

RONALD R. GRAHAM  
DOROTHY L. GRAHAM

IBLA 83-489

Decided November 17, 1983

Appeal from decision of Nevada State Office, Bureau of Land Management, declaring mining claims null and void ab initio. N MC-253818 through N MC-253820.

Affirmed.

1. Mining Claims: Lands Subject to--Public Lands: Classification--Recreation and Public Purposes Act--Segregation

Mining claims located on land which has been classified for lease or sale pursuant to the Recreation and Public Purposes Act, as amended, 43 U.S.C. §§ 869 to 869-4 (1976), and subsequently leased pursuant thereto, are properly declared null and void ab initio because the land was segregated from mineral entry, even where the lease contained a mineral reservation to the United States.

2. Appeals--Public Lands: Classification--Recreation and Public Purposes Act--Rules of Practice: Appeals: Generally

The Board of Land Appeals has no jurisdiction to hear an appeal by a mining claimant from a BLM decision classifying land for lease or sale pursuant to the Recreation and Public Purposes Act, as amended, 43 U.S.C. §§ 869 to 869-4 (1976), which has become a final order of the Secretary.

3. Mining Claims: Lands Subject to--Mining Claims: Relocation--Public Lands: Classification--Recreation and Public Purposes Act--Segregation

In order to establish that a notice of location of a mining claim is an amended location which relates back prior to a BLM decision which classified the land for lease or sale pursuant to the Recreation and Public

Purposes Act, as amended, 43 U.S.C. §§ 869 to 869-4 (1976), the mining claimant must submit proof of a chain of title to him. In the absence of such proof, the purported amendment must be treated as a relocation.

4. Mining Claims: Lands Subject to--Patents of Public Lands: Effect

Mining claims located on land patented without a mineral reservation to the United States are properly declared null and void ab initio.

APPEARANCES: James L. Wadsworth, Esq., Las Vegas, Nevada, for appellants.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Ronald R. and Dorothy L. Graham have appealed from a decision of the Nevada State Office, Bureau of Land Management (BLM), dated February 25, 1983, declaring the Crow #19 through Crow #21 mining claims, N MC-253818 through N MC-253820, null and void ab initio. 1/

On September 1, 1982, appellants and Ronald J. Jenson located three mining claims in the S 1/2 sec. 22 and the N 1/2 sec. 27, T. 28 S., R. 63 E., Mount Diablo meridian, Clark County, Nevada. In its February 1983 decision, BLM held that the land was closed to mineral entry on the date of location and declared the mining claims null and void ab initio. BLM relied on the fact that a "portion" of the lands was segregated from mineral entry "as of January 2, 1981" and subsequently subject to a lease issued on May 5, 1981, pursuant to the Act of June 14, 1926 (Recreation and Public Purposes Act), as amended, 43 U.S.C. §§ 869 to 869-4 (1976). In addition, the remaining portion of the land has been "transferred into private ownership."

In their statement of reasons for appeal (SOR) and a supplemental SOR, appellants contend that the Recreation and Public Purposes (R&PP) lease specifically reserved to the United States and "its permittees and licensees" the right to mine and remove minerals from the land, and that, in any case, mining operations are compatible with the purposes of the R&PP lease, i.e., "a community wellsite and roadside park area." Appellants also argue that they are "successors in interest" of mining claims located on the land prior to the January 1981 segregation, under the doctrine of pedis possessio (supplemental SOR at 4). Appellants further contend that the BLM decision constitutes an unconstitutional taking of property in violation of the due process clause of the Fifth Amendment of the United States Constitution. In addition, appellants argue that the land is not suited for public use because of the presence of 450,000 tons of mill tailings containing cyanide and a number of open or unfenced mine shafts and that the land is best suited for mining. Finally, appellants note that there is no record of any transfers of the land into private ownership "except for an area of less than three acres

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1/ No appeal was filed by or on behalf of Ronald J. Jenson, collocator of the mining claims. Accordingly, as to the interest of Ronald J. Jenson, the February 1983 BLM decision is final. State of Alaska, 70 IBLA 369 (1983).

in the S.W. corner of the southerly claim of the three claims" (supplemental SOR at 10).

The record, as supplemented upon request by the Board, 2/ indicates that 61.98 acres of land in the S 1/2 sec. 22 and the N 1/2 sec. 27, T. 28 S., R. 63 E., Mount Diablo meridian, Clark County, Nevada, was classified by BLM for lease or sale under the Recreation and Public Purposes Act, supra, and its implementing regulations, pursuant to an application to purchase/petition for classification (N-21747) filed by the Clark County Department of Public Works on January 24, 1979. The initial classification decision, dated December 9, 1980, stated that: "Upon notation of this classification on the Nevada State Office records, the land will be segregated from all other forms of appropriation under the public land laws and the mining and mineral leasing laws." The classification was noted on the public land records on January 2, 1981. See Letter to Clark County Department of Public Works from Acting Chief, Lands and Minerals Operations, BLM, dated July 13, 1981.

On May 5, 1981, a 5-year R&PP lease (N-21747) was issued to the Clark County Department of Public Works pursuant to section 2 of the Recreation and Public Purposes Act, as amended, 43 U.S.C. § 869-1 (1976), with respect to approximately 56 acres of land situated in the S 1/2 sec. 22 and the N 1/2 sec. 27, T. 28 S., R. 63 E., Mount Diablo meridian, Clark County, Nevada. In a March 27, 1981, decision offering the lease, BLM rescinded a prior decision offering an option to purchase, stating: "If at some future date the mining claim conflicts are resolved, we would then be in a position to offer Clark County an option to purchase the subject lands." The lease provides, in relevant part, as follows:

Sec. 2. There are reserved to the United States all mineral deposits in said lands, together with the right to mine and remove the same under applicable laws and regulations to be established by the Secretary of the Interior.

Sec. 3. The lessor reserves the right of entry, or use, by

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(c) the United States, its permittees and licensees, to mine and remove the mineral deposits referred to in Sec. 2, above.

[1] It is well established that a mining claim located on land segregated from mineral entry subject to a Recreation and Public Purposes Act classification is null and void ab initio. Gloria Ann Sandvik, 73 IBLA 82 (1983). The applicable regulation, 43 CFR 2741.4(h), provides, in relevant part, that: "The issuance of a notice that public lands are suitable for sale or lease under the act [(Recreation and Public Purposes Act)] and are classified as such shall segregate such public land from all other appropriations, including locations under the mining laws, except as provided

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2/ Consideration of this appeal necessitated review of the BLM case files for the Clarke County R&PP lease application and the M&R Nos. 1 through 3 lode mining claims.

in the notice of an amendment thereof." (Emphasis added.) <sup>3/</sup> In Gloria Ann Sandvik, *supra*, at page 85, we concluded that "in the absence of action by the proper authority to restore the land to entry, a recreation and public purpose classification segregates the land from appropriation under the public land laws, including the general mining laws." There is no evidence that action has been taken to restore the land to mineral entry.

Appellants contend that they were entitled to locate mining claims on the land covered by the notice of classification under the mineral reservation contained in the R&PP lease. The mineral reservation is made pursuant to language contained in section 2 of the Recreation and Public Purposes Act, *supra*. See also 43 CFR 2912.1-1(g). However, to permit the location of a mining claim on land classified for disposal under that Act would thwart the intent of Congress elsewhere expressed in section 1 of the Recreation and Public Purposes Act, as amended, 43 U.S.C. § 869 (1976), to the effect that: "Lands so classified may not be appropriated under any other public land law unless the Secretary revises such classification or authorizes the disposition of an interest in the lands under other applicable law." See R. C. Buch, 75 I.D. 140 (1968), *aff'd*, Buch v. Morton, 449 F.2d 600 (9th Cir. 1971).

[2] Appellants also argue that the initial classification decision was "improperly" made with respect to notification of the public and request by a public entity (SOR at 2). In addition, appellants argue that the land is not suited for public use and that an environmental impact statement (EIS) should have been prepared pursuant to section 102 of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332 (1976), "prior to classifying [the] land," in order to assess the adverse impact of the mill tailings and mine shafts. Finally, appellants argue that the land is best suited for mining and that mining should have been considered under the multiple use criteria enunciated in the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1784 (1976). See 43 U.S.C. § 1701(a)(12) (1976).

The Board of Land Appeals has no jurisdiction to hear appeals from BLM decisions classifying land. See 43 CFR 4.410(a)(1) and 2450.5(d). Under 43 CFR 2450.5, an initial classification decision of a State Director becomes a final order of the Secretary of the Interior if the Secretary, either on his own motion or that of any protestant, petitioner-applicant, or the State Director, has not exercised his supervisory authority to review the decision within 30 days from receipt by parties-in-interest. The Clark County R&PP lease application file does not reflect that the Secretary exercised his supervisory authority over the State Director's decision in this case. Accordingly, we cannot entertain those arguments by appellants directed at the propriety of the classification decision. Duella M. Adams, 70 IBLA 63 (1983).

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<sup>3/</sup> In addition, 43 CFR 2741.4(h) provides that: "If no application [for sale or lease under the Recreation and Public Purposes Act] is filed within 18 months after issuance of the notice, the segregation shall be automatically vacated and the public lands restored to their former status." (Emphasis added.) The record indicates that the lease application of the Clark County Department of Public Works was filed prior to issuance of the notice of classification.

[3] However, appellants argue that they are "successors in interest" to claims which predate the classification action (supplemental SOR at 4). These prior claims, known as the M&R No. 1 through M&R No. 3 lode mining claims, were located in 1961 and recorded with the Office of the Recorder, Clark County, Nevada, on November 13, 1961, by J. M. Reynolds and C. S. Myers. <sup>4/</sup> Appellants state that their actual possession of the land "commenced in 1979" (supplemental SOR at 2). <sup>5/</sup> Appellants also state that "there was not a deed or transfer" to them of an interest in the mining claims. Id. at 4. Rather, appellants explain that their interest arose as a result of "an informal agreement that the former owner [presumably C. S. Myers] would not complete the 1982 assessment and allow the appellants who were in possession to refile on the claims" (SOR at 2).

In R. Gail Tibbetts, 43 IBLA 210, 86 I.D. 538 (1979), we distinguished between a relocation of a prior claim, which is adverse to that claim, and an amended location of that claim, which is made in furtherance of the prior claim. In the latter case, an amended location relates back to the date of the original location in the absence of adverse intervening rights. It would, however, predate any intervening segregation of the land. R. J. Wall, 68 IBLA 122 (1982). However, in the former case, a relocation does not relate back.

The doctrine of relation back will only be invoked in the case of an amended location where the locator can establish a chain of title leading to him. As we said in Tibbetts v. BLM, 62 IBLA 124, 130 (1982): "Intrinsic to the right to amend a claim is the prerequisite that the amender have present title to the claim, for if such title is lacking, an individual is not claiming through a prior location, but rather is initiating a claim of right adverse to the original location." In such circumstances, the amended location will be treated as a relocation.

Proof of the transfer of a mining claim may consist of verbal agreements, which are contrary to the statute of frauds. R. Gail Tibbetts, supra. However, there must be proof of such agreements. In the present case, appellants expressly state that there was no transfer of the M&R Nos. 1 through 3 lode mining claims to them. Further, the nature of their "informal agreement" was such that those claims would be allowed to lapse and that they would "refile on the claims" (SOR at 2). <sup>6/</sup> Appellants' notices of location

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<sup>4/</sup> Appellants submit a copy of a judgment by the Eighth Judicial District Court, Clark County, Nevada, in Kelsey v. Reynolds, No. 117727 (Oct. 27, 1964), in which the court ordered the plaintiffs therein to convey an undivided one-third interest in certain mining claims to J. M. Reynolds, C. S. Myers, and Wayne Herrin, as cotenants. These mining claims had been relocated as the M&R Nos. 1 through 3 lode mining claims.

<sup>5/</sup> In support thereof, appellants submit a copy of evidence of annual assessment work for the 1981 assessment year, with respect to the M&R Nos. 1 through 3 lode mining claims. This document indicates that the assessment work was performed in part by Ronald Graham and that the owner of the claim at that time was Carl S. Myers.

<sup>6/</sup> The BLM case file with respect to the M&R Nos. 1 through 3 lode mining claims, N MC-81432 through N MC 81434, indicates that these claims were declared abandoned and void by BLM decision dated Feb. 18, 1983, for

are styled "Notice of Location - RE," with the prefix handwritten. Moreover, appellants have failed to provide any evidence with respect to the interests of J. M. Reynolds and Wayne Herrin in the prior claims. In the absence of evidence of transfer of the claims, we conclude that appellants' mining claims must be treated as relocations.

Appellants, however, assert that their rights in the mining claims, predating the withdrawal, arise under the doctrine of pedis possessio. As we said in United States v. Haskins, 59 IBLA 1, 53 n.36, 88 I.D. 925, 951 n.36 (1981), appeal filed, Haskins v. United States, Civ. No. 82-2112 CBM (JRX) (C.D. Calif. filed Apr. 30, 1982):

The doctrine of pedis possessio, as enunciated in Union Oil Company of California v. Smith, 249 U.S. 337 (1919), applies to pre-discovery claims and, in effect, provides that if a qualified person in good faith enters unappropriated public domain for the purpose of mineral exploration, such an individual will be protected against all intrusions so long as he remains in continuous, exclusive occupancy and diligently works towards making a discovery. See generally T. Fiske, Pedis Possessio -- Modern Use of an Old Concept, 15 Rocky Mt. Min. Law Inst. 181 (1969).

However, as appellants expressly recognize in their supplemental SOR at 7, in the case of a prospector who invokes the doctrine of pedis possessio: "While, as against the government, he is a mere tenant at will, the tenancy is accorded protection against forcible, fraudulent or clandestine intrusions upon possession by third parties seeking to make rival locations." (Emphasis added.) See Union Oil Company of California v. Smith, *supra*.

Accordingly, rights initiated under the doctrine of pedis possessio will not survive segregation of the land by BLM pursuant to a classification action. 7/

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fn. 6 (continued)

failure to file timely either evidence of annual assessment work or a notice of intention to hold the claims for the 1982 assessment year, pursuant section 314(a) of FLPMA, 43 U.S.C. § 1744(a) (1976), and 43 CFR 3833.2-1. No appeal was taken from the BLM decision.

7/ Mineral rights may also be established in the absence of location and recordation of mining claims under 30 U.S.C. § 38 (1976), where a person has "held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated." Proof of holding and working is "the legal equivalent of proofs of acts of location, recording and transfer," but does not obviate the need for compliance with other provisions of the mining laws, e.g., discovery of a valuable mineral deposit. Cole v. Ralph, 252 U.S. 286, 305 (1920). However, 30 U.S.C. § 38 (1976) may be invoked only where there has been no "adverse claim." In the present case, appellants' asserted mineral rights, predating the classification action, were adverse to the outstanding M&R Nos. 1 through 3 lode mining claims. Accordingly, appellants acquired no rights under 30 U.S.C. § 38 (1976) prior to segregation of the land. See United States v. Haskins, *supra*.

Appellants also argue that the February 1983 BLM decision constitutes an unconstitutional taking of property in violation of the due process clause of the Fifth Amendment to the United States Constitution. However, due process does not require notice and a right to a prior hearing in every case where a person is deprived of an asserted property right so long as the individual is given notice and an opportunity to be heard before the initial BLM decision, adverse to him, becomes final. Appeal to this Board satisfies the due process requirements. Philip A. Cramer, 74 IBLA 1 (1983), and cases cited therein. Moreover, where the BLM records show that land embraced by a mining claim was not open to mining location at the time of the attempted location, a hearing is not required to establish the invalidity of the claims. Sherman C. Smith, 58 IBLA 188, 190 (1981), and cases cited therein. 8/

[4] Finally, appellants argue that there is no record of any transfers of the land into private ownership "except for an area of less than three acres in the S.W. corner of the southerly claim of the three claims" (supplemental SOR at 10). However, this area is precisely the portion of appellants' mining claims referenced in the February 1983 BLM decision as having been transferred into private ownership. The record contains a copy of the supplemental master title plat for secs. 22, 25, and 27, T. 28 S., R. 63 E., Mount Diablo meridian, Clark County, Nevada, which indicates that this area is subject to mineral entry patents ("ME Pats"). Mining claims located on land patented without a mineral reservation to the United States are properly declared null and void ab initio. Nels Swanberg, 74 IBLA 249 (1983).

Accordingly, we conclude that BLM properly declared appellants' mining claims null and void ab initio.

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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Gail M. Frazier  
Administrative Judge

We concur:

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Franklin D. Arness  
Administrative Judge  
Alternate Member

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Anne Poindexter Lewis  
Administrative Judge

8/ Appellants also assert that BLM should be "estopped from denying their actions in originally recognizing the claims" (SOR at 2). We can find no basis for invoking the doctrine of equitable estoppel, especially where a crucial element is missing. Appellants cannot claim that they were ignorant of the true facts, i.e., that the land was not open to mineral entry at the time they located their claims, where this was a matter of public record. See United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970). Acceptance by BLM of appellants' notices of location for recordation, in accordance with section 314(b) of FLPMA, 43 U.S.C. § 1744(b) (1976), was not inconsistent with this fact.

