June 1, 1875, as a mill

^{7/} The case cited by Homestake in support of such an argument, State of California, 121 IBLA 73 (1991), aff'd sub nom. California Coastal Commission v. Department of the Interior, Civ. No. CIV-S-92-702 GEB GGH (E.D. Calif. Sept. 27, 1994), is distinguishable. In that case, the Board invoked the doctrine of administrative finality in affirming a decision of the State Director, California State Office, BLM, concluding that there was no Federal interest in certain land on the Bolinas Sandspit. In doing so, the Board relied on a 1906 Secretarial adjudication disclaiming Federal ownership of the Bolinas Sandspit. There has been no such prior adjudication regarding the status of the lands involved in this case.

site, and which covers only a few acres in the S½ SW¼ sec. 36. The letter states that "the evidence shows that the land embraced in the mill site is non-mineral in character * * *" (SOR, Exh. 4). Although we do not know what "evidence" was before the Commissioner, such a conclusion is consistent with sec. 15 of the Act of May 10, 1872, 30 U.S.C. § 42 (1994), which provides that only nonmineral land is available for the location of mill sites. The Commissioner's determination is site-specific for the few acres involved and, therefore, not inconsistent with our conclusion in this case.

Here, Homestake's predecessors-in-interest received patents from the State for the lands in question. However, those patents could transfer only the interest held by the State at the time of conveyance. The doctrine of administrative finality is not a bar to the State's application and BLM's decision. 8/

To the extent not expressly addressed herein, other arguments presented by Homestake have been considered and rejected.

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 as modified.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur.

David L. Hughes
Administrative Judge

8/ In this case, Homestake also asserts estoppel against the State, contending that the State should be precluding from seeking a confirmatory patent because it conveyed its title to these lands to Homestake's predecessors-in-interest and it has long acquiesced in that action. We note only that this is not the proper forum for assertion of estoppel against the State.

