



TIMBERLINE RESOURCES CORPORATION

178 IBLA 154

Decided September 22, 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

TIMBERLINE RESOURCES CORPORATION

IBLA 2009-210

Decided September 22, 2009

Appeal from a decision of the California State Office rejecting a prospecting permit application. CACA 49442.

Affirmed.

1. Patents of Public Lands: Generally--Mining Claims: Generally--
Notice: Generally--Public Records

Lands acquired by gift or donation pursuant to section 205 of the Federal Land Policy and Management Act of 1976 become public lands upon acceptance of title, but such lands are not available for entry under the mining laws until the land has been formally opened to such entry.

2. Notice: Generally--Public Records

The notation rule establishes that where public land records have been noted to show that a parcel of land is not open to entry under the public land laws, the parcel is not available for entry until such time as the notation is removed and the land restored to entry, even if the original notation was made in error.

APPEARANCES: Gary D. Babbitt, Esq., Boise, Idaho, for appellant; Nancy S. Zahedi, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Timberline Resources Corporation (Timberline) has appealed the March 27, 2009, decision of the California State Office, Bureau of Land Management (BLM), rejecting its application for a prospecting permit, CACA 49442, for acquired lands located in secs. 26-27 and 34-35 in T. 17 S., R. 39 E., Mt. Diablo Meridian (MDM), excluding lands in the Malpais Mesa Wilderness Area surrounding the lands

described in the application on the north, south and west.¹ Timberline applied for authorization to prospect for “base metals and precious metals,” which would include “zinc, lead, copper, silver, and gold.” Application at 4.

The decision noted that the lands were acquired by grant deed serialized as CACA 39989, which conveyed the land described in Timberline’s application as a gift.² The decision relies upon 43 C.F.R. § 2091.8, which governs “gift lands” and provides:

Upon acceptance by the United States, through the Secretary of the Interior, of a deed of conveyance as a gift, the lands or interests so conveyed will become the property of the United States but will not become subject to applicable land and mineral laws of this title unless and until an order to that effect is issued by BLM.[³]

¹ The application describes the land as follows: NW¹/₄SW¹/₄SW¹/₄, SW¹/₄SW¹/₄SW¹/₄, and SE¹/₄SW¹/₄SW¹/₄ sec. 26; SE¹/₄NE¹/₄SE¹/₄, SW¹/₄NE¹/₄SE¹/₄, NW¹/₄SE¹/₄SE¹/₄, NE¹/₄SE¹/₄SE¹/₄, SE¹/₄SE¹/₄SE¹/₄, and SW¹/₄SE¹/₄SE¹/₄ sec. 27; NE¹/₄NE¹/₄NE¹/₄ sec. 34; NW¹/₄NW¹/₄NW¹/₄, NE¹/₄NW¹/₄NW¹/₄, SE¹/₄NW¹/₄NW¹/₄, NE¹/₄SW¹/₄NW¹/₄, NW¹/₄SW¹/₄NW¹/₄, SW¹/₄SW¹/₄NW¹/₄, SE¹/₄SW¹/₄NW¹/₄, NW¹/₄NE¹/₄NW¹/₄, SW¹/₄NE¹/₄NW¹/₄, NW¹/₄SE¹/₄NW¹/₄, SW¹/₄SE¹/₄NW¹/₄, and SE¹/₄SE¹/₄NW¹/₄ sec. 35. Application at 3. The decision notes that Mineral Surveys 5479A and 5479B include portions of secs. 26-27 and 34-35, T. 17 S., R. 39 E., MDM. Decision at 1.

² Timberline submitted a copy of the grant deed as Ex. 10 to its Statement of Reasons (SOR) for the appeal. As BLM notes in its Answer, the donated lands were formerly patented mining claims owned by the Santa Rosa Mining Corp., which donated the lands to the United States on Nov. 23, 1998. The deed was recorded on Dec. 31, 1998, and title was accepted by the United States on Oct. 28, 2004. SOR Ex. 9 (BLM Serial Register Page).

³ Prior to 1997, 43 C.F.R. § 2091.8 formerly was designated as 43 C.F.R. § 2111.4 in Group 2100, Acquisitions (1996). Group 2100 implemented the Secretary’s authority to acquire land and improvements under the Public Land Administration Act of July 14, 1960, 43 U.S.C. § 1364 (1970), as well as three other statutes not relevant to the donation here at issue. The Public Land Administration Act was repealed by section 705(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2792 (Oct. 21, 1976). The regulation formerly codified as 43 C.F.R. § 2111.4 was moved to Subpart 2091 and redesignated as 43 C.F.R. § 2091.8, at which time the authority for Part 2090 was revised to include, in addition to other authorities, the general rulemaking authority contained in section 310 of FLPMA, 43 U.S.C. § 1740 (2006). 62 Fed. Reg. 52036 (Oct. 6, 1997). Although the language of 43 C.F.R. § 2111.4 was revised when it was redesignated as 43 C.F.R. § 2091.8,

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No such order has been issued, and accordingly, BLM rejected the prospecting application in its entirety.

On appeal, Timberline challenges the “validity of the authority on which the BLM relies to support its contention that the BLM may withdraw public lands from entry simply by annotating the master land title [Master Title Plat (MTP)] as ‘NOE’ [Not Open to Entry].” SOR at 2. Having characterized the effect of BLM’s decision as a withdrawal, Timberline contends that the decision failed to comply with section 204 of FLPMA, 43 U.S.C. § 1714 (2006), which governs withdrawals. Timberline argues that 43 C.F.R. § 2091.8 “places all donated land . . . outside the scope of FLPMA,” and that the regulation pertains to “property of the United States,’ which is not defined in FLPMA,” but is not public land.⁴ SOR at 5.

BLM acknowledges that the lands at issue were donated to the United States pursuant to section 205 of FLPMA, 43 U.S.C. § 1715 (2006) and, as such, are public lands⁵ and counters with two arguments: precious metals are subject to appropriation only by location and are not leased,⁶ and the lands are not open to entry in the absence of an order issued by BLM.⁷ Answer at 4-7.

³ (...continued)

the revisions were minor and did not materially change the substance of the regulation.

⁴ The latter assertion is without merit. Section 205 of FLPMA in general pertains to “[a]cquisitions of public lands.” 43 U.S.C. § 1715 (2006) (emphasis added). Among other things, paragraph (c) thereof addresses the “[s]tatus of *lands and interests in lands* upon acquisition by the Secretary of the Interior.” (Emphasis added.) In addition, the implementing regulation at issue in this appeal governs “gift lands.” 43 C.F.R. § 2091.8 (emphasis added).

⁵ *Public lands* are distinguishable from *acquired lands*. The term *acquired lands* has traditionally referred not to public domain lands, but to those lands “in federal ownership which . . . hav[e] been obtained by the Government by purchase, condemnation, or gift, or by exchange for such purchased, condemned or donated lands, or for timber on such lands.” *Phillips Petroleum Co.*, 10 IBLA 275, 276 (1973). Under section 205(c) of FLPMA, 43 U.S.C. § 1715(c) (2006), however, lands acquired pursuant to its provisions are expressly deemed “public lands.”

⁶ BLM’s decision was not predicated upon the submission of a prospecting application instead of locating a claim under the mining laws; consequently, that issue is not properly before us.

⁷ Anticipating that it will next declare the mining claims Timberline located on the donated lands null and void *ab initio*, BLM also argues that the notation rule

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[1] BLM's decision must be affirmed. Timberline errs in its attempt to recast the decision as an improper withdrawal. The MTP and Serial Register Pages show the subject lands have not been withdrawn or segregated from mineral entry; therefore, they are available for disposal under the public land laws. However, the Department has consistently required the publication of an opening order⁸ prior to allowing entries and applications. *E.g.*, *Pilot Plant, Inc.*, 168 IBLA 169, 179 (2006) (land exchange); *Northern Nevada Natural Mining*, 161 IBLA 318, 321 (2004) (railroad grant patented lands acquired); *Phillip A. Davis*, 131 IBLA 14, 15 (1994) (exchange under the Taylor Grazing Act). More specifically, "land acquired by donation pursuant to section 205 becomes public land upon acceptance of title, [but] such land is not available for entry under the mining laws until the land has been formally opened to such entry." *Junior L. Dennis*, 61 IBLA 8, 18 (1981), citing *Petro Leasco, Inc.*, 42 IBLA 345 (1979); also *Maurice Duval*, 68 IBLA 1, 2 (1982). Thus, by providing that lands acquired by gift do not become subject to applicable land and mineral laws of this title unless and until an order to that effect is issued by BLM, the regulation at 43 C.F.R. § 2091.8 merely embodies that long-standing rule.

[2] With its Answer BLM provided a copy of the relevant MTP showing the donated lands and the entry "CACA 49442 Deed to US All min NOE." We explained the notation rule in *William Dunn*, 157 IBLA 347, 353-54 (2002):

That rule establishes that where public land records have been noted to show that a parcel of land is not open to entry under the public land laws, the parcel is not available for entry until such time as the notation is removed and the land restored to entry, even if the original notation was made in error. *Betty J. (Thompson) Bonin*, 151 IBLA 16, 29 (1999), citing *Shiny Rock Mining Corp. v. Hodel*, 825 F.2d 216, 219 (9th Cir. 1987); *B.J. Toohey*, 88 IBLA 66, 77-85, 92 I.D. 317, 324-28 (1985), *aff'd sub nom. Cavanagh v. Hodel*, No. A86-041 Civil (D. Alaska Mar. 18, 1988); *Carmel J. McIntyre (On Judicial Remand)*, 67 IBLA 317, 327 (1982); *California and Oregon Land Co. v. Hulen and Hunnicut*, 46 L.D. 55, 57 (1917); see also *D. Stone Davis D/B/A Daisy Trading Co.*,

⁷ (...continued)

discussed below negates the validity of such mining claims. The status of the mining claims is not before us, however, and we address this argument no further.

⁸ An *opening order* is an "order issued by the Secretary or the authorized officer and published in the FEDERAL REGISTER that describes the lands, the extent to which they are restored to operation of the public land laws and the mineral laws, and the date and time they are available for application, selection, sale, location, entry, claim or settlement under those laws." 43 C.F.R. § 2091.0-5(g).

155 IBLA 133, 135 (2001), citing *O. Glenn Oliver*, 73 IBLA 56, 59 (1983); *Paiute Oil & Mining Corp.*, 67 IBLA 17, 19-20 (1982).

As the public land records were clearly noted to show the donated lands had not been opened to entry by the publication of an opening order, BLM properly rejected Timberline's prospecting application on that basis.

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 affirmed.

_____/s/_____
T. Britt Price
Administrative Judge

I concur:

_____/s/_____
James K. Jackson
Administrative Judge