

GEORGE ANTUNOVICH
JOHN E. CURRAN

IBLA 83-798

Decided October 19, 1983

An appeal from a decision of the Nevada State Office, Bureau of Land Management, declaring mining claim N MC-35041 null and void ab initio.

Affirmed.

1. Mining Claims: Lands Subject to -- State Grants

Land which has been granted and approved to a state without a reservation of minerals to the United States is not available for the location of mining claims, and a mining claim located on such land after it is so conveyed is null and void ab initio.

2. Conveyances: Generally -- Mineral Lands: Determination of Character of

A conveyance for public lands carries with it an implied affirmation of every necessary prerequisite. After the Secretary of the Interior has decided that any particular land is not mineral in character and has approved conveyance thereof on that basis, the transfer of title is not vitiated by the subsequent discovery of minerals.

3. Mining Claims: Lands Subject to -- State Selections

The final approval of a list of state selected lands ended the Department's authority to resolve conflicting claims to those lands, including its authority to recognize the validity of mining claims situated thereon.

4. Conveyances: Generally -- State Grants

While the Secretary of the Interior may recommend appropriate judicial action to cancel a conveyance and regain title if the circumstances warrant, a stranger to any prior claim or interest has no standing to seek cancellation of a state grant.

APPEARANCES: John E. Curran, for Antunovich and Curran.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

George Antunovich and John E. Curran (Antunovich and Curran) appeal from a June 13, 1983, decision of the Nevada State Office, Bureau of Land Management (BLM), declaring mining claim N MC-35041 null and void ab initio.

George Antunovich located Gold Star mining claim, N MC-35041, on August 25, 1969, in the N 1/2 NW 1/4 of sec. 6, T. 16 N., R. 21 E., Mount Diablo meridian, Storey County, Nevada. His notice of location was recorded on August 29, 1969, and filed with BLM on October 16, 1978. Proofs of labor submitted for 1978 to 1982 list Jack Curran as part owner in this and adjacent claims located by Antunovich. In a notice dated June 13, 1983, concerning mining claim recordation, BLM informed Antunovich and Curran separately that, while those portions of their claims located on public lands were properly recorded, portions thereof were located on private lands not subject to mineral entry. ^{1/} In its decision, also dated June 13, 1983, BLM declared

^{1/} BLM's notice was issued in reference to the following mining claims: Blue Star N
 MC-35033

Morning Star	N MC-35034
Evening Star	N MC-35038
Western Star	N MC-35043
South Star	N MC-35044

null and void the Gold Star claim because it was located entirely on land transferred out of Federal ownership prior to location. After reviewing records for the land on which the Gold Star claim is located, BLM had determined that the W 1/2 of sec. 6, T. 16 N., R. 21 E., Mount Diablo meridian, was conveyed to the State of Nevada pursuant to the Acts of July 4, 1866, and June 8, 1868.

[1] Mining claims may be located only on lands open to the operation of the United States mining laws. The Mining Law of 1872, 30 U.S.C. § 22 (1976), stipulates: "Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase." (Emphasis added.) Land which has been conveyed to a state without a reservation of minerals to the United States is not available for the location of mining claims and a mining claim located on such land after it is so conveyed is null and void ab initio. Don P. Smith, 51 IBLA 71 (1980); John F. Drobnick, 41 IBLA 164 (1979). Notwithstanding their assertion that the land has been used for mining purposes for over 100 years, claimants' location in 1969 is the date which we must consider as controlling in a determination of when claimants

The private lands located upon which are not subject to mineral location were listed as: W 1/2 E 1/2, W 1/2 sec. 1, T. 16 N., R. 20 E., Mount Diablo meridian; those lands within MS 37, sec. 36, T. 17 N., R. 20 E., Mount Diablo meridian; W 1/2 sec. 6, T. 16 N., R. 21 E., Mount Diablo meridian. Although the BLM notice advised that the claims are "located on private land which is not subject to mineral location," there was no adjudicative holding by BLM that the claims are null and void, and no right of appeal was provided. Only the Gold Star claim was the subject of the formal decision declaring the claim void. Nevertheless, appellants have appealed the statements in the notice as well as the decision invalidating the Gold Star claim. Accordingly, we have limited our review to a consideration of the decision concerning the Gold Star claim, although we have addressed all of the allegations presented by appellants in support of their appeal.

may have gained an interest, if any, in the land located. 2/ Accordingly, since the land had been granted to the State of Nevada prior to their location efforts, BLM was without authority to recognize the claim.

This appeal is one wherein the conditions precedent to transfer of the land is questioned by those whose only claim to the land was initiated nearly 90 years after it was granted and approved pursuant to statute. Appellants argue that the subject parcel of public lands was transferred contrary to the intent of Congress to exclude from selection all lands mineral in character. They allege that the mineral character of the W 1/2 of sec. 6 was established prior to the grant by its continuous use for mining purposes and refer to "Various Patented Mining Claims over portions of the West one-half of Sec. 6." 3/ They seek revocation and annulment of the grant of the subject land to the State of Nevada.

2/ The fact mining work has been performed and claims located on certain land for many years does not, by itself, create any rights against the Government. Arthur W. Boone, 32 IBLA 305 (1977); Roy R. Cummins, 26 IBLA 223 (1976). Reliance upon an open status of land is unreasonable and, hence, estoppel will not lie where details of a withdrawal or conveyance were available upon inquiry. United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 447 (9th Cir. 1971). Failure of the Government to inform that lands located upon were closed to mining location cannot give life to invalid claims. William C. Reiman, 54 IBLA 103 (1981); Foster Mining and Engineering Co., 7 IBLA 299, 79 I.D. 599 (1972).

3/ Antunovich and Curran describe the "Patented Mining Claims" as follows: "MS 39 Knickerbocker Pat. June 21, 1870

MS 52 Frankel Pat. April 30, 1872

MS 41 & 69 Globe-Arizona Pat. April 22, 1875

MS 39 Knickerbocker

Baltimore Con. (American Flat & Maryland MCs)

Pat. December 21, 1880

MS 99 & 47 Ledge No. 2 Pat. June 25, 1884"

They list the latter claim, issued after the Secretary's approval, as evidence of the Department's inattention to its records. Title to public mineral lands could have been acquired pursuant to the Act of July 26, 1866, 14 Stat. 251, or the Act of May 10, 1872, 17 Stat. 91, 30 U.S.C. § 22 (1976).

[2] In the Act of July 4, 1866, 14 Stat. 85, titled "An Act Concerning Certain Lands Granted to the State of Nevada," Congress expressly granted lands to be selected by the State for specified school purposes. While section 5 of the Act excluded from selection lands "valuable for mines of gold, silver, quicksilver, or copper," in order to facilitate selection, section 6 temporarily segregated the public lands in the State from entry, sale, or location under any law of the United States except the Homestead Act.

The 1866 Act was added to by the Act of June 8, 1868, 15 Stat. 67, where Congress provided a method for selecting the lands granted. Section 2 of the Act reiterated the exclusion of "lands valuable for mines of gold, silver, quicksilver, or copper."

The W 1/2 of sec. 6 was listed as selected by the State on May 19, 1873, on List No. 4, which was approved by the Acting Secretary on October 16, 1882, "subject to any valid interfering rights which may have existed at the date of selection." No reservation of minerals was made because no mineral lands were available for selection. ^{4/} Ordinarily, where

^{4/} Appellants cite 43 U.S.C. § 869-1 (1976) as supporting their proposition that Congress intended that all lands valuable for minerals be excluded from entry. As originally enacted, the Recreation and Public Purposes Act expressly limited its applicability to "nonmineral" lands. See Act of June 14, 1926, 44 Stat. 741. However, by the Act of June 4, 1954, 68 Stat. 173, Congress removed the term "nonmineral" from the statute and added the proviso which is now found at 43 U.S.C. § 869-1 (1976): "Each patent or lease so issued shall contain a reservation to the United States of all mineral deposits in the lands conveyed or leased and of the right to mine and remove the same, under applicable laws and regulations to be established by the Secretary."

It was not until 1909 that Congress instituted a policy of separating the surface estate from the rights to the underlying minerals in statutes providing for conveyance of public lands. See United States v. Union Oil Company of California, 549 F.2d 1271, 1275 (9th Cir. 1977), cert. denied,

an act granting public lands excludes those known to be mineral mineral, the determination of the fact whether a particular tract is of that character rests with the Secretary of the Interior. The approval of the list of lands selected implies that all necessary prerequisites had been met. West v. Standard Oil Co., 278 U.S. 200, 211-12, 218-19 (1929). Indeed, the Department was obligated at that time to determine whether the land was mineral in character.

As a conveyance for public lands carries with it an implied affirmation of every fact made prerequisite, once title has transferred, no executive officer of the Government may reconsider those facts. See Lee E. Williamson, 48 IBLA 329 (1980); Solicitor's Opinion, M-36539 (Nov. 19, 1958). In response to the proposition that a subsequent discovery of minerals would alter the determination and, thus, vitiate the conveyance, the Supreme Court presented the following discussion and holding in Burke v. Southern Pacific R.R. Co., 234 U.S. 669 (1914):

But it is said that the Secretary of the Interior has no authority to patent mineral lands, and that a patent for lands, in fact mineral, would afford no protection to the railroad company in the event of the future discovery of precious metals therein. This is a mistake. After the Secretary of the Interior has decided that any particular lands are not mineral, and has issued a patent therefor, the title is not liable to be defeated by the subsequent discovery of minerals. * * *

434 U.S. 930 (1978). Prior to this presently accepted method of preserving Federal control over minerals, the Government sought to retain minerals by precluding from selection, as in the present case, lands known at that time to be mineral in character. The applicability of subsequent discovery of minerals on transferred lands previously determined nonmineral in character is discussed elsewhere in this opinion.

The point is also covered by the case of Davis v. Weibbold, 139 U.S. 507, where a patent was issued for a town site, and minerals were subsequently discovered in the lands patented. But it was held that the title was not affected by such discovery, and that the provision of the town-site act (Rev. Stat., § 2392) that "no title shall be acquired to any mine of gold, silver, cinnabar, or copper," does not apply where the mines were discovered after a patent has been issued.

Mr. Justice Field, delivering the opinion of the court, quotes with approval, at page 521, the following language of Judge Sawyer in Cowell v. Lammers [21 Fed. Rep. 200, 206]: "There must be some point of time when the character of the land must be finally determined, and, for the interest of all concerned, there can be no better point to determine this question than at the time of issuing the patent."

And again, at page 523, he quotes with approval the following language of Mr. Justice Lamar, while Secretary of the Interior [5 L.D. 194]: "The issue of said patent was a determination by the proper tribunal that the lands covered by the patent were granted to said company, and hence, under the proviso of said act, were not mineral at the date of the issuance of said patent."

And again, at page 524: "The grant or patent, when issued, would thus be held to carry with it the determination of the proper authorities that the land patented was not subject to the exception stated."

* * * But, barring cases of fraud, the issuing of a patent by the Secretary of the Interior to the railroad company gives it an absolute title, not liable to be defeated by the subsequent discovery of minerals.

* * * * *

The exclusion of mineral lands is not confined to railroad land grants, but appears in the homestead, desert-land, timber and stone, and other public-land laws, and the settled course of decision in respect of all of them has been the character of the land is a question for the Land Department, the same as are the qualifications of the applicant and his performance of the acts upon which the right to receive the title depends, and that when a patent issues it is to be taken, upon a collateral attack, as affording conclusive evidence of the non-mineral character of the land and of the regularity of the acts and proceedings resulting in its issue, and, upon a direct attack, as affording such presumptive evidence thereof as to require plain and convincing proof to overcome it. Smelting Co. v. Kemp, 104 U.S. 636, 641; Steel v. Smelting Co., 106 U.S. 447; Maxwell Land Grant Case, 121 U.S. 325, 379-381; Heath v. Wallace, 138 U.S. 573, 585;

Noble v. Union River Logging Railroad, 147 U.S. 165, 174; Burfenning v. Chicago, &c. Railway Co., 163 U.S. 321, 323. In this respect no distinction is recognized between patents issued under railroad land grants and those issued under other laws; nor is there any reason for such a distinction.

Id. at 687-89, 691-92.

[3] This board has repeatedly held that the effect of the issue of a patent for public land is to transfer the legal title from the United States and to remove from the jurisdiction of this Department the inquiry into and consideration of all disputed questions of fact, including the resolution of conflicting claims to the land. Hank Patterson, 71 IBLA 109 (1983); Harry J. Pike, 67 IBLA 100 (1982); Silver Spot Metals, Inc., 51 IBLA 212 (1980). See Germania Iron Co. v. United States, 165 U.S. 379, 383 (1897); Everett Elvin Tibbets, 61 I.D. 397, 399 (1954). By comparison, a grant by Congress to a state for the use of schools is also an absolute transfer, vesting title for a specific purpose. Alabama v. Schmidt, 232 U.S. 168 (1914); Utah v. Kleppe 586 F.2d 756 (10th Cir. 1978), rev'd on other grounds sub nom. Andrus v. Utah, 446 U.S. 500 (1980). If the granting act provides for other action by the Secretary equivalent to a patent, such as final approval of a list of the lands, the approval ends the jurisdiction of the Department. West v. Standard Oil Co., supra at 212. The approval of the list ("clearlisting"), like the issuance of a patent, ended the Department's authority to resolve conflicting claims to the transferred lands, including its authority to recognize the validity of mining claims situated on those lands.

[4] An allegedly improper conveyance ordinarily cannot be challenged or remedied by the Department after legal title has passed. However, the

Secretary may recommend appropriate judicial action to cancel the conveyance and regain title if the circumstances warrant. H. B. Baldwin, 37 IBLA 215 (1978). ^{5/} See Diamond Coal and Coke Co. v. United States, 233 U.S. 236 (1914). Accordingly, the only possible action left to the Department in this case is to consider whether it would merit a recommendation to the Attorney General that an action be commenced to nullify the conveyance.

Antunovich and Curran, in their statement of reasons, argue for revocation of the grant because "the legal rights of the claim holders were not upheld." In Burke v. Southern Pacific R.R. Co., supra, the court stated the following:

Of course, if the land officers are induced by false proofs to issue a patent for mineral lands under a non-mineral-land law, or if they issue such a patent fraudulently or through a mere inadvertence, a bill in equity, on the part of the Government, will lie to annul the patent and regain the title, or a mineral claimant who then had acquired such rights in the land as to entitle him to protection may maintain a bill to have the patentee declared a trustee for him; but such a patent is merely voidable, not void, and cannot be successfully attacked by strangers who had no interest in the land at the time the patent was issued and were not prejudiced by it. Colorado Coal & Iron Co. v. United States, 123 U.S. 307, 313; Diamond Coal Co. v. United States, 233 U.S. 236, 239; Germania Iron Co. v. United States, 165 U.S. 379; Duluth & Iron Range Railroad Co. v. Roy, 173 U.S.

^{5/} A suit to cancel a conveyance will generally be recommended only where (1) the Government has an interest in the remedy by reason of its interest in the land; (2) the interest of some party to whom the Government is under obligation has suffered by issue of the patent; (3) the duty of the Government to the people so requires; or (4) significant equitable considerations are involved. Id. at 219; Everett Elvin Tibbets, supra.

43 U.S.C. § 1166 (1976) provides that a suit to annul a patent shall be brought within 6 years. However, this statute of limitation does not apply to conveyances by an approval by the Department of a list of selections. 30 Op. Att'y. Gen. 572 (1916). Because of the disposition of this appeal, we need not discuss which limitations would apply to such a suit as contemplated by appellants' arguments.

587, 590; Hoofnagle v. Anderson, 7 Wheat. 212, 214-5. In the last case this court said, speaking through Chief Justice Marshall: "It is not doubted that a patent appropriates land. Any defects in the preliminary steps, which are required by law, are cured by the patent. It is a title from its date, and has always been held conclusive against all those whose rights did not commence previous to its emanation. . . . If the patent has been issued irregularly, the Government may provide means for repealing it; but no individual has a right to annul it, to consider the land as still vacant and to appropriate it to himself." Of the same import are Cooper v. Roberts, 18 How. 173, 182; Spencer v. Lapsley, 20 How. 264, 273; Ehrhardt v. Hogaboom, 115 U.S. 67, 68.

Id. at 692-93. It is well settled that a patent issued by the United States cannot be successfully attacked by strangers who are not able to show any interest in the land at the time the patent was issued and were not prejudiced by it. Putnam v. Ickes, 78 F.2d 223, 227 (D.C. Cir.), cert. denied, 296 U.S. 612 (1935).

As a grant for the benefit of schools also extinguishes legal title in the United States on appropriate records, nullifying subsequent entries and locations under the laws of the United States, claimants here have no standing to seek a cancellation of this grant. It is clear that they were not occupants of the land in question at the time it was selected and the selection list approved, nor have they asserted any preexisting superior title through which they may claim. The grant intended by Congress was completed according to statute well in advance of Antunovich and Curran's claim and, thus, it is beyond their power to question its validity. Moreover, even if the conveyance to the State was improper and subject to annulment, a subsequent restoration of the lands will not resuscitate an invalid claim. See, e.g., Arthur W. Boone, supra; Beverly Trull, 25 IBLA 157 (1976). A return of the land to United States ownership will avail them nothing.

Antunovich and Curran, strangers to the events and rights precedent to selection and approval of the subject land under the statutory grant and proponents of a collateral attack upon the determination of the mineral character of the land, clearly have no basis for pursuing an action to nullify the conveyance. Under these circumstances, we cannot recommend that any action be taken.

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:

R. W. Mullen
Administrative Judge

Gail M. Frazier
Administrative Judge

