

JAMES H. COSGROVE

IBLA 82-208

Decided February 17, 1982

Appeal from decision of the California State Office, Bureau of Land Management, declaring a placer mining claim null and void in part. CA MC 96230.

Affirmed.

1. Act of August 11, 1955--Mining Claims Rights Restoration
Act--Mining Claims: Withdrawn Land--Powersite
Lands--Withdrawals and Reservations: Powersites

Lands covered by a preliminary permit of a prospective licensee for a power project, which was issued by the Federal Energy Regulatory Commission and is in its initial term, are not open to mineral location. A mining claim located on such lands is void ab initio unless the land has been restored to such entry in accordance with sec. 24 of the Federal Power Act, 16 U.S.C. § 818 (1976).

APPEARANCES: James H. Cosgrove, pro se.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

James H. Cosgrove, for himself and colocators Ronald L. Johnston and Philip L. Blair, has appealed the decision of the California State Office, Bureau of Land Management (BLM), dated November 10, 1981, declaring the American Rock placer mining claim, CA MC 96230, null and void ab initio to the extent that it was located on lands withdrawn from mineral location. 1/

The BLM decision states in part:

A current report from the Federal Energy Regulatory Commission indicates portions of the subject land are withdrawn pursuant

1/ The BLM decision also declared the Nocando and Heritage placer mining claims, CA MC 96231 and CA MC 96232, null and void ab initio in their entirety. Appellant is not appealing the decision as to these claims.

to the filings of Joseph M. Keating on July 15, 1980, for the proposed Rock Creek Project, FERC No. 3189, and lies within the project boundary as outlined in preliminary permit issued December 11, 1980. The report further states that those lands lying within the project boundary, as delimited on map Exhibit No. 4 are not open to mineral location. The land involved is portions of Lots 1, 2, 3, 4, S 1/2 NE 1/4 NW 1/4 NW 1/4, E 1/2 SW 1/4 NW 1/4 NW 1/4, SE 1/4 NW 1/4 NW 1/4, and SW 1/4 NW 1/4 of Sec. 20.

On September 16, 1981, appellant filed a copy of the notice of location for the American Rock claim pursuant to the provisions of the Federal Land Policy and Management Act, 43 U.S.C. § 1744 (1976), and the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1976). The claim was located on July 28, 1981, and encompasses lots 2 and 3 (or approximately the S 1/2 SW 1/4), T. 11 N., R. 11 E., Mount Diablo meridian, El Dorado County, California.

In his statement of reasons, appellant explains that before proceeding to prospect the land in question and to locate the American River mining claim, he made a diligent search of all public records in order to learn the status of the lands. As a result of his investigation of county and BLM records, he believed the land to be open to mineral location under the Mining Claims Rights Restoration Act of 1955. After filing his notice of location, he ceased all mining operations as required by section 2(b) of that Act, 30 U.S.C. § 621(b) (1976) and 43 CFR 3736.1 for a 60-day period. Upon notice that the claim was being declared null and void ab initio in part as a result of the preliminary permit issued to Joseph Keating for the proposed Rock Creek Project, FERC No. 3189, he inquired further about the project and learned that if it was brought to license the project would require only a 50-foot right-of-way around the facilities, not the 140 acres established in the preliminary permit application. He then contacted Keating requesting that he modify the project map but Keating refused. His specific arguments on appeal are as follows:

- 1.) the area withdrawn by Mr. Keating's FERC 3189 project during the preliminary permit stage is excessive and does not reflect the actual land impacted if he were to be granted a license. Returning the claim boundaries to their original status would have absolutely no adverse impact on Mr. Keating's project as it would operate in the license stage.

- 2.) it appears that by allowing the preliminary permit as it exists to preempt lands that have the potential of providing a valuable mineral, the Bureau of Land Management is going contrary to their philosophy of multiple use for public lands.

3.) as affairs currently exist, the FERC project 3189 severs the claim forcing the refile of two separate and distinct claims increasing the annual assessment work required from \$100 to \$200 dollars.

Appellant also requests that if the Board denies his appeal, the Board rule whether he would have a prior right to claim the land when it is again opened to mineral location.

Section 2(a) of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621(a), provides:

(a) 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, That all power rights to such lands shall be retained by the United States: * * * And 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.

Examination of the report from the Federal Energy Regulatory Commission confirms that those lands at issue herein were subject to preliminary permit FERC No. 3189 issued for a 12-month term on December 11, 1980, and therefore were not open to mineral location pursuant to the final proviso of section 2(a) on the location date of the American Rock placer mining claim, July 28, 1981.

[1] Lands which are covered by a license relating to a power project or a preliminary permit as prescribed by 30 U.S.C. § 621(a) (1976) and issued by the Federal Energy Regulatory Commission are not open to mineral location and any mining claim located on such land is void ab initio unless that land has been restored to such entry in accordance with section 24 of the Federal Power Act, 16 U.S.C. § 818 (1976). 2/ Lairy D.

2/ 16 U.S.C. § 818 (1976) reads in part:

"Any lands of the United States included in any proposed project under the provisions of this subchapter shall from the date of filing of

Brookshire, 56 IBLA 73 (1981); Robert A. Pettigrew, 54 IBLA 257 (1981); Harold M. Voris, 48 IBLA 206 (1980). The fact that the permittee may not use all of the lands encompassed in his permit has no bearing on this ruling.

The record does not allow us to speculate as to whether appellant's claim would be null and void ab initio if located today. What is certain is that BLM's decision was correct as to the location of the claim during the term of the permit. A mining claim located on land which was not subject to mineral entry at the time of location is null and void from its inception and confers no rights on the locator. W. R. and Margaret W. Collier, 39 IBLA 81 (1979). If circumstances have changed appellant may wish to relocate the claim. He should consult with BLM about the possibility of such relocation.

fn. 2 (continued)

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. Whenever the Commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public-land laws, the Secretary of the Interior, upon notice of such determination shall declare such lands open to location, entry, or selection, for such purpose or purposes and under such restrictions as the Commission may determine, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the Commission, for the purposes of this subchapter, which right shall be expressly reserved in every patent issued for such lands, and no claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes. * * * Provided further, That before any lands applied for, or heretofore or hereafter reserved, or classified as power sites, are declared open to location, entry, or selection by the Secretary of the Interior, notice of intention to make such declaration shall be given to the Governor of the State within which such lands are located, and such State shall have ninety days from the date of such notice within which to file, under any statute or regulation applicable thereto, an application for the reservation to the State, or any political subdivision thereof, of any lands required as a right-of-way for a public highway or as a source of materials for the construction and maintenance of such highways, and a copy of such application shall be filed with the [Federal Energy Regulatory Commission]; and any location, entry, or selection of such a lands, or subsequent patent thereof, shall be subject to any rights granted the State pursuant to such application."

See 43 CFR Subpart 2320 (46 FR 5794, Jan. 19, 1981).

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 California State Office is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

