

Appeal from a decision of Administrative Law Judge E. Kendall Clarke holding that placer mining operations on lands within a power withdrawal would substantially interfere with other uses of the lands. CA MC 46411.

Affirmed.

1. Evidence: Burden of Proof -- Evidence: Presumptions

There is a legal presumption, which is rebuttable, that official acts of public officers are regular. Where one disputes the accuracy of public land surveys made by public officials, it is his responsibility to show that they are, in fact, incorrect. Mere allegations that the surveys may be incorrect are insufficient to rebut the presumption.

2. Mining Claims: Powersite Lands -- Mining Claims: Surface Uses -- Mining Claims Rights Restoration Act

Under the Mining Claims Rights Restoration Act of 1955, it is proper to prohibit all placer mining operations on a group of mining claims on land withdrawn for power development or power sites where unrestricted placer mining on such land would result in substantial interference with the use of the land for timber harvesting or recreational purposes.

3. Mining Claims: Powersite Lands -- Mining Claims: Surface Uses -- Mining Claims Rights Restoration Act

The Mining Claims Rights Restoration Act of 1955 gives the Secretary of the Interior no discretion to permit limited

or restricted placer mining on land withdrawn or reserved for power development or power sites. The Secretary may permit either unrestricted placer mining or none at all. The only condition which he may impose on permission to mine is that the locator must restore the surface of the claim to its condition immediately prior to mining operations.

APPEARANCES: Robert E. Ehrman, Jr., pro se; Judy V. Davidoff, Esq., Office of General Counsel, U.S. Department of Agriculture, San Francisco, California.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Robert E. Ehrman, Jr., appeals from a decision of Administrative Law Judge E. Kendall Clarke, dated August 6, 1982, holding that placer mining operations on lands within a power withdrawal would substantially interfere with other uses of the lands. Judge Clarke's decision was issued following a hearing held September 2, and continued December 16, 1981, pursuant to the Mining Claims Rights Restoration Act of 1955 (Mining Restoration Act, or Act) 30 U.S.C. §§ 621-625 (1976). The claim at issue, the Coquette Creek placer mining claim, was located on June 12, 1962, according to the location notice filed with the Bureau of Land Management on October 20, 1980. ^{1/} The claim, through which the Coquette Creek flows, is located within an area withdrawn under Power Project 249 of September 14, 1921, and within the Plumas National Forest.

[1] In the September 2, 1981, hearing, appellant challenged the evidence that placed his claim within the power withdrawal. There was considerable confusion as a result of appellant's failure to describe his claim by legal subdivision in conformity with the official survey system. The hearing was adjourned pending a Forest Service survey of the claim's boundaries. When the hearing was reconvened on December 16, 1981, the Forest Service presented evidence to establish that the claim is totally within the power withdrawal. Appellant did not offer any rebuttal evidence and Judge Clarke accepted the conclusion of the survey.

^{1/} Appellant asserts that this claim dates back to the 1930's and that the 1962 location date is a result of the Forest Service's "slipshod methods." It is the obligation of the mining claimant, not the Government, to file the correct documents necessary to locate a mining claim on Federal lands. Even if the claim was located in the 1930's, as appellant argues, it would be void without the need for a hearing or any other administrative consideration. A mining claim located prior to Aug. 11, 1955, on lands withdrawn for power development or powersite purposes is null and void ab initio. The passage of the Mining Restoration Act did not give life to void claims which had been located on withdrawn lands prior to the date of the Act. John C. Farrell, 55 IBLA 42 (1981). Appellant's claim is within a power withdrawal created on Sept. 14, 1921. To establish a reviewable claim on a power withdrawal, a location after Aug. 11, 1955, is necessary.

In his statement of reasons, appellant questions the accuracy of not just the Forest Service survey accepted by Judge Clarke, but all the surveys involved in the determination. Without evidence to the contrary, his assertion is without merit. There is a legal presumption, which is rebuttable that official acts of public officers are regular. Victor Hegsted, 66 IBLA 31, 32 (1982). Based on appellant's lack of opposing evidence, the only conclusion this Board can reach is that the surveys used were accurate and dispositive of the fact that appellant's claim is wholly within the power withdrawal. Where an appellant disputes the accuracy of land surveys, it is his responsibility to show that they are, in fact, incorrect. Mere allegations that public surveys may be incorrect are insufficient to rebut the presumption.

[2] The notice of location bears the inscription "PL-359," a reference to the Mining Restoration Act, supra. The Act provides for location of mining claims on lands withdrawn for power development or power sites. The Act requires any person who locates a mining claim on such lands after August 11, 1955, to file a copy of the notice of location in the district land office within 60 days of location. 30 U.S.C. § 623 (1976). A person who files a placer mining claim may not conduct mining operations on the claim within 60 days after filing with BLM in order to give the Secretary the opportunity to decide whether a hearing should be held on the question of "whether placer mining operations would substantially interfere with other uses of the land included within the placer claim." 30 U.S.C. § 621(b) (1976). If the Secretary decides to hold a hearing, mining operations on the claim must be suspended until the hearing has been held and an appropriate order issued which

shall provide for one of the following: (1) a complete prohibition of placer mining; (2) a permission to engage in placer mining upon the condition that the locator shall, following placer operations, restore the surface of the claim to the condition in which it was immediately prior to these operations; or (3) a general permission to engage in placer mining.

30 U.S.C. § 621(b) (1976). See also 43 CFR Subpart 3730.

At the December hearing, the Forest Service's expert witness testified that placer mining activities would interfere with a proposed timber harvest in the area scheduled for 1987 (Tr. 35-41). Furthermore, recreational activities would be diminished (Tr. 41-42). Testimony was also presented that large-scale unrestricted placer mining activity could damage a Forest Service road (Tr. 33-35), a culvert, and a fish passage check dam (Tr. 44), all built at considerable expense, and a the riparian vegetation, reducing both critical water temperature and water quality (Tr. 43-46).

Appellant repeatedly denies that his small mining operation would substantially interfere with other uses of the land. He also argues that Judge Clarke erred in considering the use of the land for other activities

when it was withdrawn for powersite purposes and that the real issue is whether placer mining will substantially interfere with the land for powersite development. He contends that the Forest Service, in considering those other uses, has displayed to his detriment a bias in favor of the timber industry.

We note that while the subject lands are withdrawn for powersites or power development, the phrase "other uses of the land included within the placer claim" in section 621(b) of the Mining Restoration Act is not restricted to such uses. Although the Mining Restoration Act applies by its terms to land within powersite or power development withdrawals, all uses of the land are to be considered in determining whether placer mining operations will substantially interfere with the use of the land. United States v. Cohan, 70 I.D. 178, 179 (1963). In fact, many previous decisions considering whether to prohibit placer claims on powersite classifications have been concerned with uses other than powersites or power development. United States v. Pettigrew, 54 IBLA 149, 88 I.D. 453 (1981) (use of the adjoining river for rafting activities); United States v. Steward, 54 IBLA 67 (1981) (use of the land for timber harvests and recreational activities); United States v. Weigel, 26 IBLA 183 (1976) (use of the land and river as breeding area for game fish and animals); United States v. Western Minerals & Petroleum, Inc., 12 IBLA 328 (1973) (use of the land for watershed). On the basis of the language of section 621(b) and the Departmental decisions which interpret it, it must be concluded that the "other uses" to which that section refers are not restricted to power development or powersites. Therefore, placer mining which would substantially interfere with timber harvesting or recreational use of the withdrawn land is properly prohibited.

[3] We agree with Judge Clarke's decision that mining activities on the subject claim would substantially interfere with timber harvesting and recreational uses of the lands. In so doing, we do not necessarily reject appellant's assertions that his personal mining operation would not interfere with other uses of the land. Assuming, arguendo, that the claimant is correct in this respect, the issue before us is not whether appellant's mining operations would substantially interfere with other uses of the land, but rather whether normal placer operations carried on without restriction would so interfere. United States v. Weigel, supra at 186. The Mining Restoration Act, allows the Department only three alternative courses of action. As we have already noted, those three alternatives are: (1) To bar any placer mining activity; (2) to allow such mining activity without restriction; or (3) to allow placer mining with the restriction that the land be restored to its former condition after the cessation of mining.

The reason for this "all or nothing" approach with respect to placer mining on powersite or power development lands was explained in United States v. Bennewitz, 72 I.D. IBLA 183 (1965):

The statute permits the Secretary to act only once. He cannot issue an order not allowing unrestricted mining on the

basis of a one or two dredge operations and then, if additional dredges are added or larger ones are substituted or a totally different type of operation is adopted, issue an order prohibiting mining. He can act only once, either to permit or prohibit. Because his course of action is so limited, to avoid defeating the purpose of the act, he should be able to base his decision not only on what the claimant proposes to do but also on what the claimant or his successor may be able to do in the way of placer mining. 72 I.D. at 188.

Appellant argues that the present objection to the claim is barred because the Government has allowed it to exist for over 20 years where the Mining Restoration Act requires a challenge within 60 days of a filing for a mining claim located on a power withdrawal. His argument reflects a misunderstanding of the statute. 30 U.S.C. § 623 (1976) requires the owner of any unpatented mining claim located on a power withdrawal located after the Act to file within 60 days of location a copy of the notice of location in the United States district land office. Appellant's notice of location shows that it was filed with the Plumas County Recorder on June 19, 1962. However, a copy was not filed with BLM until October 20, 1980. ^{2/} On December 18, within 60 days of filing, appellant received a notice of the challenge to the claim. The alleged delay results from appellant's misinterpretation of the statute. The Government has allowed the opportunity for a hearing under the Act without a penalty for failure to timely file the notice of location.

Appellant also claims that Judge Clarke's failure to consider the continuing validity of the power withdrawal is a "fatal flaw" in the decision. As noted, the Department's review of appellant's location on land within a power withdrawal is limited to a determination of permitting or prohibiting placer mining. There is no authority that would allow evaluation of the "validity" of a power withdrawal without evidence that the official status of the withdrawal has been changed. The records show that the land remains subject to Power Project 249 of September 14, 1921.

We have studied the record and hearing transcripts and are impelled to the conclusion that Judge Clarke was correct in his determination that unrestricted placer mining on the withdrawn land would substantially interfere with other uses and that restoration of the surface cannot be accomplished without a long period of growth. In face of the potential detriment to other resource values, the only order that may be issued is to prohibit placer mining operations on the claim.

^{2/} This fact indicates a failure of timely compliance with the recordation requirements of 43 U.S.C. § 1744 (1976), in which event the claim would have to be conclusively deemed abandoned and void. However, that issue has not been raised in this case.

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.

Edward W. Stuebing
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Will A. Irwin
Administrative Judge