



RON WILCHER, *ET AL.*

178 IBLA 109

Decided September 1, 2009



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

RON WILCHER, *ET AL.*

IBLA 2009-20

Decided September 1, 2009

Appeal from a decision of the California State Office, Bureau of Land Management, declaring the Chaparral Oasis #1 (CAMC 292919) and the Chaparral Oasis #2 (CAMC 292920) lode mining claims null and void *ab initio* because they were located on land closed to mineral entry at the time of location.

Reversed.

1. Mining Claims: Null and Void

A BLM decision declaring mining claims null and void *ab initio* because they were located on lands subject to a closure order issued pursuant to 43 C.F.R. § 8364.1 will be reversed because a closure order issued under that regulatory provision does not segregate or withdraw land from mineral location under the Mining Law of 1872.

APPEARANCES: Ron Wilcher, Gilroy, California, Ray Iddings, Santa Cruz, California, Rodger Tiffin, Colinga, California, Leon Decker, Hollister, California, *pro sese*; Luke Miller, Esq., Assistant Regional Solicitor, Pacific Southwest Region, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Ron Wilcher, Ray Iddings, Rodger Tiffin, and Leon Decker have appealed from and petitioned for a stay of a September 23, 2008, decision of the California State Office, Bureau of Land Management (BLM), declaring the Chaparral Oasis #1 (CAMC 292919) and the Chaparral Oasis #2 (CAMC 292920) lode mining claims null and void *ab initio* because they were located on lands which, at the time of entry, were subject to a closure order.

Because we find no evidence that the order resulted in closure of the lands in question to mineral entry, the decision declaring appellants' mining claims null and void *ab initio* is reversed. We also deny as moot both the petition for stay and appellants' request for hearing.

Background

Appellants located the two claims in question on August 15, 2008, in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of sec. 24, T. 18 S., R. 12 E., Mount Diablo Meridian, San Benito County, California, and filed copies of their location notices with BLM for recordation on August 27, 2008. The lands embraced by the claims are part of the 63,000 acres of public land within the Clear Creek Management Area (CCMA) in southern San Benito County and western Fresno County in central California, which are managed by BLM. See BLM Public Scoping Report, CCMA Resource Management Plan & Environmental Impact Statement, dated August 2008 at Table 1.¹ The CCMA is defined by a northwest-trending serpentine rock outcropping, called the New Idria Formation, that measures 3 to 5 five miles wide and 15 miles long. *Id.* at 20. Materials derived from serpentine rock contain asbestos, and in 1962, the Atlas Division of the Atlas Corporation began construction of an asbestos mine and mill within the boundaries of the New Idria Formation that was in operation until 1979. *Id.* at 5. The resulting fluvial and air asbestos emissions from the site led the U.S. Environmental Protection Agency (EPA) to list the Atlas Mine on the Comprehensive Environmental Response, Compensation, and Liability Act program National Priorities List. 48 Fed. Reg. 40679 (Sept. 8, 1983).

Thereafter, in the 1984 Hollister Resource Management Plan (RMP), BLM designated approximately 30,000 acres of the CCMA as the Serpentine Area of Critical Environmental Concern (ACEC), in part due to the hazards associated with naturally occurring asbestos exposure.² 49 Fed. Reg. 39918 (Oct. 11, 1984). For public safety reasons, in December 1988, BLM closed approximately 200 acres of public lands disturbed by the Atlas mine "to all public entry and use," with certain exceptions. 53 Fed. Reg. 51590 (Dec. 22, 1988).³

¹ http://www.blm.gov/pgdata/etc/medialib/blm/ca/pdf/hollister.Par.55387.File.dat/Final_Scoping_Report_082108.pdf.

² The term "areas of critical environmental concern" means "areas within the public lands where special management attention is required . . . to protect life and safety from natural hazards." 43 U.S.C. § 1702(a) (2006).

³ BLM stated: "This closure is issued under the authority of 43 CFR 8364.1." 53 Fed. Reg. at 51590.

In 1991, EPA investigated the public health risk due to asbestos exposure within the ACEC. As a result of that investigation, EPA issued a clean-up order for the Atlas Mine. 56 Fed. Reg. 21503 (May 9, 1991). However, BLM was left to implement remedial actions for the rest of the public lands in the CCMA, with technical assistance from EPA. BLM developed a series of CCMA amendments to the RMP to address public health and safety concerns associated with asbestos exposure. These amendments, approved in 1986, 1999, and 2006, included management goals and objectives to reduce and minimize risk to human health and the environment. BLM continued to allow public access for multiple uses, even though in 2005, 2006, and 2007 it enforced “dry season” temporary closures (approximately June 1 to October 15) of the ACEC to all types of motorized and non-motorized recreational use, with certain exceptions. 70 Fed. Reg. 43703 (July 28, 2005); 71 Fed. Reg. 44311 (Aug. 4, 2006); BLM Hollister Field Office News Release, dated May 10, 2007.⁴ There is no indication that the temporary dry season closures precluded the location of mining claims in the Serpentine ACEC.

On February 29, 2008, BLM initiated the “Clear Creek Management Area Temporary Closure Environmental Assessment” (EA), CA-190-08-28, completing it on April 25, 2008. EA at 1, 10. In the EA, BLM stated that a temporary closure of the Serpentine ACEC was warranted to protect the public from the risk of asbestos exposure, which was outlined in a report to be released by EPA in May 2008.⁵ EPA released that report, titled “Clear Creek Management Area Asbestos Exposure and Human Health Risk Assessment” (EPA 2008 Assessment), on the same day, May 1, 2008, that BLM had a “notice of closure” published in the *Federal Register*.⁶ 73 Fed.

⁴ In *Salinas Ramblers Motorcycle Club*, 171 IBLA 396, 397, 402 (2007), the Board held that BLM properly invoked its discretionary authority under 43 C.F.R. § 8364.1(a) to temporarily close the Serpentine ACEC to all types of motorized and non-motorized recreational use from June 1, 2005, to Oct. 15, 2005, to protect the public health. We stated that BLM imposed the seasonal closures “to avoid further or elevated risk to visitors while more data is collected to better identify and quantify the risk to human health that may be posed by airborne asbestos.” 171 IBLA at 401.

⁵ BLM stated that the EPA report indicated “that CCMA visitor uses that generate dust on routes and trails and within staging areas and campgrounds present significant health risk from exposure to asbestos.” EA at 4. It further stated that the purpose of the proposed action in the EA was to “minimize and reduce human health risks from exposure to airborne asbestos.” *Id.* It added that closure was needed to protect CCMA visitors and the general public from the hazards of asbestos emissions. *Id.*

⁶ EPA found that the concentration of asbestos in the breathing zone is directly
(continued...)

Reg. 24087, 24088. In the notice of closure, BLM stated that, pursuant to 43 C.F.R. § 8364.1, it was closing 31,000 acres in the CCMA, including the Serpentine ACEC, and certain adjacent public lands, to “all forms of entry and public use,” with certain exceptions, effective May 1, 2008. *Id.* The closure was to be effective until BLM completed an RMP for the CCMA “to determine if and how visitor use can occur without associated excess health risks.” *Id.* BLM mandated that “[p]rivate landowners within the restricted area and persons with valid existing rights-of-way, mining claims, or leases must request in writing access permission from the Hollister Field Manager.” *Id.*

Appellants located the two claims at issue after the issuance of the closure order on lands covered by that closure order that are near the site of the Atlas Mine. According to appellants, following recordation of the claims with BLM, they sought permission from the Hollister Field Office Manager to access their mining claims. On September 23, 2008, the BLM California State Office issued its decision finding appellants’ mining claims null and void *ab initio* and effectively denying appellants’ request for permission to access the mining claims.

Discussion

The question presented by this appeal is whether the closure order, which was issued pursuant to 43 C.F.R. § 8364.1, resulted in a segregation of the described lands from mineral entry under the Mining Law of 1872. We find no evidence that the closure order in question operated to segregate lands from mineral entry under the mining law.

BLM argues that by issuing the closure order pursuant to 43 C.F.R. § 8364.1, a segregative effect occurred upon publication in the *Federal Register*. The error in this argument is that BLM assumes that action taken by it pursuant to 43 C.F.R. § 8364.1, which is titled “Closure and restriction orders,” results in a segregation of the land, such that it is unavailable for mineral entry. That regulation, however, does not state that issuance of an order thereunder results in a segregation of the lands described in the order.

⁶ (...continued)

related to the degree that an activity disturbs the soil and creates dust and that the risk of developing asbestos-related disease is dependent on the level of exposure, the duration of exposure, and the time since first exposure. EPA 2008 Assessment, Executive Summary (ES) at ES-6. Reducing exposure, EPA concluded, would reduce the risk of developing asbestos-related cancers and debilitating and potentially fatal, non-cancer diseases. *Id.* at ES-7.

The regulations relating to the segregation and opening of public lands administered by the Secretary, through BLM, are contained in 43 C.F.R. Subpart 2091. See 43 C.F.R. § 2091.0-1. “Segregation” is defined at 43 C.F.R. § 2091.0-5(b) as “the removal for a limited period, subject to valid existing rights, of a specified area of the public lands from the operation of some or all of the public land laws, including the mineral laws, pursuant to the exercise by the Secretary of regulatory authority for the orderly administration of the public lands.” “Mineral laws” means those law applicable to the mineral resources administered by BLM, including the mining laws. 43 C.F.R. § 2091.0-5(d). Generally, segregated lands are not available for application, selection, sale, location, entry, claim or settlement under the public land laws, including the mining laws. 43 C.F.R. § 2091.0-7(a).

A review of the regulations in 43 C.F.R. Subpart 2091 lists segregations as resulting from (1) publication of a Notice of Realty Action (43 C.F.R. § 2091.2; see 43 C.F.R. § 2091.7); (2) proposals or applications (43 C.F.R. § 2091.3); (3) allowance of entries, leases, grants, or contracts (43 C.F.R. § 2091.4), including desert land entries and Indian allotments (43 C.F.R. § 2091.4-1), airport leases and grants (43 C.F.R. § 2091.4-2), and Carey Act contracts (43 C.F.R. § 2091.4-3). In addition, publication of a notice of an application or proposal for withdrawal filed on or after October 21, 1976, results in a segregation of the described land (43 C.F.R. § 2091.5-1), while the segregative effect of withdrawal applications or proposals filed prior to October 21, 1976, occurred on the date of proper filing (43 C.F.R. § 2091.5-2). The regulations also discuss the segregative effect of emergency withdrawals (43 C.F.R. § 2091.5-3), water power withdrawals (43 C.F.R. § 2091.5-4), Federal Power Act withdrawals (43 C.F.R. § 2091.5-5), and Congressional withdrawals (43 C.F.R. § 2091.5-6).

Nowhere in 43 C.F.R. Subpart 2091 is there a reference to the segregative effect of a closure order issued pursuant to 43 C.F.R. § 8364.1. Moreover, the Board has held that notation of an application on the proper BLM records has a segregative effect only when a statute or Departmental regulation provides that the filing of the application segregates the land.⁷ *Donald Graydon Jolly*, 173 IBLA 201, 212 (2007),

⁷ Even if there were a segregative effect, there is no evidence that a notation of the closure order has been made on the public land records. BLM’s argument that the *Federal Register* notice constitutes a public lands record must be rejected. “Public lands records mean[] the Tract Books, Master Title Plats and Historical Indices maintained by the Bureau of Land Management, or automated representation of these books, plats and indices on which are recorded information relating to the status and availability of the public lands.” 43 C.F.R. § 2091.0-5(e). The *Federal Register* notice is not such a record.

and cases cited.⁸ Thus, unless specifically segregated or withdrawn from mineral entry, mineral deposits in lands within the CCMA are “free and open to exploration” as provided by the mining laws, 30 U.S.C. § 22 (2006).

The regulation at 43 C.F.R. § 8364.1(a) states that to “protect persons, property, and public lands and resources, [BLM] may issue an order to close or restrict use of designated public lands.” While that regulation is designed to ensure safe, enjoyable, and environmentally sound visitation on the public lands, it does not attribute any segregative effect to an order to close or restrict use of designated public lands.⁹ Therefore, an order issued under 43 C.F.R. § 8364.1 does not segregate or withdraw land from mineral location under the Mining Law of 1872.

Finally, BLM submits that its policy of protecting human health would be violated if this Board were to allow appellants to maintain their located claims. We note that while appellants’ mining claims are not null and void *ab initio* for the reason provided in BLM’s decision, BLM may regulate activities on the claim under the regulations in 43 C.F.R. Subpart 3809. Any activities that would result in unnecessary and undue degradation are prohibited. *See* 43 U.S.C. § 1732(b) (2006).

⁸ In *Jolly*, the Board reversed a BLM decision declaring certain mining claims null and void *ab initio*. BLM based its decision on its conclusion that the claims had been located on land included in a city’s pending Federal land purchase application, which closed the land to operation of the mining laws. We found no evidence that the filing of that application segregated the land from location under the mining laws. In *Scott Burnham (On Reconsideration)*, 102 IBLA 363, 365 (1988), we held that a mineral patent application did not have a segregative effect. In *Nancy Hollingsworth*, 92 IBLA 358, 360-61 (1986), we concluded that the notation of an Alaska regional corporation’s land selection location on the public land records did not segregate the land, absent a statutory or regulatory provision for such segregation. *See Leo Rhea Partnership*, 80 IBLA 1, 2 (1984) (state indemnity selection application had no segregative effect because the application was filed prior to publication of a regulation providing for a segregative effect).

⁹ While BLM clearly had discretionary authority to act under 43 C.F.R. § 8364.1 to protect the public health and welfare through issuance of the closure order, it had the alternative at that time, pursuant to 43 C.F.R. § 2091.5-1, to protect both the public lands and public health and welfare by publishing a notice of a proposal for withdrawal in the *Federal Register*. Such a notice would have segregated the land described in the notice to the extent specified in the notice. *See* 43 C.F.R. § 2091.5-3, *as amended*, 73 Fed. Reg. 74039-47 (Dec. 5, 2008) (emergency withdrawals are now effective on the date of signing by the Secretary).

We conclude that BLM erred in declaring appellants' claims null and void *ab initio*.¹⁰

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is reversed, the petition for stay is denied as moot, and the motion for a hearing is denied.

/s/
Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

/s/
H. Barry Holt
Chief Administrative Judge

¹⁰ In its decision, BLM also stated that the land at issue was closed to “all forms of entry” at the time appellants entered the lands and that location of the claim violated the closure order. Decision at unpaginated 2. As discussed, the lands were not closed to mineral entry and the decision did not impose any penalty pursuant to 43 C.F.R. § 8360.07 for a closure order violation.