

A. W. SCHUNK

IBLA 73-86 Decided June 28, 1974

Appeal from decision of the Arizona State Office, Bureau of Land Management, A-6724, declaring the Mizer Nos. 55, 60-62 mining claims null and void in part.

Vacated.

Rules of Practice: Supervisory Authority of the Secretary – Administrative Practice

In the exercise of its delegated authority pursuant to 43 CFR 4.1, the Interior Board of Land Appeals need not limit its review to a narrow issue where to do so would preserve error or inequity.

Mining Claims: Lands Subject to – Mining Claims: Determination of Validity

A permit issued by the Forest Service for a transmission line right-of-way under 16 U.S.C. § 522 (1970) does not serve as a withdrawal or close the land to mineral location. A Bureau of Land Management decision will be vacated where it invalidated mining claims because they conflicted with a transmission line right-of-way issued under the authority of 16 U.S.C. § 522.

APPEARANCES: A. W. Schunk, pro se; Richard L. Fowler, Esq., Office of General Counsel, U.S. Department of Agriculture, Albuquerque, New Mexico, for the Forest Service; William A. Simson, Manager, Land Department, for the Arizona Public Service Company.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Acting upon information furnished by the Forest Service, the Arizona State Office, Bureau of Land Management (BLM), rendered a decision on July 31, 1972, holding the Mizer Nos. 55, 60, 61 and 62 mining claims invalid insofar as they conflicted with a right-of-way issued in February 1961 by the Forest Service, Department of Agriculture, to the Arizona Public Service Company. The Mizer claims were located in 1970. The decision recited that in accordance with 44 L.D. 513 (1916) the lands covered by the right-of-way were closed to mineral location and that mining claims located in conflict therewith are invalid.

A timely appeal was filed by Mr. R. H. Fairchild on behalf of A. W. Schunk on August 15, 1972. Fairchild's authority to act as attorney-in-fact was confirmed on September 12, 1972. Appellant does not question the correctness of the decision below. Rather, he argues that it would be unfair to deprive him of his investment in the claims. He states that he is willing to comply with reasonable safety requirements to prevent interference with use of the right-of-way.

While the appeal is subject to dismissal because the statement of reasons did not respond to the BLM decision, 43 CFR 4.412, to dismiss the appeal would perpetuate an error. Accordingly, and in recognition of its effect upon appellant's rights, we address ourselves to the decision below.

The Forest Service requested BLM to initiate contest proceedings against the Mizer Nos. 55-64 mining claims because of lack of discovery. However, BLM declared the Mizer Nos. 55, 60 and 62 null and void to the extent those claims conflicted with a previously issued right-of-way for transmission line purposes to a private corporation, Arizona Public Service Co. The mining claims were located in 1970. The right-of-way was authorized in 1962 by a permit issued under the authority of the Act of February 15, 1901, 16 U.S.C. § 522 (43 U.S.C. § 959) (1970). That Act, in pertinent part, provides:

That any permission given by the Secretary * * * under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to or over any national forest [public land, reservation or park].

The plain meaning of the statute authorizes the issuance of permits which create no rights in land and by the statutory terms do not close land to the operation of the general land laws. A permit under the act is non-exclusive. This concept accords with Wilcox v. Jackson, 13 Pet. (U.S.) 498 (1839), and is reiterated in the Forest Service Manual § 2811.24. In Wilcox, Jackson sought to enter lands at Ft. Dearborn in Chicago even as the Army vacated the post. However, the Indian Department was then using the vacated premises for warehousing and other related purposes. Jackson's entry was thwarted. The Supreme Court held that when a tract of land is severed from the mass of the public domain it is not subject to appropriation under the general land laws. Lands used by the Government for public purposes are so appropriated. This case serves as the basis for the Instructions at 44 L.D. 359 (1915) and 44 L.D. 513 (1916). The Instructions concern telephone lines or like structures, constructed, maintained and operated by the United States over public lands under the authority of certain appropriation acts. They do not refer, explicitly or implicitly, to privately owned, maintained or operated lines. It was directed that where entry is made on lands upon which the United States had constructed telephone, telegraph, or other improvements the entry is subject to the continued use by the Government and the patent would be so noted. To similar effect see 43 CFR 1821.4-1, 2801.1-2. ^{1/}

The Department adheres to the Wilcox rule. The same rule is applicable in the National Forests. The Forest Service Manual, § 2811.25, states that lands occupied or used under a special use permit are closed to mineral entry in such circumstances. The Forest Service Manual provision cites United States v. Mobley, 45 F. Supp. 407 (ND Calif. 1942); and Schaub v. United States, 207 F.2d 325, (9th Cir. 1953).

^{1/} 43 CFR § 1821.4-1 Notation of rights-of-way:

"(a) In order that all persons making entry of public lands which are affected by rights-of-way may have actual notice thereof, a reference to such right-of-way should be made upon the original entry papers and upon the notice of allowance of the application issued to the entryman."

43 CFR § 2801.1-2 Disposals subject to right-of-way:

"All persons entering or otherwise appropriating a tract of public land, to part of which a right-of-way has attached under the regulations in this part, take the land subject to such right-of-way and without deduction of the area included in the right-of-way."

In Mobley, the Court found that no discovery of a valuable mineral had been made upon the mining claims. The discussion concerning the impact of the special use permit as closing the land to the operation of the mining laws may therefore be regarded as obiter dicta. As to the abortive attempt to locate a mining claim, the Court said at page 414:

* * * * *

We conclude that neither defendant has any valid right, possessory or other, which he or she can assert against the Government of the United States, or any of its permittees, and that the Government is entitled to a decree quieting its title to the parcel of land, as prayed for in its complaint, and a permanent injunction enjoining the defendants from asserting any right to it or interfering with the possession of any persons acting under the authority of the Government.

In Schaub a material site had been designated for use in connection with Federal Aid Highway construction under 23 U.S.C. § 18 (1946), now § 317 (1970). The material pit was also designated for special use under the Act of March 30, 1948, 62 Stat. 100, (formerly 48 U.S.C. § 341 (1954)). Under that Act the Secretary of Agriculture may authorize use of national forest lands in Alaska for various purposes:

* * * and after such permits have been issued and so long as they continue in full force and effect the lands therein described shall not be subject to location, entry, or appropriation, under the public land laws or mining laws, or to disposition under the mineral leasing laws * * *.

The Court held that the federal use of the lands for material site purposes effectively closed the lands from further appropriation.

In Schaub the mineral claimant sought to acquire mineral materials which were then being mined by or for the United States for federal use.

But where the Forest Service proposed an administrative site, surveyed the parcel for that purpose in 1909, and had made minimum improvements which subsequently became derelict, the Department held that the mere proposal for construction was insufficient to

effect the withdrawal of any unimproved land from mineral location. United States v. Crocker, 60 I.D. 285 (1949). In citing the 44 L.D. Instructions, mandate was given that the telephone lines and a road constructed and used on public lands do not withdraw the land, but the telephone lines and the road could be excepted from the patent.

We note that as early as 1922 the Federal Power Commission and the Department recognized that lands withdrawn or classified for power purposes for transmission lines and lands within permits or approved rights-of-way, issued under 16 U.S.C. §§ 420 and 523, and 43 U.S.C. § 961, should and must remain open to location subject to the provisions of section 24 of the Federal Power Act, 16 U.S.C. § 818 (1970).^{2/} In this case, the permit, issued under an authority which cannot "confer any right, or easement, or interest in, to or over any national forest: lands, created no vested interest in the land. The utility company holds nothing more than a revocable permit to maintain a transmission line. At most, it may be afforded the protection outlined in Crocker, supra, and 43 CFR 2801.1-2.

We have considered the briefs filed by the parties pursuant to our order of March 12, 1974. Nothing contained in the briefs vitiates our conclusion that the issuance of a permit for a privately owned transmission line right-of-way by the Forest Service does not segregate or withdraw the land covered thereby from the operation of the mining laws. Southern Idaho Conf. Ass'n. of 7th Day Adv. v. United States, 418 F. 2d 411 (9th Cir. 1969), is not to the contrary; a material site granted under 23 U.S.C.

§ 317 (1970) is clearly an appropriation of the land. That is so by reason of the specific language of the Federal Aid Highway Act, apart from any other considerations which may be pertinent.

^{2/} 43 CFR § 2344.2 General determination under section 24:

"(a) On April 17, 1922, the Federal Power Commission made a general determination "that where lands of the United States have heretofore been, or hereafter may be, reserved or classified as powersites, such reservation or classification being made solely because such lands are either occupied by power transmission lines or their occupancy and use for such purposes has been applied for or authorized under appropriate laws of the United States, and such lands have otherwise no value for power purposes, and are not occupied in trespass, the commission determines that the value of such lands so reserved or classified or so applied for or authorized, will not be injured or destroyed for the purposes of power development by location, entry or selection under the public land laws, subject to the reservation of section 24 of the Federal Water Power Act."

No authority has been cited for the application of Forest Service Manual sec. 2811.25 to the factual situation herein. General withdrawal authority is delegated to the Secretary of the Interior. 43 U.S.C. §§ 141-42 (1970); Executive Order No. 10355, 17 F.R. 4831. Since the private use of Arizona Public Service is not a use by the United States within the ambit of 44 L.D. 359 or 44 L.D. 513, the permit does not, by virtue of the 44 L.D. doctrines, serve to withdraw the land from the operation of the mining laws. The mining claims are not invalid for the reasons assigned by the Bureau of Land Management or by reason of the lands being affected by a transmission line right-of-way granted under the 1901 Act.

Therefore, pursuant to the authority delegated by the Secretary, to the Board of Land Appeals, 43 CFR 4.1, contestant's motion for dismissal of the appeal is denied and the decision below is vacated.

Frederick Fishman
Administrative Judge

I concur:

Joseph W. Goss
Administrative Judge

ADMINISTRATIVE JUDGE STUEBING CONCURRING IN PART; DISSENTING IN PART:

I agree absolutely with the holding in the majority opinion. The Forest Service cannot withdraw public domain lands from the operation of the Federal laws relating to the use and disposition of such lands by issuing a special use permit to a non-federal applicant, save only where a statute specifically provides that a permit will have such effect. In the absence of a formal withdrawal, the extent of an appropriation of lands by the Government for a valid federal use is determined by the extent of the improvements and actual use and occupancy of the land for such purposes. A. J. Katches, A-29079 (December 4, 1962) and cases cited therein; cf. Instructions, 44 L.D. 513 (1916); see also Rights of Way – Forest Reserves – Jurisdiction, 33 L.D. 609 (1905). The Secretary of Agriculture is not expressly or impliedly authorized to withdraw unimproved national forest land from mining location. United States v. Crocker, 60 I.D. 285 (1949).

The purpose of this separate concurrence is not only to emphasize my agreement with the majority view regarding the non-segregative effect of a special use permit issued by the Forest Service under these circumstances, but also to further explore the authority by which this Board may review a case on appeal despite a serious procedural deficiency.

The case has not been properly brought before us, having been presented by one who is not authorized to practice. Qualifications to practice before the Department of the Interior are prescribed by 43 CFR Part 1. One who does not appear to fall within any of the categories of persons authorized to practice does not become so qualified merely because he is designated "attorney in fact" for the appellant, and an appeal brought by one not eligible to practice is subject to dismissal. Henry H. Ledger, 13 IBLA 356 (1973). The appeal is therefore subject to dismissal. The majority find that it is nevertheless within the scope of its authority to disregard the procedural deficiency and consider the matter on its merits, noting that dismissal for this reason is not mandatory. I agree. However, the Board has no inherent authority of its own. It exercises only the delegated authority of the Secretary of the Interior, and unless the Secretary has authority to consider such an appeal on its merits and has delegated that authority to this Board, the appeal must be dismissed.

However, it has been held repeatedly that as long as public lands remain under the care and control of the Department its power to inquire into the extent and validity of rights claimed against

the Government and to correct its own errors does not cease. George L. Ramsey, 58 I.D. 272, 304 (1943), and cases cited therein. In Knight v. United States Land Ass'n, 142 U.S. 161, 181 (1891), the United States Supreme Court held:

It makes no difference whether the appeal is in regular form according to the established rules of the Department, or whether the Secretary on his own motion, knowing that injustice is about to be done by some action of the Commissioner, takes up the case and disposes of it in accordance with law and justice.

In Pueblo of San Francisco, 5 L.D. 483, 494, (1887), Secretary Lamar stated:

The statutes in placing the whole business of the Department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul or affirm all proceedings in the Department having for their ultimate object to secure the alienation of any portion of the public lands, or the adjustment of private claims to lands, with a just regard to the rights of the public and of private parties. Such supervision may be exercised by direct orders or by review on appeals. The mode in which the supervision shall be exercised in the absence of statutory direction may be prescribed by such rules and regulations as the Secretary may adopt. When proceedings affecting titles to lands are before the Department the power of supervision may be exercised by the Secretary, whether these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designed to facilitate the Department in the dispatch of business, not to defeat the supervision of the Secretary.

Clearly the Secretary has authority to consider and decide a case in which there is a defective appeal. This brings to the foreground the question whether this Board also has that authority.

The regulation, 43 CFR 4.1, provides in part:

§ 4.1 Scope of authority; applicable regulations.

The Office of Hearings and Appeals, headed by a Director, is an authorized representative of the Secretary for the purpose of hearing,

considering and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department involving hearings, and appeals and other review functions of the Secretary.

* * * * *

Board of Land Appeals. The Board decides finally for the Department appeals to the head of the Department from decisions rendered by Departmental officials relating to the use and disposition of public lands and their resources and the use and disposition of mineral resources in certain acquired lands of the United States and in the submerged lands of the Outer Continental Shelf. Special procedures for hearings, appeals and contests in public lands cases are contained in Subpart E of this part.

Since the Office of Hearings and Appeals has authority to hear, consider and determine "as fully and finally as might the Secretary, matters within the jurisdiction of the Department" involving public land matters, inter alia, and that specific function (as to public land matters) is vested in this Board, we may consider an appeal on its merits, despite procedural deficiencies, where sufficient reason for so doing is apparent and dismissal is not required by regulation.

The case at bar involves a fundamental misconception of land status on the part of a field official of the Bureau of Land Management. To avoid an unjust result in this instance and to prevent the perpetuation and repetition of the error in future cases, it is entirely appropriate that we review and decide the matter on its merits. This action in no way obligates us to accord similar consideration to other cases involving the same kind of procedural deficiency. Such cases continue to be subject to dismissal.

Edward W. Stuebing
Administrative Judge

