

TREVA L. BERGER

IBLA 77-232

Decided August 19, 1977

Appeal from decision of the Chief, Land and Minerals Operations, Nevada State Office, Bureau of Land Management (BLM), declaring placer mining claim null and void in part ab initio.

Affirmed.

1. Mining Claims: Lands Subject to--Mining Claims:  
Withdrawn Land--Withdrawals and Reservations: Generally

A mining claim located before August 11, 1955, on land within an existing highway material site withdrawal is properly declared null and void as the land was then closed to mineral entry. Void claims located prior to that date were not given life by the Mining Claims Rights Restoration Act of 1955.

2. Administrative Authority: Generally--Bureau of Land Management--Federal Land Policy and Management Act of 1976--Public Lands: Leases and Permits--Regulations: Generally--Secretary of the Interior

Until such time as the Department promulgates regulations, policy guidelines or criteria implementing section 302 of the Federal Land Policy and Management Act of 1976, the Bureau of Land Management may properly defer action on the proposed creation of an estate in federal land thereunder.

APPEARANCES: C. E. Horton, Esq., Ely, Nevada, for appellant.

## OPINION BY ADMINISTRATIVE JUDGE STUEBING

Treva L. Berger (appellant) appeals from the February 10, 1977, decision of the Nevada State Office, Bureau of Land Management, declaring her placer mining claim null and void ab initio in part because part of the lands included in the claim had been withdrawn from mineral location and entry prior to its location. The record indicates that this placer mining claim was originally located on June 12, 1942, and recorded on August 6, 1942, by one John Popish. By a series of transfers of this claim, known as the "Spring Hill" placer mining claim, appellant came into possession of it. However, on October 15, 1940, prior to the location of this claim, part of the land included in it was withdrawn from mineral location and entry by Highway Material Site CC-020739, which was granted to the State of Nevada pursuant to section 17 of the Federal Highway Act of 1921 (42 Stat. 212), 23 U.S.C. § 317 (1970). This action effectively withdrew the land from entry and location under the general mining law. See A. W. Schunk, 16 IBLA 191, 194; 81 I.D. 401, 403 (1974); Carl M. Shearer, A-30838 (Dec. 21, 1976).

[1] Mining claims located on land which is closed to mineral entry are null and void from their inception. United States v. Consolidated Mines & Smelting Co., Ltd., 455 F.2d 432, 444 (9th Cir. 1971); David Loring Gamble, 26 IBLA 249 (1976); John Boyd Parsons, 22 IBLA 328 (1975); Albert Gardini, A-30958 (October 16, 1968); Leo J. Kottas, 73 I.D. 123 (1966), aff'd sub nom., Lutzenhiser v. Udall, 432 F.2d 328 (9th Cir. 1970).

Accordingly, since the record shows that, at the time of the location of this mining claim, part of the land included therein was within highway material site CC-020739 and, therefore, was not open to mining location, we hold that the BLM properly declared the claim null and void ab initio as to this part.

[2] In a report prepared by the Ely District Office of the BLM, and in a letter dated November 19, 1976, from the State Office to Senator Cannon, it is suggested that the District Office will consider offering appellant a lifetime or 20-year lease on this property, under the authority of section 302 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732 ( Supp. 197). The opinion subsequently issued by the BLM does not address this suggestion, and appellant, in her statement of reasons, asserts that this decision should be modified and amended to include a lifetime lease to appellant for this land.

The issuance of the decision by the BLM without including such a lifetime or 20-year lease in this property was proper. At the

present time, no regulations have been promulgated by the Secretary implementing section 302 of FLPMA, nor has there yet been formulated any policy guidelines or criteria for the implementation of this provision of the law. See Frank Meluzzo, 72 I.D. 21 (1965). Moreover, it does not appear that appellant has filed an application for a life estate or 20-year lease with the Nevada State Office. The issue of the validity of the mining claim is a completely separate and independent matter, and the BLM is correct in so treating it.

This decision is without prejudice to appellant's applying for or being granted lease under section 302 of FLPMA.

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 affirmed.

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Edward W. Stuebing  
Administrative Judge

I concur:

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Newton Frishberg  
Chief Administrative Judge

## ADMINISTRATIVE JUDGE GOSS CONCURRING:

I concur in the result. As to the possibility of a long term lease, that issue is not before the Board. So far as the record shows, application therefor has not been made; there has been no denial thereof. As to the authority of the Bureau of Land Management to issue such a lease, the Bureau has not been given an opportunity to respond to the proposition that it lacks authority. Neither does the record show whether policy guidelines or criteria have been issued for implementation of Section 302 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 43 U.S.C. § 1732 (1976). While I do not believe the Board should take a position on this matter unless it comes before the Board on appeal, I am inclined to question whether there is any statutory requirement for written implementing guidelines or criteria. Section 310 of the Act, 43 U.S.C. § 1740 (1976), provides:

The Secretary, with respect to the public lands, shall promulgate rules and regulations to carry out the purposes of this Act and of other laws applicable to the public lands, and the Secretary of Agriculture, with respect to lands within the National Forest System, shall promulgate rules and regulations to carry out the purposes of this Act. The promulgation of such rules and regulations shall be governed by the provisions of chapter 5 of title 5 of the United States Code, without regard to section 553(a)(2). Prior to the promulgation of such rules and regulations, such lands shall be administered under existing rules and regulations concerning such lands to the extent practical.

In S. Rep. No. 94-583, 94th Cong., 1st Sess. 40 (1975), it is stated that "to the extent practical" the routine administration of public lands was not to be interrupted during the considerable time required to promulgate new regulations.

Section 4 [renumbered Sec. 310].

This section authorizes the Secretary to promulgate rules and regulations in accordance with the Administrative Procedure Act (5 U.S.C. 553).

As the procedures for promulgation of rules and regulations will take time to complete; this section provides that the national resource lands will be administered under existing rules and regulations until the new ones take effect.

Further, Section 504(g) of the Act expressly provides that rights-of-way may be granted without implementing regulations. See also Carver, Federal Land Policy and Management Act of 1976, Rocky Mtn. Min. L. Newsltr, October 1976, at 5.

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Joseph W. Goss  
Administrative Judge