

BILL HALLOCK
WALT HALLOCK

IBLA 85-1

Decided June 5, 1985

Appeal from a decision of the California State Office, Bureau of Land Management, declaring null and void placer mining claims CA MC 153830.

Affirmed.

1. Mining Claims: Powersite Lands -- Mining Claims: Withdrawn Land
-- Mining Claims Rights Restoration Act

Lands covered by a preliminary permit of a prospective licensee for a power project, which was issued by the Federal Energy Regulatory Commission and is in its initial term, are not open to mineral location. Mining claims located on such land are void ab initio unless the land has been restored to mineral entry.

APPEARANCES: Bill Hallock and Walt Hallock, pro sese.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Bill and Walt Hallock appeal from a September 11, 1984, decision of the California State Office, Bureau of Land Management (BLM), declaring the Seven Eleven 1 and 2 placer mining claims (CA MC 153830) null and void ab initio because the land at issue was withdrawn from mineral entry.

These two mining claims were located on July 11, 1984, and encompass land described by claimants as: the N 1/2 NW 1/4 NW 1/4, and the S 1/2 NW 1/4 NW 1/4, sec. 5, T. 5 N., R. 12 E., Mount Diablo Meridian, Calaveras and Amador Counties, California (40 acres). ^{1/} The joint notice of location was filed with BLM on July 13, 1984, and included the following notation: "Filed under Public Law 359 of the 84th Congress." According to the record, BLM identified three separate entries posted to the public land

^{1/} To conform with the official survey plat, the description should read: "Lot 4, sec. 5, T. 5 N., R. 12 E., M.D.M. (42.16 acres)." The land in question is dissected by the Mokelumne River which also serves in this area as the boundary between Calaveras and Amador Counties.

records which withdrew the land at issue for powersite projects. ^{2/} In its effort to determine the current availability of the land for mineral entry, BLM contacted the Federal Energy Regulatory Commission (FERC) by notice dated July 24, 1984. In reply, FERC informed BLM that the land described by claimants was withdrawn under a preliminary permit for prospective Project No. 4289 known as the Upper Mokelumne River Project, issued May 28, 1982, to East Bay Municipal Utility District (EBMUD). Based upon FERC's report, BLM declared the mining claims null and void ab initio for the stated reason that the land was withdrawn and unavailable for mineral location on account of the issued preliminary permit.

[1] In their statement of reasons, appellants contend that applicable law allows mining while a planning permit is in effect. Their interpretation of the prevailing law is incorrect when applied to the present situation. Section 2(a) of the Mining Claims Rights Restoration Act of 1955 (P.L. 84-359), as amended, 30 U.S.C. § 621(a) (1982), provides in part:

All public lands belonging to the United States heretofore, now or hereafter withdrawn or reserved for power development or power sites shall be open to entry for location and patent of mining claims and for mining, development, beneficiation, removal, and utilization of the mineral resources of such lands under applicable Federal statutes: Provided, That all power rights to such lands shall be retained by the United States: * * * And provided further, That nothing contained herein shall be construed to open for the purposes described in this section any lands (1) which are included in any project operating or being constructed under a license or permit issued under the Federal Power Act [16 U.S.C. 791a et seq.] or other Act of Congress, or (2) which are under examination and survey by a prospective licensee of the Federal Energy Regulatory Commission, if such prospective licensee holds an uncanceled preliminary permit issued under the Federal Power Act authorizing him to conduct such examination and survey with respect to such lands and such permit has not been renewed in the case of such prospective licensee more than once.

See also 43 CFR 3730.0-3(a). Therefore, lands withdrawn for power purposes are conditionally open to entry and the location and patent of mining claims, with certain exceptions. This case, however, is included within one of the exceptions. The Act establishes that lands which are covered by a preliminary permit issued by FERC are not open to mineral entry and location. It is well established that any mining claim located on such land is null and void ab initio unless the land has been properly restored to mineral entry under section 24 of the Federal Power Act. James H. Cosgrove, 61 IBLA 376 (1982). Examination of the record confirms that during the period appellants located their claims the land at issue was subject to EBMUD's preliminary permit for Project 4289. See 19 FERC P62,375, order issuing preliminary permit, Project No. 4289, May 28, 1982. By its terms, the permit is not scheduled to

^{2/} A copy of the survey plat found in the record also reveals that the described land was the subject of two separate mineral surveys about which nothing has been said in the case file.

expire until 36 months after date of issuance. There is no indication in the record that the land covered by the permit has been restored to mineral entry.

Appellants also assert that a determination the land was withdrawn under P.L. 84-359 is inappropriate because the present project phase is merely the latest revision in a "plan [that] has been under study for years, tying up the lands" (Statement of Reasons at 2). They allege that the project does not comply with language in P.L. 84-359 providing that the permit may not be renewed more than once, if the withdrawal is to remain effective. However, the record establishes that EBMUD's application for a preliminary permit for its proposed Upper Mokelumne River Project was not filed until March 4, 1981. Nothing indicates that the prospective licensee's preliminary permit is not in its initial term.

Subsequent to filing their notice of appeal and statement of reasons, appellants have vigorously pursued correspondence to ascertain the status of the Mokelumne project. Appellants claim that EBMUD now intends to abandon the project before the preliminary permit expires on May 31, 1985. ^{3/} Appellants request recognition of the validity of their claims predicated upon the apparent intent of EBMUD to forego a request for license for construction of this project. Such a change in circumstances, however, will not alter the fact that appellants located the claims at issue on land which was not then subject to mineral entry. BLM correctly decided that location of the claims during the period of the permit rendered the claims null and void from inception and conferred no rights in the locators. See Russell Hoffman, 83 IBLA 295 (1984); James H. Cosgrove, *supra* at 379. Our conclusion that appellants have no rights in the land by way of their untimely location does not prejudice them from relocating the claims should the land be opened to mineral entry.

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 affirmed.

Franklin D. Arness
Administrative Judge

We concur:

James L. Burski C. Randall Grant, Jr.
Administrative Judge

Administrative Judge

^{3/} On May 15, 1985, appellants submitted a copy of a notice from EBMUD to FERC dated May 1, 1985, declaring its intent to surrender the permit and not to file an application for a license to proceed with the proposed power project.

