

Editor's note: Appealed -- aff'd, sub nom. Nuco Uranium and Mineral Corp. v. Watt, Civ. No. 83-10 HB (D.N.M. Aug. 19, 1983); aff'd, No. 83-2177 (10th Cir. Nov. 9, 1984)

OLIVER AND ROBERT A. REESE,
SILVER ASSOCIATES, INC.

IBLA 70-220

Decided January 21, 1972

Appeal from decision (NM Misc. 1108-A, 1108-C) by Acting Chief, Office of Appeals and Hearings, Bureau of Land Management, holding mining claims null and void.

Affirmed.

Mining Claims: Lands Subject to -- Withdrawals and Reservations: Effect of

Lands which have been withdrawn from entry under some or all of the public land laws remain so withdrawn until there is a formal revocation or modification of the order of withdrawal, and it is immaterial whether the lands are presently being used for the purpose for which they were withdrawn.

Mining Claims: Determination of Validity

Mining claims located on land withdrawn from mineral entry are null and void ab initio.

APPEARANCES: James Womack for Oliver and Robert A. Reese; Melvin T. Yost for Silver Associates; Richard L. Fowler, Attorney-in-Charge, Office of the General Counsel, United States Department of Agriculture, for United States Department of Agriculture.

OPINION BY MR. RITVO

Silver Associates, Inc., and Oliver and Robert A. Reese have appealed to the Secretary of the Interior from a decision by the Acting Chief, Office of Appeals and Hearings, Bureau of Land Management, dated June 25, 1970, which affirmed a New Mexico land office decision of September 18, 1969. The land office decision declared 64 lode mining claims 1/ in the Hope group held by Silver Associates and 22 lode mining claims in the FB group 2/ held by the Reeses null

1/ The Hope claims are Hope Nos. 1-49, 50-58, 60-64, and 70.

2/ The FB claims are FB. 1-4, 19-22, 33-34, 54-55.

and void ab initio . The land office held that the lands, which lie within the Fort Bayard Military Reservation, were not open to mining location or mineral entry at the time the claims were located since they were shown on the official records of the land office as withdrawn from appropriation under the mining laws by Executive Order dated April 19, 1869, and have not been opened to entry; and the land use is subject to restrictions in the January 3, 1941, transfer of custody to the Forest Service that the lands will not be subject to appropriation under the public land laws and that no mining will be permitted which will endanger the water supply of the Fort Bayard facility. The land office decision was prepared in response to a request by the Regional Forester, Forest Service, U.S. Department of Agriculture.

The Bureau of Land Management decision modified the land office decision to show that the FB 33-44, 54,55 claims are not within the military reservation itself but are in part within an outlying area withdrawn from the protection of the water supply of Fort Bayard by Executive Order 919 (July 23, 1908), or Executive Order 1213 (June 22, 1910), or were patented without reservation of minerals to the United States. It held them invalid ab initio to the extent they invade such lands. The Bureau of Land Management made no determination of the validity of that part of the FB 39-44 claims as to certain land in SE 1/4 SW 1/4, SW 1/4 SE 1/4 sec. 6, and E 1/2 NE 1/4 sec. 7, T. 17 S., R. 12 W., N.M.P.M., which was open to mineral entry.

The Forest Service moved to dismiss Silver Associates' appeal on the ground that the statement of reasons was not timely filed. The Forest Service motion was denied by this office on October 8, 1970. Silver Associates has requested oral argument, but the Reeses have not.

Fort Bayard is located in Grant County, New Mexico. According to Silver Associates, the area is one of the most productive mineral areas in New Mexico. The site was first selected in 1866 as a military post as protection for the miners of the southwestern New Mexico area against the Warm Springs Apache Indians. By Executive Order dated April 19, 1869, President Ulysses S. Grant declared Fort Bayard a military reservation. Executive Order 477 (July 14, 1906), redefined the boundaries of Fort Bayard so as to enclose approximately 8,840 acres. The Executive Order stated that any lands excluded from the military reservation by operation of the Order were placed under the control of the Secretary of the Interior pursuant to the Act of July 5, 1884, 23 Stat. 103, for disposal as therein specified or as otherwise might be provided by law. Additional lands totaling 2,926 acres in Gila National Forest, within secs. 6, 7, 18, T. 17 S., R. 12 W. and within secs. 1, 2, 3, 10, 11, 12, T. 17 S., R. 13 W., N.M.P.M., were reserved from the public domain and withdrawn from

all forms of entry for protection of the water supply of Fort Bayard by Executive Orders 637 (May 23, 1907), 919 (July 23, 1908), 970 (November 13, 1908), 1213 (June 22, 1910), 1257 (October 22, 1910) and 1341 (April 24, 1911). The War Department also purchased some 2,353 acres of contiguous patented land to protect the water supply. The total area of approximately 13,000 acres is referred to as the Fort Bayard Military Reservation without distinction as to method of acquisition or withdrawal.

By Act of March 2, 1907, 34 Stat. 1172, a hospital for the treatment of tubercular patients was opened on the reservation for the officers and men of the United States Navy and Marine Corps. The hospital and the reservation were transferred on January 23, 1922, to the Treasury Department for the use of the Public Health Service for hospital or sanatorium purposes, pursuant to the Act of March 3, 1919, 40 Stat. 1302. ^{3/} On April 29, 1922, the Fort Bayard hospital was transferred to the Veterans Administration by Executive Order No. 3669. ^{4/}

^{3/} The act provides:

"Sec. 2. There are hereby permanently transferred to the Treasury Department for the use of the Public Health Service for hospital or sanatoria or other uses the following properties, with their present equipment, including sites and leases, or so much thereof as may be required by the Public Health Service, including mechanical equipment in connection therewith, and approaches thereto, with authority to lease or purchase sites not owned by the Government, as follows: . . .

"Sec. 3. The Secretary of War is hereby authorized and directed to transfer without charge to the Secretary of the Treasury for the use of the Public Health Service such hospital furniture and equipment, including hospital and medical supplies, motor trucks, and other motor-driven vehicles, in good condition, not required by the War Department, as may be required by the Public Health Service for its hospitals, and the President is authorized to direct the transfer to the Treasury Department of the use of such lands or parts of lands, buildings, fixtures, appliances, furnishings, or furniture under the control of any other department of the Government not required for the purposes of such department and suitable for the uses of the Public Health Service."

^{4/} Executive Order No. 3669 provides in part:

"Now, THEREFORE, By virtue of the authority vested in me by [the Act of August 9, 1921, 42 Stat. 147, et seq.] I direct that the following specifically described hospitals now under the supervision of the United States Public Health Service . . . are hereby transferred to the United States Veterans' Bureau and shall on and after the effective date hereof operate under the supervision, management and control of the Director of the United States Veterans' Bureau:

. . . .
No. 55 Fort Bayard, New Mexico"

By a letter dated January 2, 1941, from the Commissioner of Public Buildings, Federal Works Agency, to the Secretary of Agriculture pursuant to the provisions of section 1, Executive Order 6166 and of the Act of August 27, 1935, 40 U.S.C. § 304(a) (1964), custody of all of the military reservation lands described in Executive Order 477, except the SW 1/4 sec. 25, SE 1/4 sec. 26, NE 1/4 sec. 35, NW 1/4 sec. 36, T. 17 S., R. 13 W., was transferred to the administration of the U.S. Department of Agriculture, to be accomplished by the Forest Service. The transfer of jurisdiction was conditioned by the restriction that none of the land be subject to appropriation under any of the public land laws and that no use, such as mining or grazing activities, be made of the lands which would endanger the water supply of the Fort Bayard Hospital facilities established on the 640 acres, whose jurisdiction was retained by the Veterans Administration.

The 640 acres surrounding the hospital buildings have been disposed of by transferring 468 acres and the hospital buildings to the State of New Mexico by a quitclaim deed dated July 1, 1966, executed by the United States, acting by and through the Secretary of Health, Education and Welfare, and reserving all mineral rights to the United States. Sixteen acres were reserved to the Veterans Administration in N 1/2 SE 1/4 sec. 26, for use as a military cemetery. Public Land Order 1290 of April 24, 1956, withdrew 156 acres in the E 1/2 SW 1/4 sec. 25, NW 1/4 sec. 36, for a Forest Service administrative site.

The Acts of July 11, 1957, 71 Stat. 291, and October 22, 1968, 82 Stat. 1317, have authorized the Secretary of Agriculture to sell to the village of Central, New Mexico, certain lands, approximately 235 acres in secs. 34, 35, T. 17 S., R. 13 W., administered by the Secretary, within the former Fort Bayard Military Reservation. In the Act of July 11, 1957, all minerals in the lands conveyed to the village of Central were reserved to the United States. In the Act of October 22, 1968, the Secretary of the Interior was authorized to sell to the village of Central or its successors the mineral rights in the lands conveyed by the Secretary of Agriculture.

The Bureau held that the orders closing the land at issue to mining have not been revoked, that the lands are still subject to these orders and therefore closed to mineral location and that the fact the lands are no longer used for the purposes for which they were withdrawn is immaterial. It also held that in the congressional acts disposing of some of the land and buildings Congress recognized the transfer of jurisdiction to the Secretary of Agriculture over the surface of the lands and of the Secretary of the Interior over the minerals. It then held that the repeal of sections 1, 2 and 3 of the Act of July 5, 1884, 23 Stat. 103, by the Act of October 1, 1957, 65 Stat. 701, 706, which had provided a method for disposing of lands in abandoned or relinquished military reservations, did not open the

land to mineral entry until the Secretary of the Interior issued an order opening them to entry. Finally it held that the Act of February 28, 1958, 43 U.S.C. § 158 (1970), which provided that all minerals in withdrawals or reservations of public lands for an agency of the Department of Defense are under the jurisdiction of the Secretary of the Interior and are to be disposed of only under the mining and mineral leasing laws, but that no disposition of minerals shall be made if the Secretary of Defense determines that such disposition is inconsistent with the military use for which the lands have been reserved, did not open lands previously withdrawn from mineral entry.

On appeal the appellants contend that the lands are no longer subject to Executive Order 477. They assert that land once in a withdrawal does not remain so withdrawn until the withdrawal is revoked, whether or not the land is or has ever been used for the purpose for which it was withdrawn.

The Department has held repeatedly that a withdrawal remains in effect until it is revoked, even though the purpose of the withdrawal has been fulfilled. Grace Kinsela, 74 I.D. 386 (1967); David W. Harper, 74 I.D. 141, 148-149 (1967); United States v. Charles L. Seeley and Gerald F. Lopez, A-28127 (January 28, 1960). The appellants' simple assertion that the land is no longer used as a military reservation is not a persuasive argument.

Next they assert that the Act of February 28, 1958, and the Act of October 31, 1951, 65 Stat. 701, 706, which repealed sections 1, 2, and 3, but left in effect section 5 of the Act of July 5, 1884, supra, opened the land in the claims to mineral entry without the necessity of specific order to that effect.

Section 5 of the Act of July 5, 1884, provides:

Whenever any lands containing valuable mineral deposits shall be vacated by the reduction or abandonment of any military reservation under the provisions of this Act, the same shall be disposed of exclusively under the mineral-land laws of the United States.

Appellants also contend that section 6 of the Act of February 28, 1958, supra, provides for the opening of military reservations to mineral entry unless the Secretary of Defense determines that such use would be inconsistent with the military use, a determination the Secretary of Defense has not made as to Fort Bayard.

Section 6 states:

All withdrawals or reservations of public lands for the use of any agency of the Department of Defense, except lands withdrawn or reserved specifically as naval petroleum, naval oil shale, or naval coal reserves, heretofore or hereafter made by the United States, shall be deemed to be subject to the condition that all minerals, including oil and gas, in the lands so withdrawn or reserved are under the jurisdiction of the Secretary of the Interior and there shall be no disposition of, or exploration for, any minerals in such lands except under the applicable public land mining and mineral leasing laws: Provided That no disposition of, or exploration for, any minerals in such lands shall be made where the Secretary of Defense, after consultation with the Secretary of the Interior, determines that such disposition or exploration is inconsistent with the military use of the lands so withdrawn or reserved.

Considering first the Act of February 28, 1958, supra, which is applicable if the land is still within a military reservation, we note that its meaning has been discussed in prior Departmental decisions. B. L. Haviside, Jr., 66 I.D. 271 (1959), held that when a withdrawal order for a military reservation contained a provision that the land was withdrawn from mining and mineral leasing laws, section 6 did not open to mineral leasing lands specifically withdrawn from such disposition.

David W. Harper et al., supra, held that this section did not change the law, and the procedure necessary for land within a military reservation withdrawn from mineral entry to become subject to disposition under the public land laws was the same as that which preceded the Act. This procedure required that an order withdrawing land from mineral entry must be revoked by an order of equal efficacy, restoring the land to such entry.

Both decisions cited a comment by the Senate Committee on Interior and Insular Affairs (2 U.S. Code Cong. & Ad. News 2244 (1958)) that the act is a restatement of what the law has been in the past, and made clear that the Secretary of the Interior, not the Secretary of Defense, has jurisdiction over minerals in public lands withdrawn for the use of defense agencies. Therefore, section 6 is of no help to appellants.

We now turn to appellants' contention that the land in the claims was opened to entry pursuant to section 5 of the Act of July 5, 1884, supra. Section 1 of that Act provided that whenever in the opinion of the President lands in a military reservation should become useless for military purposes, the President could place these lands under the jurisdiction of the Secretary of the Interior for disposition as provided in the Act and notify the Secretary of his action. Sections 2 and 3 authorized the Secretary of the Interior to have such lands surveyed, appraised and offered at public sale.

The appellants contend that section 5, which was not repealed, allows for the opening of a military reservation to entry without following certain procedures as originally provided.

Prior to the repeal of sections 1, 2, 3, supra, lands within a military reservation became subject to disposition under section 5 only after the President had issued an Executive Order pursuant to section 1 placing the lands under the control of the Secretary of the Interior. 36 Att'y Gen. 500, 503 (1931).

Before considering appellant's contention, we first must reemphasize our earlier holding that land once in a military reservation remains withdrawn from mineral entry until some specific action is taken to terminate the reservation; that is, an old military reservation does not simply fade away. Therefore, even if the repealed sections of the Act of July 5, 1884, are no longer applicable to lands in military reservations, there still must be some step taken by an authorized officer of the United States terminating the reservation and opening the lands to mineral entry under section 5.

Moreover, the legislative history of the Act of October 31, 1951, supra, indicates that Congress was simply substituting one method of disposition of surplus lands for another. Senate Report No. 797, 82nd Congress, 1st Sess., in commenting on S. 1952 which became the Act of October 31, 1951, supra, states that its purpose is to repeal laws which have become obsolete, inoperative or in conflict with recent legislation enacted to provide the Government a more efficient system of procurement and distribution of supplies and materials, property management, and utilization of surplus property. It said that sections 1, 2, 3 of the Act of July 5, 1884, were unnecessary in view of sections 202, and 203 of the Federal Property and Administrative Services Act of 1949, (40 U.S.C. §§ 483, 484 (1970)), and so were obsolete.

Sections 202 and 203, supra, provide for the transfer of excess property between executive agencies and for the disposition of

property declared surplus. They and the regulation issued in explication of them require that a certain procedure be followed before land they apply to can be transferred or sold. Elgin A. McKenna, 74 I.D. 133 (1967) aff'd 418 F.2d 1171 (D.C. Cir. 1969).

Furthermore, for surplus lands or interests in land withdrawn from the public domain and not subject to the Federal Property and Administrative Service Act, supra, the Departmental regulation sets out a detailed procedure that must be followed before the land or interests in land become available for disposition under the general public land laws. 43 CFR §§ 2370.0-1 - 2374-2. Thus provision has been made for the disposition of lands vacated by reduction or abandonment of a military reservation which must be followed before the valuable mineral deposits in them become subject to disposition under the mining laws of the United States. These steps not having been taken, the valuable mineral deposits are not subject to mineral location. 5/

So far we have assumed that the land in the claims was either in an "active" military reservation or that it was in a vacated one and in either case subject to the conditions controlling such land. However, as we noted above, the land has been used by several non-military agencies pursuant to several executive orders and most recently has been transferred to the custody of the Department of Agriculture. We need not now decide the exact status of the land. As we have held, if it is still within a military reservation it is not yet open to mineral location. As we shall see, if the various transfers terminated its status as a military reservation, it still is not subject to mineral locations. Therefore, in either case, the mining claims were properly held null and void ab initio .

From the record available to us, it appears that the lands in the reservation were transferred in 1922 pursuant to the Act of March 3, 1919, 40 Stat. 1302, from the War Department to the Treasury Department for the use of the Public Health Service. A short time later Fort Bayard, along with many other installations, was transferred to Veterans' Bureau by Executive Order 3669 (April 22, 1922). On January 2, 1941, custody of the public domain lands and acquired lands was transferred to the Department of Agriculture subject to the restrictions that it shall not be subject to appropriations under any of the public land laws, and that no use shall be made of the land, such as mining or grazing activities by individuals, which will endanger the water supply of the Fort Bayard Facility.

5/ We also note that section 5, supra, states that it applies only to lands "vacated . . . under the provisions of this act." Such language supports the conclusion that section 5 is not self-executing.

We need not determine now whether any one or all of these transfers terminated the military reservation. We note, however, that the transfer to the Public Health Service was made pursuant to an Act of Congress which "permanently transferred" to the Treasury Department for the use of the Public Health Service certain hospitals and sanatoria and "such hospitals hereafter vacated by the War Department as may be required and found suitable by the needs of the Public Health Service." Sec. 2, Act of March 3, 1919, supra. Further, the transfer to the Veterans' Bureau was accomplished by an Executive Order, again under authority of an Act of Congress, specifically addressed to the transfer of property from the Public Health Service to the Veterans' Bureau. The land transfer to the Department of Agriculture was only of the custody of the land.

Whatever the effect these dispositions may have had on the continued existence of the military reservation, each of them reserved the land for a special use by an agency of the United States. If any of them terminated the mineral reservation it did not at the same time restore the land to the public domain or open it to mineral entry. If the land is now to be declared excess to the needs of the Veterans Administration, the procedures of the Federal Property and Administrative Services Act, supra, and the Department regulation, 43 CFR Part 2370, would be applicable. Until such action is completed the land remains closed to mineral entry.

In a recent opinion, the Solicitor, Department of the Interior, emphasized that not all lands belonging to the United States are open to mineral location and held that lands designated as wilderness pursuant to the Act of September 3, 1964, 16 U.S.C. § 1131 (1970), are not open to mineral entry. He said, Solicitor's Opinion, 74 I.D. 97, 101 (1967):

The first issue is the extent to which it may be necessary or desirable to expressly restrict the applicability of the mining laws where it is intended that such activities not take place within a designated wilderness area.

It is long-settled law that notwithstanding the broad textual reference in the mining laws to "lands belonging to the United States, both surveyed and unsurveyed," unless the lands are "public lands" i.e., open to entry, location, selection, sale or other disposal under the general public lands laws, they are closed to activity under the mining laws. Oklahoma v. Texas, 258 U.S. 574 (1922); Rawson v. United States, 225 F.2d 855 (9th Cir. 1955), cert. den., 350 U.S. 934 (1956). Thus, where lands have

been reserved from the public domain, or acquired by the United States, the mining laws are inapplicable. Rawson v. United States, *supra*; 17 Ops. Att'y Gen. 230 (1881).

The rationale for this construction has been thus expressed:

This section is not as comprehensive as its words separately considered suggest. It is part of a chapter relating to mineral lands which in turn is part of a title dealing with the survey and disposal of "The Public Lands." To be rightly understood it must be read with due regard for the entire statute of which it is but a part, and when this is done it is apparent that, while embracing only lands owned by the United States, it does not embrace all that are so owned. Of course, it has no application to the grounds about the Capitol in Washington or to the lands in the National Cemetery at Arlington, no matter what their mineral value; and yet both belong to the United States. And so of the lands in the Yosemite National Park, the Yellowstone National Park, and the military reservations throughout the western States. Only where the United States has indicated that the lands are held for disposal under the land laws does the section apply; and it never applies where the United States directs that the disposal be only under other laws. Oklahoma v. Texas, *supra*, at 599-600.

Thus whether the land is either within a military reservation or is under the jurisdiction of the Veterans Administration, it is not now open to mineral location and was not at the time the mining locations were made. The claims were therefore properly held null and void ab initio.

Since the pertinent issues have been fully argued in the briefs, oral argument would serve no useful purpose and Silver Associates' request is denied.

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 is affirmed.

Martin Ritvo, Member

We Concur:

Edward W. Stuebing, Member

Netwon Frishberg, Chairman

