

Editors' note: 81 I.D. 65 ; Appealed -- aff'd, sub nom. Reeves v. Morton, Civ. No. 74-117 PHX WDC (D.Ariz. Aug. 9, 1974)

CITY OF PHOENIX

v.

ALVIN B. REEVES ET AL.

IBLA 73-205

Decided February 1, 1974

Appeal from decision by Administrative Law Judge L. K. Luoma, declaring placer mining claims null and void.

Affirmed as modified.

Administrative Procedure: Adjudication--
Administrative Procedure: Hearings--
Hearings--Mining Claims: Hearings--
Rules of Practice: Hearings

The Administrative Procedure Act requires an agency to give all interested parties an opportunity to participate in an adjudication where time and public interest permit.

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Administrative Procedure: Adjudication--
Mining Claims: Contests--Mining Claims:
Determination of Validity--Mining claims:
Withdrawn Land--Rules of Practice:
Private Contests

The Department of the Interior has jurisdiction to determine if a mining claim is invalid by being located on land not subject to mineral location, even where the issue of validity of the claim is raised in the context of a private contest brought by a surface patentee.

Administrative Practice--Executive Orders and
Proclamations--Rules of Practice:
Generally--Statutory Construction:
Generally

Executive orders have the force and effect of law and rules of statutory construction apply to them.

Administrative Practice--Executive Orders and
Proclamations--Mining Claims: Lands Subject
to--Patents of Public Lands: Effect--
Rules of Practice: Generally--Statutory
Construction: Implied Repeals--Withdrawals
and Reservations: Generally

There is a strong presumption against implied repeal of an executive order. If a statute covers the same area as an executive order

and they are not absolutely irreconcilable, effect will be given to both. A statute, authorizing a patent of lands to a city, subject to a reservation of minerals to the United States, did not impliedly revoke an Executive Order withdrawal of the lands for classification and in aid of legislation to grant the patent to the city, which withdrawal closed the lands to non-metalliferous location under the mining laws.

Act of July 15, 1921--Conveyances: Generally--
Mining Claims: Lands Subject to--Patents
of Public Lands: Reservations

Where the United States disposes of public lands with a reservation of minerals to the United States, the reserved minerals are not subject to location under the general mining laws in the absence of specific statutory authority. Minerals reserved to the United States in a patent to the City of Phoenix issued pursuant to the Act of July 15, 1921, 42 Stat. 143, are

not subject to the mining laws, as neither that Act nor any other statute provides for disposition of the reserved minerals under the mining laws.

Mining Claims: Withdrawn Land--Withdrawals and
Reservations: Effect of--Withdrawals and
Reservations: Revocation and Restoration

A mining claim located on land closed to mineral entry is void.

APPEARANCES: Bruce F. Demaree, Esq., of Richmond, Ajamie, Fay & Warner, Phoenix, Arizona, for appellant. Donald W. Lindhelm, Esq., for appellees.

OPINION BY MRS. THOMPSON

Alvin B. Reeves, and the heirs of A. H. Reeves, 1/ deceased (contestees), have appealed from the October 17, 1972, decision of Administrative Law Judge L. K. Luoma holding their A & H Nos. 3 and 4 placer mining claims null and void for the reason that the sand and gravel deposits were not reserved to the United States, but had been conveyed as part of the surface estate to the City of Phoenix.

1/ Genevieve C. Rippey, Leroy Reeves, and Thelma Reeves.

On March 19, 1965, the City of Phoenix (contestant) initiated a private contest to have the A and H Nos. 3 and 4 placer mining claims embracing the S1/2 1/ /2 SW1/4 of section 23, T. 1 N., R. 2 E., G. & S.R.M., Maricopa County, Arizona, declared invalid. A hearing was held on May 5, 1969.

The contestees base their claim to the land on location notices filed and recorded in the office of the County Recorder, Maricopa County, Arizona, on May 24, 1955. The City of Phoenix bases its title to the land on Patent No. 832934 issued to the City by the Bureau of Land Management on November 18, 1921. Prior to the issuance of the patent, Executive Order No. 3388, January 22, 1921, temporarily withdrew the land in question

* * * from settlement, location, sale and entry for classification and in aid of legislation granting said lands to the city of Phoenix, Arizona, for municipal purposes, and this order shall remain in full force until revoked by the President, or by an act of Congress. (Emphasis added.)

This order withdrew the land from nonmetalliferous mineral location. On July 15, 1921, Congress authorized the transfer of this land to the "City of Phoenix for municipal purposes * * * [reserving] to the United States all oil, coal or other mineral deposits found at any time in the land, and the right to prospect for, mine and remove the same * * *." Act of July 15, 1921, P.L. No. 67-34, 42 Stat. 143 (Act). Under the authority of the Act, patent was issued to Phoenix.

At the hearing, counsel for the United States made an appearance and filed a motion to intervene. This was denied. Although the United States did not appeal from that decision, in order to correct the error, we note that the denial of the motion was improper. The United States has an interest in determining the validity of mining locations where alleged rights to minerals reserved to the United States are asserted by claimants under the mining laws, 30 U.S.C. § 21 et seq. (1970). This is especially true in this case where one of the issues involved in the private contest was whether the sand and gravel deposits were encompassed in a mineral reservation to the United States. The Administrative Procedure Act requires an agency to give all interested parties an opportunity to participate in adjudications where time and public interest permit. 5 U.S.C. § 554(c)(1) (1970). The United States was an interested party and the public interest would have been served by permitting it to intervene.

The question of the authority of this Department to determine the validity of these mining claims has been brought into sharp focus by appellants' first contention. They contend the Judge's decision should be set aside and the contest dismissed because the land has been patented and consequently the Department does not have jurisdiction to determine the rights between the two private parties to the sand and gravel resources. They rely on

Berg v. Taylor, 51 L.D. 45 (1925), where the Department held that questions pertaining to a conflict between a surface patentee and an applicant for a coal lease concerning the use of the surface estate are a matter beyond the jurisdiction of this Department and a matter for the courts. In Berg and in Marathon Oil Co. v. West, 48 L.D. 150 (1921), cited in Berg, this Department invoked its authority to grant mineral leases, despite protests by surface owners, leaving the issues as to conflicts in the possession and use of the surface for the courts. The instant case, however, does not involve Departmental interference with surface users' rights where the initial validity of the mineral users' right under federal law was presupposed, as it was in Berg and Marathon. Here the question is whether the mining claims are valid under federal law. The Berg and Marathon rationale does not apply to this question. This case is also outside the ambit of circumstances requiring court proceedings to determine rights as between conflicting claimants under the mining laws. See 30 U.S.C. § 30 (1970); Ti, Inc. v. Minnesota Mining and Manufacturing Co., A-31106 (Supp.) (July 2, 1969), modifying A-31106 (January 16, 1969).

It is well established that this Department has authority to determine the validity of mining claims located under the mining laws of the United States. E.g., Best v. Humboldt Placer Mining Co.,

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U.S. 334, 336-37 (1963). Where a mining claim is void because it was located on land withdrawn from mineral entry, this Department may, without bringing a contest, declare the claim void ab initio. Dredge Corp. v. Penny, 362 F.2d 889, 890 (9th Cir. 1966); Foster Mining and Engineering Co., 7 IBLA 299, 304-05, 79 I.D. 599, 602 (1972); Ernest Alpers, A-30627 (March 10, 1967). This Department has jurisdiction, therefore, to determine if a claim is located on land not subject to mineral location even where the issue of validity is raised in the context of a private contest brought by a surface patentee. See United States v. Williamson, 75 I.D. 338, 343 (1968). Cf. Davis v. Nelson, 329 F.2d 840, 846 (9th Cir. 1964).

Appellants next contend that the Judge's decision declaring the claims invalid was in error, and that the sand and gravel deposits are locatable deposits, because the City of Phoenix would have a common law right of action for damages against them for any injury to the surface estate, bringing the case within the ambit of United States v. Isbell Construction Co., 4 IBLA 205, 78 I.D. 385 (1971). Further, they contend the land is located in a riverbed subject to sporadic flooding which precludes any permanent development upon the surface estate, and that the City of Phoenix has recognized this fact by planning construction of a flood control channel using the mineral estate. They request this Board to hold that they have a right to remove any sand and

gravel which does not conflict with the surface use. In view of our conclusions discussed below, we find it unnecessary to respond to these particular contentions.

In their brief to the Judge, appellants contended that the Act of July 15, 1921, revoked Executive Order No. 3388 and restored the lands to mineral entry and location. Phoenix raised a subsidiary issue of whether the sand and gravel placer claims are void because they are part of the surface estate patented to the City and not part of the mineral estate reserved to the United States.

The Judge, relying on United States v. Isbell Construction Co., *supra*, decided that although the mineral estate on the land in question would be open to location under the general mining laws, the sand and gravel located there was not part of the mineral estate reserved to the United States, but part of the surface estate granted to Phoenix. Accordingly, he held the claims invalid.

The land involved in Isbell, however, was clearly open to location under the mining law, including nonmetalliferous claims. 43 U.S.C. § 315e (1970); Executive Order No. 6910 of November 26, 1934, as amended by Executive Order of November 26, 1935, 55 I.D. 401. Here, before we can decide whether the sand and gravel in the land is subject to the mining law, we must first decide whether the land was

open to location. If the Act of July 15, 1921, and issuance of the patent to Phoenix, or other administrative action, did not revoke Executive Order No. 3388 and restore the land to mining location, then the land has been closed to entry since January 22, 1921, and any claims located thereafter would be void. This threshold issue, whether reserved minerals are withdrawn, or are otherwise locatable under the mining laws, was not present in the Isbell case, and for that reason it is distinguishable. In view of our ruling on this threshold issue, infra, we are not deciding whether the sand and gravel deposits fell within the mineral reservation.

The status of the land is reflected in part by the Bureau of Land Management (BLM) records. The historical index covering this township shows the Executive Order, the Act of July 15, 1921, and the issuance of the patent to Phoenix. Mining claims are void where the official public land records show the land was not open to location at the time of entry. Leo J. Kottas, 73 I.D. 123, 127-28 (1966), aff'd sub nom. Lutzenhiser v. Udall, 432 F.2d 328 (9th Cir. 1970); David W. Harper, 74 I.D. 141, 145 (1967).

On the question of whether these mining claims are void as located for minerals which have been withdrawn and never restored to location, the Judge accepted an argument that the Act of July 15, 1921, and issuance of the patent to the City of Phoenix, subject to

a mineral reservation, fulfilled the purpose of the temporary withdrawal and thus effectuated a restoration of the minerals to location. That conclusion is erroneous. At the very least, it must rest upon an implied repeal of the withdrawal by the action of Congress, as the language of the Act of July 15, 1921, does not expressly revoke the withdrawal or authorize mineral location upon the minerals to be reserved.

The withdrawal was by executive order. Executive orders have the force and effect of law, Farkas v. Texas Instrument, Inc., 375 F.2d 629, 632 (5th Cir.), cert. denied, 389 U.S. 977 (1967); Feliciano v. United States, 297 F. Supp. 1356, 1358 (D.P.R. 1969), aff'd, 422 F.2d 943 (1st Cir. 1970), and rules of statutory construction apply to them. Feliciano, supra at 1359; United States v. Angcog, 190 F. Supp. 696, 699 (D.C. Guam 1961). Repeal of an executive order or statute may be either express or implied. However, there is a strong presumption against implied repeal. One statement of this policy is that if two statutes cover the same area and are not absolutely irreconcilable, effect is given to both. United States v. Borden Co., 308 U.S. 188, 198 (1938). Another expression is that a law will not be construed as impliedly repealing another law "unless no other reasonable construction can be applied." United States v. Jackson, 302 U.S. 628, 631 (1938). See Ely v. Velde, 451 F.2d 1130, 1134-35 (4th Cir. 1971); Feliciano, supra at 1359.

In construing executive orders, the Department of the Interior has implicitly recognized the presumption against implied repeal. Neither the mere passage of time nor accomplishment of an avowed purpose has been held to be a substitute for formal revocation of the withdrawal and restoration of the lands to location or entry under the mining or other public land laws. United States v. Consolidated Mines & Smelting Co., Ltd., 455 F.2d 432, 445 (9th Cir. 1971); Tenneco Oil Co., 8 IBLA 282, 284 (1972); Rowe M. Bolton, 5 IBLA 226, 227 (1972); Grace Kinsela, 74 I.D. 386, 387 (1967). It is, in part, because of this policy that the official records do not reflect any revocation or restoration.

As stated previously in this case, the Act did not expressly revoke the executive order; it made no mention of it at all. Under this circumstance, the repeal of the order, if it occurred, must have been implied. However, the grant of the patent to Phoenix with a mineral reservation to the United States did not mandate the revocation of a temporary withdrawal order and the restoration of the withdrawn land to mineral location, because the Government could have good and sufficient reasons to both grant the patent and retain the withdrawal as to the reserved minerals. The two are not absolutely irreconcilable and under rules of statutory construction, effect must be given to both. United States v. Borden Co., *supra*. This conclusion is strengthened by the fact the withdrawal was for

classification purposes as well as in aid of legislation for the City of Phoenix. This militates against any argument that the Act of July 15, 1921, constituted a revocation of the withdrawal order and restoration of nonmetalliferous reserved minerals to location under the mining laws. Neither the Act nor subsequent administrative action purported to make any classification or restoration. See Ernest Alpers, supra.

There is a further compelling reason why the contestees' locations under the mining laws for the reserved minerals are void. The mining laws are applicable to public lands and such lands may be purchased by the claimant when he has made a discovery of a valuable mineral deposit within his mineral location on public lands. 30 U.S.C. § 21 et seq. (1970). When public lands are disposed of with a reservation of minerals to the United States, it has been ruled that without specific statutory authority making the reserved minerals subject to the mining laws, the mining laws do not apply to such deposits. Solicitor's Opinion, M-36279 (July 19, 1955). This Opinion discussed the applicability of the mining laws to minerals reserved in a patent to the City of Denver. The act authorizing the patent, Act of August 25, 1914, 38 Stat. 706, was similar to that involved in this case as it provided that minerals were to be reserved to the United States, but gave no authorization of the right to mine such minerals under the mining laws. The

Opinion concluded that authority to dispose of the minerals under the mining laws could not be read into the statutory provision for reserving the minerals. It distinguished other statutes where the United States has granted the land, reserving the minerals, and specifically authorizing location of the minerals under the mining laws. The rationale of that Opinion is applicable here. The Act authorizing the patent to the City of Phoenix while reserving minerals did not authorize their location under the mining laws. We know of no other statute making such an authorization. Consequently, the mining laws are not applicable to the reserved minerals in the patent.

Under either of the above views, the reserved minerals were not subject to location under the mining laws. Therefore, as the withdrawal was never revoked nor the land restored to location under the mining laws for the reserved minerals, they were not open to appropriation under the mining laws at the time the contestees made their locations. Terza Hopson, 3 IBLA 134, 138 (1971). See Dredge Co., 64 I.D. 368, 374-75 (1957), aff'd, 362 F.2d 889 (9th Cir. 1966); Ernest Alpers, supra; Frank Melluzzo, 72 I.D. 21 (1965). Therefore, the claims must be deemed invalid. E.g. Mickey G. Shaulis, 11 IBLA 116 (1973); Brace C. Curtiss, 11 IBLA 30 (1973).

The Judge's decision is set aside and modified to the extent it is inconsistent with this decision and the claims are declared void for the reasons stated in this decision.

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

Joan B. Thompson, Member

We concur:

Martin Ritvo, Member

Douglas E. Henriques, Member

