

SAM ROSETTI

IBLA 74-156

Decided May 6, 1974

Appeal from decision (I 7076) of Idaho State Office, Bureau of Land Management, declaring mining claim null and void ab initio.

Set aside and remanded.

Mining Claims: Lands Subject to--Mining Claims Rights Restoration  
Act--Withdrawals and Reservations: Power Sights

From the effective date of the Mining Claims Rights Restoration Act of August 11, 1955, 69 Stat. 682-683 as amended, 30 U.S.C. §§ 621-625 (1970), all lands included in an application to the Federal Power Commission for either a preliminary permit or a license, where no permit has been issued, are open to mineral entry, absent other impediments.

Ralph Page, 8 IBLA 435 (1972), explained.

Mining Claims: Lands Subject to--Mining Claims Rights Restoration  
Act--Withdrawals and Reservations: Power Sites

The mean filing of applications for a license or a preliminary permit for a power project since the date of the Mining Claims Rights Restoration Act does not preclude the operation of the U.S. mining laws as to those lands.

Mining Claims: Lands Subject to--Mining Claims Rights Restoration  
Act--Withdrawals and Reservations: Power Sites

Public lands covered by a license, or an application for a license for a power project where already covered by a preliminary permit issued by the Federal Power Commission, which permit has not been renewed more than once in the case of such prospective licensee, are not open to mineral location.

APPEARANCES: Sam Rosetti, pro se.

## OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Sam Rosetti 1/ has appealed from a decision, dated October 19, 1973, of the Idaho State Office, which held the Buzzards Roost placer claim to be null and void ab initio. This claim, within Lots 2 and 3, section 12, T. 29 N., R. 4 W., B.M., Nez Perce County, Idaho, was located January 4, 1964, and recorded on January 7, 1964. At those times the lands within those lots, below the 1,630 feet contour, were withdrawn pursuant to the filing of an amended application for a license for Power Project No. 2273, made on August 22, 1960. The application for license was rejected by the Federal Power Commission (FPC) on February 3, 1964. 2/ The lands were again withdrawn on October 2, 1968, by the Wild and Scenic Rivers Act (82 Stat. 906, 911, 915), 16 U.S.C. §§ 1276(a)(23), 1280(b) (1970).

In his appeal, appellant simply states that a valid entry is claimed under Public Law 39, the Mining Claims Rights Restoration Act, as amended, 30 U.S.C. §§ 621-25 (1970). This Act provided in part that all lands withdrawn for power development were to be opened to mineral location unless they were (1) "in any project

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1/ Appellant Rosetti's appeal is entitled a protest, and states with regard to reasons that: "We claim valid entry under P.L. 359; mining in power site withdrawals." The "we" used apparently refers to some or all of the other named parties to the decision of the State Office. These were George Grasser, G.G.R.B. Mining Co., and Howard Hentry.

2/ This is shown by a letter from the Federal Power Commission to the Bureau of Land Management.

operating or being constructed under a license or permit \* \* \*"; or (2) "under examination and survey" by a prospective power project licensee, who held "an uncanceled preliminary permit issued under the Federal Power Act" authorizing such examination and survey, "and such permit has not been renewed in the case of such prospective licensee more than once." Id. at 621(a).

The customary procedure for obtaining a license to construct a power project under the Federal Power Act, as amended, 16 U.S.C. §§ 791a-828c (1970), includes the filing of an application for a preliminary permit with the FPC, the grant of that permit, the filing of an application for a license, and the grant of that application. In the present case, however, no preliminary permit was applied for or obtained. The record indicates that only an amended application for a license was filed on August 22, 1960, and that it was denied by the FPC on February 3, 1964.

Some recent decisions of the Board of Land Appeals speak very broadly on the issue of whether public lands included only within an application for a license for a power project are withdrawn from mineral location under the terms of the Mining Claims Rights Restoration Act, supra.

For instance, in Ralph Page, 8 IBLA 435 (1972), the text contains the sentence that "\* \* \* [a]t 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." Id. at 437 (emphasis on disjunctive structure supplied). The disjunctive structure was carried into the headnotes for that case, upon which the Idaho State Office apparently relied in the decision appealed by Rosetti. The headnote states:

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.  
(Emphasis supplied.)

If applications for either a license or a preliminary permit are filed with the FPC, what is the status of the public lands involved during the period before the FPC grants either a license or a preliminary permit?

Section 24 of the Federal Power Act (41 Stat. 1063, 1075), as amended, 16 U.S.C. § 818 (1970), provides:

Any lands of the United States included in any proposed project under the provisions of sections 792, 793, 795-818, and 820-823 of this title shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby,

shall be filed in the local land office for the district in which such lands are located.  
(Emphasis supplied.)

Section 4 of the same Act, 16 U.S.C. § 797 (1970), delineating the general powers of the Federal Power Commission, states:

The Commission is authorized and empowered--

(e) To issue licenses \* \* \* for the purpose of constructing, operating, and maintaining dams, [etc.] \* \* \*: \* \* \* And provided further, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the provision of said subsection.

(f) To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 802 of this title: Provided, however, That upon the filing of any application for a preliminary permit \* \* \* the commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application \* \* \*.

Thus it is clear that "applications," as used in section 24 of the Act, supra, include those for preliminary permits.

But the Mining Claims Rights Restoration Act, supra, opens to mineral location all lands withdrawn for power purposes unless within areas under examination by a permittee of the FPC. As is stated in this Act,

All public lands belonging to the United States heretofore, now or hereafter withdrawn or reserved for power development or power sites shall be open to entry for location and patent of mining claims and for mining, development, beneficiation, removal, and utilization of the mineral resources of such lands under applicable Federal Statutes: \* \* \* provided further, That nothing contained herein shall be construed to open for the purposes described in this section any lands (1) which are included in any project operating or being constructed under a license or permit issued under the Federal Power Act or other Act of Congress, or (2) which are under examination and survey by a prospective licensee of the Federal Power Commission, if such prospective licensee holds an uncanceled preliminary permit issued under the Federal Power Act authorizing him to conduct such examination and survey with respect to such lands and such permit has not been renewed in the case of such prospective licensee more than once. (Emphasis supplied.)

30 U.S.C. § 621(a) (1970).

Thus, it is clear that from August 11, 1955, the effective date of the Mining Claims Rights Restoration Act, supra, all lands for which no preliminary permit has been issued, but which are only included in either an application for a license or an application for a preliminary permit, are open to mineral entry 3/, absent other impediments, subject, however, to the terms of that Act.

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3/ We note that Foster Mining and Engineering Co., 7 IBLA 299, 308, 79 I.D. 599, 604 (1972) states: "The effect of the filing of the application for a preliminary permit as to the status of public land included therein is the same as the filing of the application for a license for a proposed power project. \* \* \*" That statement is made in the context of sec. 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1970) and is correct in that context. Under the Mining Claims Rights Restoration Act, 30 U.S.C. §§ 621-25 (1970), an uncanceled preliminary permit, not renewed more than once, continues to segregate the land from mining whether or not an application for license has been filed.

Although Gardner C. McFarland, 8 IBLA 56 (1972), alludes to the exclusionary effect of an application for a license when filed by the holder of a preliminary permit, another authority for this holding is found in A. L. Snyder, 75 I.D. 33 (1968).

In Snyder, the land upon which a mining claim was located in 1961 had been included in an application for a power project filed in 1953. A preliminary permit for the power project was issued in 1957, and an application for a license for the project was filed in 1959. The Mining Claims Rights Restoration Act, as already noted, became effective in 1955.

As stated in Snyder, supra at 36, the Mining Claims Rights Restoration Act, supra,

\* \* \* was intended to protect from mineral location land held under the conditions it describes. When those

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fn. 3 (Cont.)

Foster at 7 IBLA 311, 79 I.D. 605, further states: "Because appellants' claims were located when the land was within the preliminary permit they must be declared null and void ab initio. The fact that notice of the application for the permit, the permit, and the application for a license was [sic] not made on the land office records of public land status, does not compel a contrary conclusion." \* \* \* The latter sentence simply recites the fact of non-notation; it was not intended to suggest, nor does it mean, that under the Mining Claims Rights Restoration Act, supra, either the filing of an application for a permit, or the filing of an application for license when no preliminary permit is outstanding would bar land from the operation of the mining laws. Both Page and Foster, recite that preliminary permits had been issued. Those decisions are therefore correct on the facts stated.

conditions exist, the land is not open to mineral entry; when they do not, the land is open to mineral entry.

Thus it was found that the public lands involved were withdrawn from mineral location from 1953 to 1955, when the Mining Claims Rights Restoration Act became effective. However, when the preliminary permit was issued in 1957 the lands were again closed to mineral location, due to terms of the Act, and thus Snyder's location in 1961 was null and void ab initio.

Therefore, the mere filing of applications for a license or a preliminary permit for a power project since the date of the Mining Claims Rights Restoration Act, supra, does not effect a withdrawal of the public lands involved from the operation of the U. S. mining laws. Those lands, until a preliminary permit or license is issued, remain open to " \* \* \* entry for location and patent of mining claims and for mining, development, beneficiation, removal, and utilization of the mineral resources of such lands under applicable Federal statutes \* \* \*." Id. 4/ It is true, of course, that the liability of

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4/ The terms of 18 CFR 4.31 (provisions for acceptance of license applications by the Federal Power Commission (FPC)) and those of 18 CFR 4.81 (provisions for acceptance of applications for preliminary permits by the FPC) require notice of such filings to be given to the Department of the Interior "so that withdrawals from entry may be recorded."

Such withdrawals for power purposes are effective from the date of the filing of the proper application. However, as explained in this decision, these withdrawals, when made after August 11, 1955, the date of the Mining Claims Rights Restoration Act, do not preclude the lands affected thereby from the operation of the U. S. mining laws until such time as a preliminary permit or license is issued.

the United States for use of the lands for power purposes is limited by section 3 of the Mining Claims Rights Restoration Act, 5/ 30 U.S.C. § 622 (1970). We also recognize that under 30 U.S.C. § 621(b) (1970), the locator of a placer mining location, such as is at issue here, "shall conduct no mining operations for a period of sixty days after the filing of a notice of location \* \* \*." This section does not necessarily go to the question of validity of the claim.

Accordingly, 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 set aside and the case remanded.

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Frederick Fishman  
Administrative Judge

I concur:

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Edward W. Stuebing  
Administrative Judge

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5/ Section 3 of the Act provides:

"Prospecting and exploration for and the development and utilization of mineral resources authorized in this chapter shall be entered into or continued at the financial risk of the individual party or parties undertaking such work: Provided, That the United States, its permittees and licensees shall not be responsible or held liable or incur any liability for the damage, destruction, or loss of any mining claim, mill site, facility installed or erected, income, or other property or investments resulting from the actual use of such lands or portions thereof for power development at any time where such power development is made by or under the authority of the United States, except where such damage, destruction, or loss results from the negligence of the United States, its permittees and licensees."

## JUDGE THOMPSON CONCURRING IN THE RESULT:

We assume in this case that there was only an application for a license for a power project filed with the Federal Power Commission and that a preliminary permit or any other authorization from the Commission has never issued for the applicant to conduct a survey and examination of the lands. 1/ The issue raised in this case is one of first impression; namely, whether mining claims are void ab initio when located after the Mining Claims Rights Restoration Act of August 11, 1955, as amended, 30 U.S.C. § 621 et seq. (1970), on land within a power site withdrawal, if there has only been an application for a license for a power project and there has never been a preliminary permit authorizing the applicant to conduct an examination or survey of the lands in the application.

All of the cases cited by the majority dealt with different questions and different factual situations and are distinguishable for that reason. In their factual context, the decisions are clear and are not in any conflict with the result reached in this case. 2/

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1/ The Chief, Bureau of Power, FPC, in a letter to the Bureau of Land Management dated January 3, 1972, mentions only an amended application for license for power Project No. 2273. He concluded in his letter that the lands were "not open to mineral location under the Act of August 11, 1955, between the period of August 22, 1960, and February 5, 1964." Judge Fishman has since been informally advised by FPC personnel that a preliminary permit pertaining to that project was never issued.

2/ For example, Ralph Page, 8 IBLA 435 (1972); Gardner C. McFarland, 8 IBLA 56 (1972); Foster Mining and Engineering Co., 7 IBLA 299,

I agree with the majority that mining claims are not void ab initio by reason of being located on lands where there has only been an application for a license or a preliminary permit and no preliminary permit has ever been issued. I wish to emphasize, however, ever, that lands within an application for a license or for a preliminary permit are withdrawn when the application is filed with the Federal Power Commission in accordance with section 24 of the Federal Power Act, as amended; 16 U.S.C. § 818 (1970), until action by the Commission or Congress opens such land to entry. Foster Mining and Engineering Co., 7 IBLA 299, 79 I.D. 599 (1972). Congress, by the Mining Claims Rights Restoration Act, opened land withdrawn for power purposes to mineral entry, with certain exceptions which we conclude are not applicable here, but Congress also provided the opened land is subject to a reservation of power rights to the United States. 30 U.S.C. § 621(a) (1970). Therefore, any mining claims located after that Act on lands withdrawn for power purposes are subject to the power reservation.

The lands

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fn. 2 (Cont.)

311, 79 I.D. 599, 605 (1972); A. L. Snyder, 75 I.D. 33 (1968), all concerned land status where a preliminary permit had issued. In Page and Snyder applications for a license had been filed while the permit was in existence. Snyder had ruled at 36 (also in Foster at 311) that an application for a license filed while a permit was in effect "kept the land 'under examination and survey by a prospective licensee of the Federal Power Commission' within the meaning of \* \* \* [the second clause of the third proviso of 30 U.S.C. § 621(a)] since it was filed before the permit expired and preserved the priority of the permittee under the permit." Thus, any reference to the application for a license in Page was based upon the facts in that case where a preliminary permit had issued and the rationale in Snyder.

are open to mineral location only subject to the conditions and restrictions of that Act. See also especially 30 U.S.C. §§ 622, 623 and 625.

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Joan B. Thompson  
Administrative Judge

15 IBLA 300

