

Editor's note: Explained by later decision -- See Sam Rosetti, 15 IBLA 288, 81 I.D. 251 (May 6, 1974)

RALPH PAGE

IBLA 72-132

Decided December 22, 1972

Appeal from decision of Idaho State Office, Bureau of Land Management, I-4486, declaring the Argosy Placer Claim null and void ab initio.

Affirmed as modified.

Mining Claims: Lands Subject to -- Mining Claims: Withdrawn Land -- Withdrawals and Reservations: Reclamation Withdrawals

Mining claims located on lands within a reclamation withdrawal which were not open to mineral entry are properly declared null and void ab initio.

Withdrawals and Reservations: Effect of

Subsequent modification or revocation of an order withdrawing lands from mineral entry does not validate a claim located while the lands were closed to location.

Mining Claims: Lands Subject To -- Mining Claims: Powersite Lands -- Mining Claims Rights Restoration Act

Public lands covered by a license or an application for a license for a power project issued by the Federal Power Commission are not open to mineral location.

Act of October 2, 1968 (Wild and Scenic Rivers Act) -- Mining Claims: Lands Subject to -- Statutory Construction: Legislative History -- Withdrawals and Reservations: Generally

Since § 9(d) of the Wild and Scenic Rivers Act withdraws from mineral location only lands which constitute the bed or bank or are situated within one-quarter mile of the bank of a river listed in § 5(a) as a potential addition to the wild and scenic rivers system, the designation pursuant to § 5(d) of that Act of a river area as one which federal agencies shall evaluate in their planning reports does not place the river

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in the category of a potential addition to the wild and scenic rivers system or withdraw the bed or banks of the river or lands within one-quarter mile of the bank of the river from mineral location.

Mining Claims: Determination of Validity

No hearing is necessary to declare mining claims void ab initio where the records of the Department show that at the time of location of the claim the land was not open to such location.

APPEARANCES: Harold Banta, Esq., of Banta, Silven, Young and Marquette, Baker, Oregon, for Appellant.

OPINION BY MR. RITVO

Ralph Page has appealed from an Idaho State Office, Bureau of Land Management, decision, dated September 15, 1971, which declares his Argosy Placer Claim null and void ab initio since it was originally located on land withdrawn from such entry.

The Argosy Placer Claim, located in the Payette and Nez Perce National Forests, consists of approximately 20 acres of land within lot 1 section 3, and lots 1 and 2 section 10, T. 22 N., R. 3 W., Boise Meridian, Idaho. The claim is situated on the banks of the Snake River, two miles downstream from the Hells Canyon Dam. Page located the Argosy Claim on October 30, 1961. An examination requested by the Payette National Forest Supervisor's Office and conducted by Vernon T. Dow, a mining engineer, indicates that work on the land consists of two small pits and the remains of old placer operations performed by early-day miners. The only improvement on the Argosy Claim is a tent house which the claimant uses as a fishing camp.

The lands, at the date of location, were included in the following withdrawals:

- 1) Power Site Classification (PSC) No. 78, dated June 18, 1924.
- 2) Reclamation withdrawal for the Hells Canyon Project, dated February 12, 1952 (this withdrawal revoked on February 15, 1963).
- 3) Power Project No. 2243, filed on March 31, 1958. Lands below the 1560 foot contour are within the boundary of Project No. 2243.

The decision of the State Office held that the reclamation withdrawal and the power project precluded a mining location. Entries for mining claims located on lands in a first form reclamation withdrawal are null and void ab initio. A. L. Snyder, et al., 75 I.D. 33 (1968); Grace Kinsela, 74 I.D. 386 (1967). Appellant argues that revocation of the reclamation withdrawal on February 15, 1963, removed any obstacle to his entry. This, however, is not the case. Subsequent modification or revocation of an order withdrawing land from mineral entry does not validate a claim located while the land was closed to location. David W. Harper, 74 I.D. 141 (1967); Betty J. Fuller, Luella M. Strother, A-30218 (July 13, 1964). No rights were vested in appellant at the inception of his entry or at the date of revocation of the reclamation withdrawal.

While the land has been restored from the reclamation withdrawal and that withdrawal is no longer an obstacle to relocation of the claim, 1/ the portion of the land below the 1560 foot contour was within an application for a license filed with the Federal Power Commission on March 31, 1958, for Project No. 2243. A 50-year license was issued by the Federal Power Commission to Pacific Northwest Power Company, effective March 1, 1964. 2/ While section 2(a) of the Mining Claims Rights Restoration Act of August 11, 1955, 30 U.S.C. § 621(a) (1970), opened to mineral entry lands "heretofore, now or hereafter" withdrawn for power development or power sites, so that PSC 78 no longer closes the land to mineral location, it excepted lands included within a preliminary permit or which are within a project operating under a license or permit issued under the Federal Power Act. Such lands remain closed to mineral location. Gardner C. McFarland, 8 IBLA 66 (1972); A. L. Snyder, et al., supra. At all times material here, the lands below the 1560 foot contour, having been covered by an application for a license, a license itself or a preliminary permit, were and remain closed to mineral location.

1/ See: Gardner C. McFarland, 8 IBLA 56 (1972); Merritt N. Barton, 6 IBLA 293, 79 I.D. (1972)
2/ The Federal Power Commission order issuing a license to Pacific Northwest Power Company was set aside and the case remanded to the Federal Power Commission. Udall v. Federal Power Commission, 387 U.S. 428 (1967). However, this tract, as well as other lands, has remained within a preliminary permit for a power project issued to Pacific Northwest Power Company. The proceedings for the issuance of a license are now pending before the Federal Power Commission.

In rejecting Page's claim, the State Office also referred to an "Order" issued by the Secretaries of Agriculture and of the Interior, dated October 28, 1970. 35 F.R. 16693 (1970). It said that the order withdrew all public lands within one quarter mile of the Snake River downstream from Hells Canyon Dam for a potential addition to the Wild and Scenic Rivers System. The State Office held that lands in such status are not open to mineral location. We find this interpretation is mistaken.

The Wild and Scenic Rivers Act of October 3, 1968, 16 U.S.C. § 1271 *et seq.* (1970), creates a wild and scenic river system to preserve and protect certain rivers in free flowing condition. The Act designated sections of certain rivers as components of the system, 16 U.S.C. § 1273 (1970).

It also designated certain rivers as potential additions to the system and provided a method of adding them to it. 16 U.S.C. §§ 1275, 1276(a) (1970). The portion of the Snake River described in the Secretary's order, *supra*, is not designated as a potential addition.

The Act also provides in sec. 5(d), 16 U.S.C. § 1276 (d) (1970), that:

In all planning for the use and development of water and related land resources, consideration shall be given by all Federal agencies involved to potential national wild, scenic and recreational river areas, and all river basin and project plan reports submitted to the Congress shall consider and discuss any such potentials. The Secretary of the Interior and the Secretary of Agriculture shall make specific studies and investigations to determine which additional wild, scenic and recreational river areas within the United States shall be evaluated in planning reports by all Federal agencies as potential alternative uses of the water and related land resources involved.

Section 9(b) of the Act, 16 U.S.C. sec. 1280(b) (1970), further provides that:

The minerals in any Federal lands which constitute the bed or bank or are situated within one-quarter mile of the bank of any river which is listed in section 1276(a) [potential additions to the wild and scenic river system] are hereby withdrawn from all

forms of appropriation under the mining laws during the periods specified in 1276(b) [from 5 to 8 years after the date of the Act]. . . .

Acting under the provision of section 5(d), supra, the Secretaries of Agriculture and of the Interior issued the notice of October 28, 1970. It described a portion of the Snake River, Idaho, among others, and directed:

In accordance with said section all Federal agencies, in their planning reports concerning such rivers, shall evaluate their wild, scenic, or recreational potential as alternative uses of the water, and related land resources involved.

The Secretaries' notice does not by its terms withdraw the public lands in the river areas listed in it from mineral location. A conclusion that it does can be reached only by determining that the notice constitutes the river a potential addition to the wild and scenic rivers system and, as a result, places its bed and banks within the withdrawal made by section 9(b) of the Act, supra. We find no basis for such a conclusion.

Under the statute only lands constituting the bed or bank or within one quarter mile of the bank of any river designated in § 5(a) are withdrawn from mineral location by § 9(b). Since the Snake River is not listed in § 5(a), the lands underlying and adjoining it are not withdrawn from mineral location.

Section 5(d) directs the Secretary to determine which river areas, shall be evaluated in planning reports made by federal agencies. To the potential addition "areas," it adds other river areas which must be considered in the preparation of these reports. It is directed only to planning activities and does not create another category of river lands which are subject to the statutory controls and restrictions on mineral location. Accordingly, we conclude that the Secretaries' notice of October 28, 1970, did not affect the availability for mineral location of the lands along the portion of the Snake River it covered. The State Office's conclusion to the contrary is set aside.

In summary, then, we agree with the Idaho State Office decision insofar as it held the Argosy placer mining claim void ab initio and the lands in the claim below the 1560 foot contour line to be withdrawn from mineral location.

Appellant stresses in his appeal that the State Office decision was a summary determination without formal contest proceedings. No hearing is necessary to declare mining claims void ab initio where the record shows that the entry was made at a time when the lands were not open to location. Foster Mining and Engineering Company, 7 IBLA 299, 79 I.D. (1972); The Dredge Corporation, 64 I.D. 368, 375 (1957), 65 I.D. 336 (1958); aff'd sub nom. Dredge Corp. v. Penny, 362 F.2d 889 (9th Cir. 1966).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office is affirmed as modified herein.

Martin Ritvo, Member

We concur:

Newton Frishberg, Chairman

Joan B. Thompson, Member.

