

Editor's note: 78 I.D. 107; Errata issued on May 7, 1971 -- See 2 IBLA 115A below.

M .G. JOHNSON

IBLA 70-14

Decided April 5, 1971

Mining Claims: Land Subject to -- Reclamation Land: Generally--Withdrawals and Reservations:
Reclamation Withdrawals

Land in a second form reclamation withdrawal remains open to mineral location.

2 IBLA 106

IBLA 70-14 : Nevada 1918
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:
M. G. Johnson : Lode mining claims held
null and void ab initio
:
:
: Reversed

DECISION

M. G. Johnson has appealed to the Secretary of the Interior from a decision dated October 2, 1968, [FNa] of the Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision of the Nevada land office declaring null and void ab initio the M.J.B. lode mining claims Nos. 1 through 6 because the claims were located on land included in a reclamation withdrawal.

The claims were located in May 1957 on unsurveyed land which, when surveyed, will probably be secs. 15 and 22, T. 20 S., R. 67 E., M.D.M., Nevada. The records of the Bureau of Land Management show that all lands in Nevada within four miles of the Colorado River were withdrawn on January 31, 1903, by the Secretary of the Interior from settlement, entry or other forms of disposition under the public land laws except the homestead laws. The withdrawal was made pursuant to section 3 of the act of June 17, 1902, 43 U.S.C. § 416 (1964).

The land office held that the claims were within the area withdrawn and that the withdrawal segregated the land it covered from certain forms of entry, including mineral locations.

On appeal, Johnson contended that the claims were outside the withdrawn area and that, in any event, the withdrawn land remained open to mineral location.

The Office of Appeals and Hearings, by making certain computations on the U.S. Geological Survey quadrangles covering the area in which the mining claims are located and the one to the west, and by enlarging the Bureau of Land Management's Nevada

protraction diagram, which includes T. 20 S., R. 67 E., supra, concluded that the claims were within the withdrawn area. It also found that Johnson's exhibit, which located the claims on the same Geological Survey quadrangle, placed the claims within the withdrawn area when overlaid on a transparency of the BLM projection enlarged to the same scale.

It then held that Johnson's assertion that there is now and was when the claims were located a distinction between two types of reclamation withdrawal was without merit. It stated that the development of the reclamation law had wiped out the distinction between withdrawals and that lands withdrawn for reclamation purposes are closed to mineral location unless opened to such disposition by the Secretary under the act of April 23, 1932, 43 U.S.C. § 154 (1964), which authorizes him to do so. It concluded that the lands were never opened to mineral entry in the absence of such a reopening.

On appeal to the Secretary, Johnson asserts that the lands are not within the withdrawn area. He notes that none of the documents and computations on which the Bureau relied were appended to the decision. As a result, he says, he has not been able to check the accuracy of the calculations and cannot concede that they are correct.

He then reasserts his contention that the land remained open to mineral location even if withdrawn. He points out that the withdrawal left the land open to homestead entry and thus was a second form withdrawal. Both court and Departmental decisions, he continues, hold that lands withdrawn under the second form and open to homestead entry are also open to mineral location, citing Loney v. Scott, 112 Pac. 172 (Ore. 1910); Albert M. Crafts, 36 L.D. 138 (1907); Instructions, 35 L.D. 216 (1906).

We will first consider whether the lands, even if withdrawn, remained open to mineral location, for, if they did, it does not matter whether they are situated within or without the limits of the withdrawal.

To begin with, section 3 of the act of June 17, 1902, supra, authorizes the Secretary (1) to withdraw from public entry lands required for irrigations works, and (2) to withdraw from public entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from such works. The types of withdrawal become known as withdrawals under the first or second form, respectively. Instructions, 33 L.D. 607, 608 (1905).

As the appellant argued and as the Bureau of Land Management agreed, a second form withdrawal did not at the beginning close the land it covered to mineral location. Loney v. Scott, *supra*; Albert M. Crafts, *supra*. The Bureau, however, held that later developments so attenuated the difference between the forms of withdrawal that no reclamation withdrawn land remained open to mineral location. It reasoned:

Any distinction between forms of withdrawal, founded on patent requirements under homestead law, could not be made after the passage of the act of June 25, 1910, 43 U.S.C. 436 (1964), because by reason of section 5 of that act there could no longer be any ordinary homestead entry in a reclamation project. Affirmative authority to control mineral entry lands withdrawn for reclamation purposes was granted to the Secretary of the Interior by the act of April 23, 1932, 43 U.S.C. 154 (1964). It provided that the Secretary may, in his discretion, open lands withdrawn under the reclamation laws to location, entry and patent under the general mining laws. See Associate Solicitor's Opinion, M-36433 (April 12, 1957). The departmental regulations which implement that act provide for making application for the opening of lands withdrawn pursuant to section 3 of the act of June 17, 1902, *supra*. 43 CFR 3400.4 (formerly 43 CFR 185.36). The subject lands were never reopened to mineral entry pursuant to the land and regulation.

By the act of August 4, 1939, as amended, 43 U.S.C. 387 (1964), the Secretary was authorized to permit the removal of sand, gravel and other minerals, under grant of lease or license, from lands withdrawn for reclamation purposes. Pursuant to that act, a departmental regulation issued in 1955 (Circular 1917, 20 F.R. 5778 (August 10, 1955)), provided for leasing for minerals the lands surrounding Lake Mead withdrawn for reclamation purposes. 43 CFR Subpart 3326 (formerly 43 CFR 199.70). Subsequent to the passage of the act of October 6, 1964, which pertained specifically to the administration of the Lake Mead National Recreation Area and included mineral leasing among the permitted activities therein, the regulation was amended, effective September 29, 1965 (43 CFR 3326.0-3) to reflect the authority granted under the more recent act.

As the Bureau of Land Management decision recognized, the Department and the courts soon after the passage of the Reclamation Act of 1902 held that lands within a second form withdrawal remained open to mineral entry. Instructions, 35 L.D. 216 (1906); Albert M. Crafts, supra; Loney v. Scott, supra.

The first statute that could have changed this interpretation was section 5 of the act of June 25, 1910, ch. 407, 36 Stat. 835, 836, as amended, 43 U.S.C. § 436 (1964). As originally enacted, section 5 stated: "That no entry shall be hereafter made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage and fixed water charges and the date when the water can be applied and made public announcement of the same." As the Department said a year later:

The evident purpose of this legislation was to cure a defect in the reclamation act allowing homestead entries to be made of arid lands within irrigation projects in advance of the supply of water, which could not be successfully cultivated in their desert condition. It was well known that it was impossible for the settler to live on the land and support his family without irrigation, and in many cases great distress resulted in the effort to maintain residence upon such lands. To avoid the evil consequences that would inevitably result from the allowance of entries upon lands within irrigation projects in advance of sufficient progress in the construction of the works to reasonably assure a sufficiency of water for the irrigation of the land, the Department from time to time had been, prior to the passage of said act of June 25, 1910, importuned to withhold such lands from entry of every character as a matter of public policy and in the interest of sound administration until water for the irrigation of the land was available, which could not be entertained, because of the express provisions of the reclamation act allowing entries under the homestead law of lands susceptible of irrigation from the project. See Instructions (33 L.D., 104).

The first act of June 25, 1910 (Chap. 407), was designed to cure these apparent defects in the reclamation act by withholding lands in a reclamation project from entry of every character until public announcement is made of the date when the water can be applied, and the second act of that date (Chap 432) was intended to relieve entrymen who had made entries prior to the passage of said act and prior to the supply of water by the project from the necessity of maintaining residence upon the land "until water for irrigation is turned into the main irrigation canal from which the land is to be irrigated." Roberts v. Spencer, 40 L.D. 306, 309 (1911).

On its face section 5 had nothing to do with mineral entry. It has been suggested, however, that since the holding that land in a second form withdrawal remained open to mineral entry was based upon the concept that as long as it was open to homestead entry, it had to remain open to mineral location, when the act of June 25, 1910, closed such land to homestead entry, it in effect also closed them to mineral location. Associate Solicitor's opinion M-36433 (April 12, 1957).

We have not found any departmental decision or discussion other than M-36433 (supra) which adopts this position, nor have we found one which contradicts it. It is somewhat surprising that if the 1910 act so drastically changed the then existing law as to close all the land in second form withdrawals to mineral location there would be no reflection of the new status in a decision, instruction, or regulation. In its context it could as well be restricted to surface entries as expanded to encompass any possible disposition of the withdrawn land.

The language of the act itself is not conclusive.

The difficulty it was meant to resolve was one occasioned by homestead entries, not mineral locations. We note, too, that after the land is opened to homestead entry when the conditions of the 1910 act have been met, it is then subject to mineral location. The pertinent regulation reads:

All homestead entries for farm units described in public notices will be subject to the laws of the United States governing mineral land, and all homestead applicants under the public notice must waive the right to the mineral content of the land, if required to do so by the Bureau of Land Management; otherwise, the homestead applications will be rejected or the homestead entry or entries cancelled. 43 CFR 401.24.

A homestead entry remains subject to cancellation upon discovery of mineral in the land until the entryman has earned equitable title by filing of satisfactory final proof, if the requirements of the homestead laws and regulations have been met. George R. Pollard, A-27898 (October 18, 1960); Solicitor's Opinion, 65 I.D. 39, 44 (1958); Union Oil Company of California, 61 I.D. 106 (1953); cf. Milton H. Lichtenwalner, 69 I.D. 71 (1960).

It would be passing strange to permit mineral location of land after it is ready for reclamation development, and indeed after reclamation and cultivation have begun, and yet bar mineral location while the land remains rude and arid. Therefore, we cannot conclude that section 5 of the act of June 25, 1910, supra, of itself closed land within a second form withdrawal to mineral location.

Did any subsequent legislation accomplish that result? The next statute cited is the act of April 23, 1932, supra. It provides:

That where public lands of the United States have been withdrawn for possible use for construction purposes under the Federal reclamation laws, and are known or believed to be valuable for minerals, the Secretary of the Interior, when in his opinion the rights of the United States will not be prejudiced thereby, may, in his discretion, open the land to location, entry, and patent under the general mining laws.

We note at once that the statute refers to "lands withdrawn for possible use for construction purposes." That, of course, is the language of a first form withdrawal which refers to "lands required for any irrigation works" as opposed to "lands believed to be susceptible of irrigation from ... [such] works". § 3, act of June 17, 1902, supra. While the legislative history of the 1932 act does not differentiate between the forms of withdrawal, it is plain that the act was conceived in terms of lands withdrawn for the construction, operation and maintenance of irrigation works without any reference to those withdrawn only because they were susceptible of irrigation from a reclamation project. S.Rep. No. 502, 72d Cong., 1st Sess. (1932). As the Secretary of the Interior said in a letter quoted in the Senate Report, legislation was needed to give the Secretary an alternative to opening land to unrestricted mineral location without reservation under section 3 of the act of June 17, 1902, supra, by allowing him to restore

such land subject to appropriate reservation, stipulations, and agreements. Here again, the discussion is in terms of what would seem to be first form withdrawals, for in section 3 the restoration provision is part of the first form withdrawal clause.

We cannot find in this act any statement persuasive enough to conclude that it first recognized a change in the availability of second form withdrawal land for mineral location and then made provision for their reopening to such location subject to its terms. 1/

We note that a few years earlier in the Boulder Canyon Project Act of December 21, 1928, 43 U.S.C. § 617 et seq. (1969), the Congress made perfectly clear its intention to withdraw irrigable lands from mineral entry. Section 9, 43 U.S.C. § 617h, reads: "That all lands of the United States found by the Secretary of the Interior to be practicable of irrigation and reclamation by the irrigation works authorized herein shall be withdrawn from public entry."

Here there is no reference to lands needed for irrigation works or for their construction, maintenance or operation. When the Congress intended to cover lands to be irrigated from a project as distinct from those used for irrigation works, it made its intention perfectly clear in very simple language.

The next statute cited is section 10 of the Reclamation Project Act of August 4, 1939, 43 U.S.C. § 387 (1964). It provides:

1/ We note that the pertinent regulation 43 CFR 3816, 35 F.R. 9744 (formerly 43 CFR 3400.4) enlarging on the act of April 23, 1932, supra, speaks in terms of its applicability to "withdrawals made pursuant to section 3." Whether the regulation meant to include all withdrawals under section 3 or only those under section 3 to which the act of April 23, 1932, pertained, a regulation cannot override the terms of a statute. As the regulation is broader in language than the statute, to avoid conflict the regulation is to be read as applying only to withdrawals that have been made "for possible use for construction purposes".

The Secretary, in his discretion, may (a) permit the removal, from lands or interests in lands withdrawn or acquired and being administered under the Federal reclamation laws in connection with the construction or operation and maintenance of any project, of sand, gravel, and other minerals and building materials with or without competitive bidding.

The statute again is quite explicit in its reference to lands withdrawn "in connection with the construction or operation and maintenance of any project." It does not refer to lands to be irrigated by the project, but once more is couched in the language of a first form withdrawal.

Here, too, as noted in discussing the act of April 23, 1932, a Departmental regulation issued some 17 years later with reference to an application of the 1939 act speaks of land withdrawn "for reclamation purposes". 43 CFR 199.70, 20 F.R. 5778, now, as amended, 43 CFR 3566.0-3. The regulation applied only to Lake Mead and to an area surrounding the lake as shown on the map referred to in the regulation, depicting the boundaries. The mining claims are outside these boundaries.

The act of October 6, 1964, 16 U.S.C. § 460(n) et seq. (1964), dealt solely with the administration of the Lake Mead Recreational Area and plainly authorizes the Secretary to issue mineral leases for lands within the boundaries of the redefined recreation area. 43 U.S.C. § 460(n)-3(b). Since the mining claims were located prior to the enactment of this statute, the rights of the appellants, if based on a valid location, would not be affected by it. Further, the act itself protects valid rights. 43 U.S.C. § 460(n)-1.

This review of the sources supporting the view that land in a second form withdrawal is not open to mineral location leaves us unpersuaded of the soundness of that view. We conclude that such land was open to mineral location after the withdrawal was made and remained so through the date on which appellants made their locations.

Accordingly, it is unnecessary to determine whether the claims are within or without the four-mile limit of the withdrawal. The crucial issue is whether the claims are valid under the mining

laws. Effective July 1, 1970, the Board of Land Appeals, Office of Hearings and Appeals, assumed jurisdiction over all appeals before the Director, Bureau of Land Management, in the exercise of the supervisory authority of the Secretary of the Interior (35 F.R. 10012, June 12, 1970).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision of the Bureau of Land Management appealed from is vacated and the case remanded for further proceedings consistent herewith.

Martin Ritvo, Member

We concur:

Edward W. Stuebing, Member

Anne Poindexter Lewis, Member

May 7, 1971

IBLA 70-14 : Nevada 1918
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:
M. G. Johnson : Lode mining claims held
null and void ab initio
:
2 IBLA 206 : Reversed

Decided April 5, 1971

ERRATA

In the above-captioned decision on page 112, the indented quotation of a provision of the act of April 23, 1932, should have been punctuated after the word "minerals" by "..." so as to indicate the omission of a portion of the statute.

On page 114, in the second complete paragraph, following the reference to 43 U.S.C. § 617 et seq., the parenthetical reference to the edition (1969) should read (1964). In the last sentence of the same paragraph the quoted portion of the statute should read: "All lands of the United States found by the Secretary of the Interior to be practicable of irrigation and reclamation by the irrigation works authorized herein shall be withdrawn from public entry...."

On page 114, in the third full paragraph, the reference to the act of October 6, 1964, should read, "the act of October 8, 1964," and the two subsequent references to 43 U.S.C. § 406(n) should read "16 U.S.C. § 406(n)."

On page 115, in the final paragraph, the word "vacated" should read "reversed."

The decision is hereby amended to incorporate the corrections noted above.

Newton Frishberg, Acting Director

2 IBLA 115A

