

PAUL J. DESFOSSSES  
HARDES MINING CO.

IBLA 86-931, 86-1588

Decided May 3, 1988

Consolidated appeals from two decisions of the Bureau of Land Management, one declaring placer mining claims null and void ab initio, and the other rejecting a request to restore land withdrawn for reclamation purposes to mineral entry. I-MC 105940 through I-MC 105948, and I-18489.

Affirmed.

1. Act of April 23, 1932--Mining Claims: Lands Subject to--Mining Claims: Withdrawn Lands--Reclamation Lands: Generally--Withdrawals and Reservations: Reclamation Withdrawals--Withdrawals and Reservations: Revocation and Restoration

Where public lands have been withdrawn from location of mining claims under a first-form reclamation withdrawal, no mining claim may be located thereon until there has been a formal revocation of the withdrawal or restoration of the land to mineral entry. A mining claim located on such lands prior to restoration is properly declared null and void ab initio regardless of the locator's agreement to abide by the conditions imposed by the Bureau of Reclamation as a condition of restoration.

APPEARANCES: Paul J. DesFosses, pro se, and for Harde Mining Company.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Paul J. DesFosses has appealed from a March 12, 1986, decision of the Idaho State Office, Bureau of Land Management (BLM), declaring certain placer mining claims located by himself and his associates null and void ab initio. The mining claims were identified in the notices of location filed for recordation with BLM as the McTucker #1 through #8 and the McTucker #10 (I-MC 105940 through I-MC 105948). The notices of location reflect that the claims were located on August 20, 1985. In support of its decision, BLM found that the lands embraced within the mining claims fell into three categories: lands withdrawn from location of mining claims pursuant to Secretarial Orders of October 22, 1920, and July 5, 1921, for the Minidoka

Reclamation Project; lands patented without reservation of minerals; and lands granted to the State of Idaho without reservation of minerals. This appeal has been docketed by the Board as IBLA 86-931.

In his statement of reasons for appeal, appellant argues that he petitioned to open the lands within the reclamation withdrawal to mineral entry pursuant to the provisions of the Act of April 23, 1932, 43 U.S.C. | 154 (1982). Appellant asserts that subsequently the Commissioner of Reclamation recommended opening the lands to mineral entry subject to certain restrictions and that thereafter he entered into a contract with the Bureau of Reclamation (BOR) on June 20, 1983, authorizing his entry on the withdrawn land. Appellant contends that this agreement opened the withdrawn lands to mineral entry and authorized location of his mining claims. Appellant does not challenge the decision as to lands disposed of without reservation of minerals.

Approximately the same tracts of land embraced in the mining claims were the subject of a petition for restoration to mineral entry (I-18489) filed with BLM by Harges Mining Company on January 29, 1982. Subsequently, pursuant to an adverse recommendation by the BOR, the petition was rejected by decision of BLM dated June 8, 1982. This decision was appealed to this Board and, ultimately, was set aside by order of March 29, 1983, after receipt of a copy of a letter from the BOR to appellant's counsel indicating a change in position on the request to open the lands. Thereafter, it appears that Harges Mining Company and the BOR entered into the agreement of June 20, 1983, referred to above, which appellants construe to authorize mineral entry on certain land 1/ withdrawn as part of the Minidoka Reclamation Project. 2/ Despite the apparent agreement between BOR and Harges Mining Company, there was a breakdown in communication between BOR and BLM and no further action was taken to restore the land to mineral entry.

Subsequently, by letter of May 15, 1985, BLM advised DesFosses that execution of the contract was not sufficient in and of itself to open the lands to location of a mining claim and that publication of an opening order in the Federal Register would be required. 3/ At that point, BLM requested an updated report/recommendation from BOR. Notwithstanding the purported agreement of June 1983, BOR advised BLM in a memorandum dated March 27, 1986, and a followup memorandum of July 17, 1986, that it was

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1/ The land covered by the agreement was limited to lot 8, sec. 32, T. 4 S., R. 33 E., Boise Meridian. This was one of the tracts embraced in the McTucker #5 claim.

2/ It appears from the record that a copy of the contract was supplied by BOR to BLM and was forwarded to Harges by BLM as an enclosure with a letter of Apr. 14, 1983.

3/ This letter was precipitated by appellant's inquiries which were in turn triggered by BLM decisions voiding prior mining claims located by appellant on lands within the reclamation withdrawal. Appellant failed to pursue a timely appeal of the decision on these claims and subsequently located the claims which are the subject of this appeal.

unable to support opening any of the lands to location of mining claims in view of the potential adverse impacts. BOR cited the objection of the irrigation districts paying for the project to the loss of a part of the reservoir site to a mining claim, as well as potential adverse impact to critical wetlands wildlife habitat. 4/

This adverse recommendation led to the BLM decision of July 31, 1986, issued to Harges Mining Company, rejecting the application for restoration of the lands to location under the mining laws pursuant to 43 U.S.C. | 154 (1982). The Harges Mining Company appeal from this decision has been docketed by the Board as IBLA 86-1588. These two cases were consolidated by order of the Board dated October 16, 1986, in view of the related factual context and the common controlling issue, i.e., whether the lands have been effectively restored to mineral entry.

The essence of appellants' contention of error on appeal is that the agreement of June 20, 1983, between Harges Mining Company and BOR constituted a binding agreement between the Department of the Interior and appellants 5/ effectively restoring the land to location of mining claims. Hence, appellants contend it was improper to reject the petition and to declare the mining claims null and void. 6/

The agreement at issue provides in pertinent part:

WHEREAS, the Locator [Harges Mining Company] has requested to mine land withdrawn by the Bureau of Reclamation for the American Falls Reservoir, pursuant to Sec. 3 of the Act of June 17, 1902 (32 Stat. 388), as amended and supplemented. The Land opened to the Locator for mining purposes is described as Lot 8 of Section 32, Township 4 South, Range 33 East, Boise Meridian, Idaho; and

WHEREAS, the Bureau of Reclamation has agreed to open the described lands to mineral location, entry, and extraction, but not to patent under the Act of April 23, 1932 (47 Stat. 136; 43 U.S.C. | 154), and regulations issued pursuant thereto.

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4/ BOR defended its apparent change in position with respect to lot 8, sec. 32, with the explanation that it had understood at the time of the June 1983 agreement that mining could be authorized under the 1932 Act without a right to patent by the locator, but had been subsequently advised by legal counsel that BOR could neither impose such a restriction nor select the person allowed to locate claims on the land to be restored. 5/ The agreement was signed by Paul J. DesFosses as president of Harges Mining Company and by the Regional Director of the BOR.

6/ Appellants devote little discussion to the implications of the discrepancy between the small acreage which was the subject of the June 1983 agreement and the much larger acreage embraced in the petition for restoration

NOW, THEREFORE, to prevent interference with the construction, operation, and maintenance of the Minidoka Project, the Locator agrees that the following conditions shall apply to all prospecting, mining, and other uses and operations on the lands described above in conjunction with and in addition to pertinent State and Federal mining laws: [The contract then lists a number of conditions].

Thus, the issue presented is whether the agreement itself restored the lands to mineral entry pursuant to the Act of April 23, 1932, 43 U.S.C. | 154 (1982).

[1] The Act of April 23, 1932, as amended, 43 U.S.C. | 154 (1982), authorizes the Secretary to open to mineral location, entry, and patent under the general mining laws, land withdrawn for reclamation purposes. The Act provides:

Where public lands of the United States have been withdrawn for possible use for construction purposes under the Federal reclamation laws, and are known or believed to be valuable for minerals and would, if not so withdrawn, be subject to location and patent under the general mining laws, the Secretary of the Interior, when in his opinion the rights of the United States will not be prejudiced thereby, may, in his discretion, open the land to location, entry, and patent under the general mining laws, reserving such ways, rights, and easements over or to such lands as may be prescribed by him and as may be deemed necessary or appropriate, including the right to take and remove from such lands construction materials for use in the construction of irrigation works, and/or the said Secretary may require the execution of a contract by the intending locator or entryman as a condition precedent to the vesting of any rights in him, when in the opinion of the Secretary same may be necessary for the protection of the irrigation interests. Such reservations or contract rights may be in favor of the United States or irrigation concerns cooperating or contracting with the United States and operating in the vicinity of such lands. The Secretary may prescribe the form of such contract which shall be executed and acknowledged and recorded in the county records and United States local land office by any locator or entryman of such land before any rights in their favor attach thereto, and the locator or entryman executing such contract shall undertake such indemnifying covenants and shall grant

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fn. 6 (continued)

and in the mining claims declared null and void. The notice of appeal in IBLA 86-931 does characterize the June 1983 agreement as an "exploration agreement in that it specifically provides for very limited mining on a small portion of the lands with the understanding that the period of testing was to be three years, after which time [renegotiations] could occur."

such rights over such lands as in the opinion of the Secretary may be necessary for the protection of Federal or private irrigation in the vicinity. Notice of such reservation or of the necessity of executing such prescribed contract shall be filed in the Bureau of Land Management and in the appropriate local land office, and notations thereof shall be made upon the appropriate tract books, and any location or entry thereafter made upon or for such lands, and any patent therefor shall be subject to the terms of such contract and/or to such reserved ways, rights, or easements and such entry or patent shall contain a reference thereto.

The Secretary of the Interior may prescribe such rules and regulations as may be necessary to enable him to enforce the provisions of this section. [Emphasis added.]

43 U.S.C. | 154 (1982).

The regulations promulgated by the Department to implement this authority are found at 43 CFR Subpart 3816. The regulations are clear that the application must be filed with the BLM and that, if found satisfactory, it will be transmitted to the BOR with a request for a report and recommendation. 43 CFR 3816.3. Where BOR makes an adverse report on the application, it will be rejected by BLM subject to the right of appeal. Id. Further, if BOR finds the lands may be opened without prejudice to the rights of the United States, the report may recommend "the form of contract to be executed by the intending locator or entryman as a condition precedent to the vesting of any rights in him, which may be necessary for the protection of the irrigation interests." 43 CFR 3816.4. BOR clearly has the role of deciding whether opening the withdrawn land is consistent with the irrigation interests of the United States, and if opening is recommended, setting any necessary conditions in the form of a contract to be executed by any prospective locator as a precondition to the vesting of any rights. However, there is nothing in the terms of the statute or the regulations which purports to confer on the BOR itself the authority to open the public lands to mining location.

It is well established that once public lands have been withdrawn from the location of mining claims, no mining claim may be located thereon until there has been a formal revocation of the withdrawal or restoration of the land to mineral entry. See Ronald W. Ramm, 67 IBLA 32 (1982); William C. Reiman, 54 IBLA 103 (1981); David W. Harper, 74 I.D. 141 (1967). One of the principal reasons for this rule is to avoid giving a mining claimant a preference to which he has no right. See Vaughn K. Leavitt, 55 IBLA 59, 62 (1981); David W. Harper, supra at 149-151. This rule has been applied to mining claims located on lands within a reclamation withdrawal despite approval by the Commissioner of Reclamation of a termination of the withdrawal where actual revocation was not effectuated prior to location of the claim. Robert K. Foster, A-29857 (June 15, 1964), aff'd, Foster v. Jensen, 296 F. Supp. 1348 (S.D. Cal. 1966). The same result must be reached here.

While it is clear under the terms of the statute that execution of the contract by a locator is a precondition to the vesting of any rights once the land is restored to entry, <sup>7/</sup> there is nothing in the terms of the statute or the regulations which would support construing the contract itself as opening the lands to entry. A contrary result would place BOR in the position of determining who should be allowed to locate a mining claim on public lands, in addition to the responsibility recognized by statute and regulation to set by contract the terms to which any prospective locator must agree. There is simply no support in the mining laws, the Act of April 23, 1932, or the regulations promulgated thereunder for such a result. Such a holding would also run contrary to a long history of Departmental precedent.

Accordingly, we must reject appellants' contention and conclude that the June 20, 1983, contract which appellants and BOR executed did not, in and of itself, restore the land within the reclamation withdrawal to location of mining claims. Consequently, the mining claims were properly declared null and void ab initio. It also follows that, in view of the March 27, 1986, and July 17, 1986, adverse recommendations of BOR regarding restoration of the land to mineral entry, BLM properly rejected the petition for restoration. 43 CFR 3816.3.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

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C. Randall Grant, Jr.  
Administrative Judge

We concur:

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R. W. Mullen  
Administrative Judge

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Franklin D. Arness  
Administrative Judge

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<sup>7/</sup> Thomas L. Lee, 98 IBLA 149 (1987).