

Editor's note: Appealed -- aff'd, Civ.No. 84-643 (D. Ore. Jan. 10, 1986), 629 F.Supp. 877; aff'd in part, remanded in part, No. 86-3643 (9th Cir. Aug. 17, 1987), 825 F.2d 216; on remand D.Ct. dismissed action as barred by statute of limitations; aff'd No. 89-35577 (9th Cir. June 28, 1990), 906 F.2d 1362

SHINY ROCK MINING CORPORATION (ON RECONSIDERATION)

IBLA 83-428

Decided November 30, 1983

Petition for reconsideration of Shiny Rock Mining Corp., 75 IBLA 136 (1983).

Reconsideration granted, decision reaffirmed.

1. Administrative Practice--Board of Land Appeals--Rules of Practice: Appeals: Generally

Upon assuming jurisdiction of an appeal, the Board of Land Appeals has full authority to consider the entire record in making a decision; its review is not limited to the theories of law upon which the parties have proceeded.

2. Applications and Entries: Generally--Mining Claims: Lands Subject to--Mining Claims: Withdrawn Land--Mistakes--Words and Phrases

"Notation rule." Under the "notation rule" when the official records of the Bureau of Land Management have been noted to reflect the devotion of land to a particular use which is exclusive of other conflicting uses, no incompatible rights in that land can attach by reason of any subsequent application or entry until the record has been changed to reflect that the land is no longer so segregated. The rule generally applies even where the notation was posted to the records in error, or where the segregative use so noted is void, voidable, or has terminated or expired, so long as the records continue to reflect it as efficacious.

3. Administrative Procedure: Hearings--Constitutional Law: Due Process--Mining Claims: Generally--Mining Claims: Lands Subject to--Mining Claims: Withdrawn Land

Mining claims located on lands which are closed to mineral entry are null and void from their inception as a matter of law, and no property rights are created thereby. Therefore, no contest proceeding, notice, or hearing is required preliminary to a decision holding that such claims are invalid.

APPEARANCES: M. Craig Haase, Esq., Reno, Nevada, for appellant.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

By decision styled Shiny Rock Mining Corp., 75 IBLA 136 (1983), this Board affirmed the January 20, 1983, decision of the Oregon State Office, Bureau of Land Management (BLM), declaring a portion of the Mandalay lode mining claim, OR 18926, null and void ab initio and rejecting mineral patent application, OR 26755, as to those lands. In a letter dated September 7, 1983, to the Secretary of the Interior, appellant Shiny Rock Mining Corporation requested review of that decision on the grounds that the Board did not rule on the merits of its appeal but instead invoked the notation rule which "is either not applicable to the facts * * * or, if applicable, is unconstitutional." Appellant's letter has been considered a petition for reconsideration under 43 CFR 4.21(c) that is hereby granted so that we may address appellant's concerns.

Appellant complains that the notation rule was not briefed or brought to issue before the Board. Appellant argues that it has a property right to locate mining claims on public lands that are open to location, that an invalid withdrawal does not cease or terminate that property right and that the application of the notation rule to declare the Mandalay claim null and void ab initio deprives it of its property right without due process of law because it validates the unconstitutional actions of BLM, that is, the alleged failure of BLM to follow its regulations in withdrawing the land at issue.

[1] Initially we note that, upon assuming jurisdiction of an appeal, the Board of Land Appeals, as the authorized representative of the Secretary of the Interior, exercises his authority to consider the entire record when it makes a decision and its review is not limited to the theories of law upon which the parties have provided. 43 CFR 4.1; R. Jay Kidd, 66 IBLA 71 (1982); United States v. Elbert Gassaway, 43 IBLA 382 (1979).

[2] Appellant argues that the notation rule has its roots in Departmental regulations that permitted segregation of lands from entry upon application for segregation or withdrawal of the lands and that its purpose was to permit the Department to determine whether or not to grant the application without the possibility of intervening claims arising during the determinative process. Appellant directs attention to a 1957 regulation, 43 CFR 295.11. Appellant concludes that once a decision on the withdrawal was made, it had to stand on its own merits.

Although appellant has correctly identified a reason why an application is noted to the status records, that is, to segregate the lands during consideration of the application, the notation rule is not simply an expansion of that regulation. The genesis of the rule, as we have observed before and as explained in an enclosure to a letter dated April 20, 1964, to the United States Attorney, Salt Lake City, from Attorney General Clark re Jay P. Nielson v. J. E. Keogh, Civ. No. 158-63, is as follows:

[I]t was held long ago that when a homestead entry is made, even though erroneously, the land is considered as withdrawn from further entry until such time as the entry has been cleared from the records. Bunker Hill Co. v. United States, 226 U.S. 548, 550 (1913); McMichael v. Murphy, 197 U.S. 304, 310-312 (1905); Hodges v. Colcord, 193 U.S. 192, 194-196 (1904); Hastings etc. Railroad Co. v. Whitney, 132 U.S. 357, 360-366 (1889); Putman v. Ickes, 64 U.S. App. D.C. 339, 342, 78 F.2d 223, 226 (1935); Germania Iron Co. v. James, 89 Fed. 811, 814-817 (C.A. 8, 1898), app. dism. 195 U.S. 638.

Historically, then, no rights can be obtained in that part of the public domain which has been segregated by reason of a pre-existing appropriation -- even one subsequently found to be invalid. This same principle has long been applied by the Secretary to oil and gas leases. Within two years of the enactment of the Mineral Leasing Act, it was held in Martin Judge, 49 L.D. 171, 172 (1922) that "until an outstanding permit is canceled by the Commissioner and the notation of the cancellation made in the local office, no other person will be permitted to gain any right to a permit for the same class of deposits by the filing of an application therefor, or by the posting of notice of intention to apply for such a permit." None of the numerous amendments of the Act since 1922 has questioned the Martin Judge decision which has been uniformly followed by the Department of the Interior. Joyce A. Cabot, 63 I.D. 122-123 (1956); R. B. Whitaker, 63 I.D. 124, 126-128 (1956); Albert C. Massa, 63 I.D. 279, 286 (1956). [Emphasis added.]

See also Irvin D. Bird, Jr., 73 IBLA 210 (1983); Carmel J. McIntyre, 67 IBLA 317, 326-27 (1982); Paiute Oil and Gas Mining Corp., 67 IBLA 17, 20 (1982); John C. and Martha W. Thomas, d.b.a. Tungsten Mining Co. (On Reconsideration), 59 IBLA 364 (1981); Stephen Kenyon, 51 IBLA 368 (1980); State of Alaska, Kenneth D. Makepeace, 6 IBLA 58, 66-67, 79 I.D. 391, 397 (1972). The rule is not limited to just notation of an application for use. Rather, the rule is that whenever BLM records have been noted to reflect use of land that is exclusive of another conflicting use, no incompatible rights in the land can attach by reason of a subsequent entry, application, or use until the records have been changed to reflect the availability of the land for the desired use. As we said in our original decision in this case, it has long been recognized that the rule applies even where the segregative use is void or voidable. Joyce A. Cabot, supra, and cases cited.

Contrary to appellant's arguments, a change in the notation has long been required to eliminate the segregative effect of an application for withdrawal. It does not simply disappear once a determination on the application has been made. See 43 CFR 295.13(c) (1957). In any case the segregative effect of an application for withdrawal is not the issue here. A withdrawal, effected by Public Land Order (PLO) No. 3502 (29 FR 16862 (Dec. 9, 1964)), has been noted on BLM records for almost 19 years. Appellant did not locate

the Mandalay claim until July 17, 1979, when the records showed the lands at issue to be withdrawn. Even assuming arguendo that appellant's arguments concerning the issuance of PLO 3502 are correct, the lands were not open to the location of mining claims on that date under the longstanding practices of this Department, as confirmed by the above noted court decisions, because the records of the Department showed it to be closed to mining location.

[3] Although section 1 of the Act of May 10, 1872, 17 Stat. 91, as amended, 30 U.S.C. § 22 (1976), is expansive in scope, declaring that "all valuable mineral deposits in lands belonging to the United States * * * shall be free and open to exploration and purchase," it has long been recognized that the general mining law does not apply to all land "belonging to the United States." Rather, "only where the United States has indicated that the lands are held for disposal under the land laws does the section apply; and it never applies where the United States directs that the disposal be only under other laws." Oklahoma v. Texas, 258 U.S. 574, 600 (1922). Under the mining law, appellant has a right to enter and locate mining claims on public lands available for that purpose. No property rights are created by the location of mining claims on lands that are not open to mineral entry and location, and such claims are void as a matter of law. No contest proceeding or hearing is required to so hold. United States v. Consolidated Mines & Smelting Co., 455 F.2d 432 (9th Cir. 1971); Dredge Corp. v. Penny, 362 F.2d 889 (9th Cir. 1966); Lillian Barlow, 58 IBLA 385 (1981). See Lutzenhiser v. Udall, 432 F.2d 328 (9th Cir. 1970).

The only question that was necessary for this Board to decide in this appeal was whether the lands were available for location at the time the Mandalay claim was located in 1979. The answer was "No", and thus the claim was found to be null and void ab initio, because appellant located it at a time when BLM records reflected that the lands were withdrawn by PLO 3502, be it void or voidable. Even had the Board gone on to decide that PLO 3502 indeed had been improperly issued, such decision would not have had retroactive effect to open the land in 1979. That can only be done by a change in the notation on BLM status records. It was unnecessary for this Board to wholly resolve the status of PLO 3502 to answer the question raised by this appeal. See Ronald W. Ramm, 67 IBLA 32 (1982).

Although it was not necessary to do so (and contrary to the assertion in the petition for reconsideration that our original opinion "did not deal with any of the issues or facts applying to the withdrawal at issue,") we did examine many of the issues raised by appellant's statement of reasons, based on the materials appellant made available to us concerning PLO 3502 and our own research. See 75 IBLA 136 at 137-38. We found no cause for serious question of the legality of BLM's withdrawal. We have again reviewed the arguments in the statement of reasons point by point along with the relevant Federal Register notices and other materials and affirm that conclusion. If appellant believes that the withdrawal was defective or that more land was withdrawn than was needed for the purposes stated, it may wish to pursue whether

BLM would be willing to revoke or modify the withdrawal so that appellant may relocate the Mandalay claim after the land is open to entry and its status has been so noted on the status records. But appeal to this Board is not the means for accomplishing this end. R. M. Polk, 57 IBLA 117, 119 (1981); Harry H. Wilson, 35 IBLA 349, 359-60 (1978); J. P. Hinds, 25 IBLA 67, 72, 83 I.D. 275, 277 (1976).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, our decision Shiny Rock Mining Corp., 75 IBLA 136 (1983), is reaffirmed.

Will A. Irwin
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Douglas E. Henriques
Administrative Judge

