

LEE CHEMICALS

IBLA 84-1

Decided April 25, 1985

Appeal from a decision of the California State Office, Bureau of Land Management, dismissing a protest to inclusion of a reservation in mineral patent 04-81-0009.

Reversed and remanded.

1. Federal Land Policy and Management Act of 1976: Generally--
Federal Land Policy and Management Act of 1976: California Desert Conservation
Area--Statutory Construction: Generally--Statutory Construction: Legislative History

The language of sec. 601(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1781(f) (1982), was intended by Congress to have application to patents issued to mining claims which had been perfected after passage of the Act. A patent to a mining claim which had been perfected prior to passage of the Act should, therefore, not contain the restrictive language contemplated by sec. 601(f).

APPEARANCES: M. William Tilden, Esq., San Bernardino, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Lee Chemicals has appealed from a decision of the California State Office, Bureau of Land Management (BLM), dated August 17, 1983, which denied its protest to the inclusion of a reservation in mineral patent 04-81-0009. We reverse.

Lee Chemicals is the successor-in-interest to Levon Bardsley, Sarah L. Bardsley, Robert L. Bardsley, Roberta L. Bardsley, Marlene M. Bardsley, Roy Tull and Helen Tull with regard to four association placer mining claims which their predecessors-in-interest had located in April 1951. ^{1/} These claims, known as the Cadiz #48, #50, #55 and #57 placer mining claims, were

^{1/} Inasmuch as the rather complicated chain of title by which Lee Chemicals became the ultimate holder of those claims is not germane to the issues presented by the instant appeal, it will not be set out.

located so as to embrace a deposit of natural mineral brine containing ions of sodium, calcium, chloride and potassium, for the purpose of producing calcium chloride by an evaporation process. The claims are situated within the California Desert Conservation Area (CDCA). See 43 U.S.C. § 1781 (1982).

On April 15, 1969, a patent application embracing these four claims was filed with BLM. On March 2, 1973, having made various preliminary investigations, the California State Director, BLM, brought a contest against the claims alleging, inter alia, that at the times the claims were located they were not subject to location because the chlorides were physically commingled in such a way that locatable minerals could not be mined without significantly extracting or disturbing leasable minerals. While an answer was duly filed denying the allegations of the complaint, the matter did not come on for hearing until 1977. This delay was apparently occasioned by attempts within the Department to reach some type of settlement with the claimants.

In any event, no settlement was forthcoming and the case proceeded on its merits. By decision dated October 3, 1978, Administrative Law Judge Michael L. Morehouse dismissed the contest complaint, having concluded that the contestees had established that the contested claims were not valuable for sodium (a leasable mineral) as of the time the claims were located. The Government then pursued an appeal to this Board. In a decision styled United States v. Bardsley, 45 IBLA 367 (1980), the Board affirmed Judge Morehouse's decision and, noting that the parties had stipulated that there was no issue as to the existence of a valuable mineral deposit in 1951 or to the adequacy and sufficiency of the procedural steps taken on the ground and reflected in the public record, directed that "all else being regular, the patent sought in application R 2233 should be granted." Id. at 376.

On December 19, 1980, a patent for the claims was issued by the California State Office, BLM. The patent, however, was made subject to three conditions and stipulations, the third of which is the subject of this appeal. Thus, it was provided:

That the use of the lands described in this patent, and any mining activities therein are subject to such reasonable regulations as may be prescribed by the Secretary of the Interior to protect the historical, scenic, archaeological, biological, cultural, economical, scientific, educational, recreational, and environmental value of the public lands of the California Desert Conservation Area against undue impairment, and to assure against pollution of the streams and waters within said Area.

On April 30, 1981, counsel for appellant filed a formal protest to the inclusion of this language in the patent. It is clear from the case file that the applicability to appellant's patent of the above reservation, which was derived from section 601(f) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1781(f) (1982), was internally examined at some length after the filing of this protest. Nevertheless, it was concluded that the reservation was properly applied and the State Office denied the request that it be stricken. The State Office did, however, agree that the language

of the reservation could be modified so as to more closely track the statutory language ^{2/} and stated that it would issue an amendatory patent with the modified reservation if appellant submitted an application therefor. Appellant thereupon appealed to this Board.

[1] Our decision herein is controlled by our recent opinion in California Portland Cement Corp., 83 IBLA 11 (1984), which also involved the interpretation of section 601(f) of FLPMA, 43 U.S.C. § 1781(f) (1982). That section provides:

Subject to valid existing rights, nothing in this Act shall affect the applicability of the United States mining laws on the public lands within the California Desert Conservation Area, except that all mining claims located on public lands within the California Desert Conservation Area shall be subject to such reasonable regulations as the Secretary may prescribe to effectuate the purposes of this section. Any patent issued on any such mining claim shall recite this limitation and continue to be subject to such regulations. Such regulations shall provide for such measures as may be reasonable to protect the scenic, scientific, and environmental values of the public lands of the California Desert Conservation Area against undue impairment, and to assure against the pollution of the streams and waters within the California Desert Conservation Area. [Emphasis added.]

As we noted in California Portland Cement Corp., *supra*, the question was not whether Congress could have directed that every patent thereafter issued for land in the CDCA contain language subjecting the land to such reasonable regulations as the Secretary might prescribe, but rather whether Congress did, in fact, so direct. Admittedly the second sentence of section 601(f) apparently directed that "any patent" issued on such a claim should recite the limitation of the previous sentence. However, key to our determination that it did not apply to every claim was the opening phrase "subject to valid existing rights," which modified not only the first sentence but the second sentence as well.

As originally proposed in H.R. 13777, language similar to section 601(f) was found in section 401(f). Included in that section, as passed by the House of Representatives, was an additional phrase limiting applicability of the Secretary's regulations to claims located "after the date of approval of this Act." We noted in California Portland Cement Corp., *supra*, that this express language was deleted in a House-Senate conference to which both H.R. 13777, and the Senate version, S.507, had been referred in order to iron-out differences. After pointing out that the phrase "after the date of approval of this Act" had been deleted without explanation, the Board concluded that "the language was deleted because it was redundant" of the opening declaration that the section applied "subject to valid existing rights." Id. at 15.

^{2/} The changes involved the deletion of the adjectives "historical, archaeological, biological, cultural, economical, educational and recreational" in the first sentence of the reservation.

Actually, as can be seen, the phrase limiting applicability of that section to claims located "after the date of approval of the Act," was more restrictive than the opening limitation making the entire section "subject to valid existing rights." Had the deleted phrase remained in the text, the section would have applied only to claims located after the Act had been adopted. By deleting this language and retaining the language making it generally applicable "subject to valid existing rights" (emphasis supplied), Congress effectively differentiated between existing locations supported by a discovery and those not. The former were excepted from the scope of the Act, the latter were covered by its provisions. In essence, Congress distinguished between those claimants who, by making a discovery, had acquired vested rights vis-a-vis United States from those claimants who were merely in the status of prospectors and whose rights of pedis possessio did not run against the United States.

Thus, the applicability of section 601(f) to appellant's claims is dependent upon a determination whether these claims were supported by a discovery on or before October 21, 1976, the date of enactment of FLPMA. The record in this case clearly establishes that a discovery then existed. Therefore, appellant is correct in its assertion that the reservation was not properly included in its patent.

Accordingly, 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 reversed and the case is remanded to BLM for issuance of an amendatory patent, not containing the language found in stipulation No. 3.

James L. Burski
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

R. W. Mullen
Administrative Judge.

