

Editor's note: 96 I.D. 452

GOLDEN REWARD MINING CO.

IBLA 88-32

Decided October 16, 1989

Appeal from a decision of the Montana State Office, Bureau of Land Management (BLM), declaring 11 lode mining claims null and void ab initio. M MC 132703(SD) through M MC 132708(SD), and M MC 132777(SD) through M MC 132781(SD).

Affirmed.

1. Federal Land Policy and Management Act of 1976: Conveyances--Federal Land Policy and Management Act of 1976: Reservation and Conveyance of Mineral Interests--Federal Land Policy and Management Act of 1976: Sales--Mining Claims: Lands Subject To

Sec. 209 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1719 (1982), provides that conveyances of title issued by the Department for sales pursuant to sec. 203 of FLPMA, 43 U.S.C. § 1713 (1982), shall reserve to the United States all minerals in the lands, together with the right to prospect for, mine, and remove the minerals under applicable law and such regulations as the Secretary may prescribe. In the absence of regulations expressly approving the location of mining claims for the locatable minerals reserved upon the patenting of lands under sec. 203, mining claims located on such lands are properly declared null and void ab initio.

APPEARANCES: Max Main, Esq., Belle Fourche, South Dakota, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The Golden Reward Mining Company (Golden Reward) has appealed from the September 1, 1987, decision of the Montana State Office, Bureau of Land Management (BLM), declaring 11 lode mining claims null and void ab initio.

Specifically, Golden Reward objects to that portion of BLM's decision relating to 10 of the claims in which BLM ruled as follows:

The Ann & Patti #1 through Rosie #3 (M MC 132703(SD) through [M MC] 132708(SD)), EASTER, RLA, ALS (M MC 132777(SD) through [M MC] 132779(SD)), and KIRSTIN (M MC 132781(SD)) lode mining claims are located on lands which were patented with a reservation of the minerals to the United States subject to applicable law and such regulations as the Secretary of the Interior may prescribe. No regulations have been promulgated by the Secretary[;] therefore, these lands are not open to mineral entry. [1/]

No citations were supplied by BLM in support of this conclusion. 2/

1/ BLM declared 11 claims null and void ab initio in their entirety. First, BLM ruled that all 11 claims had been located in whole or in part on lands patented without a reservation of minerals. Second, it found that 10 of the claims were located on lands patented with a reservation of minerals, but that such lands were not open to mineral entry. Therefore, only one claim (M MC 132780 (SD)) was declared null and void because it was located entirely on lands patented without a reservation of minerals. That claim is not in dispute herein.

The other 10 claims, therefore, were declared null and void in their entirety because they were located in part on lands patented without a reservation of minerals and in part on lands patented with a reservation of minerals, but not open to entry. It is only the latter ground which appellant attacks.

2/ We note that in the section of the BLM Manual relating to public sale procedures, there is a provision at 2711.51 A addressing locatable minerals which states that "[l]ocatable minerals reserved under section 203 of FLPMA are not subject to prospecting and location unless and until the Secretary issues regulations providing for their disposal on lands sold under FLPMA. The Master Title Plats should be so noted." The Manual also provides that after title passes "leasable minerals are available for disposition under the various leasing authorities * * *" (BLM Manual 2711.51 B).

The record reveals that the lands that are subject to these claims were patented in January 1982 under Patent No. 40-82-0019, pursuant to sections 203 and 209 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1713 and 1719 (1982). The patent contains the following exception and reservation:

EXCEPTING AND RESERVING TO THE UNITED STATES * * * All the mineral deposits in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove such deposits from the same under applicable law and such regulations as the Secretary of the Interior may prescribe. (Emphasis supplied.)

In its statement of reasons, Golden Reward, after quoting BLM's holding, states as follows:

The reference to "such regulations as the Secretary of the Interior may prescribe" is apparently a citation of 43 U.S.C. § 1719(a) [(1982)], which provides that all conveyances of title "shall reserve to the United States all minerals in the lands, together with the right to prospect for, mine, and remove the minerals under applicable law and such regulations as the Secretary may prescribe."

The [BLM's] assertion that the "lands are not open to mineral entry," because the Secretary has not prescribed new regulations is incorrect. The previously cited subsection (a) of 43 U.S.C. § 1719 does not state that the Secretary must prescribe new regulations prior to the public's exercise of its "right to prospect for, mine, and remove the minerals"; the said subsection (a) only provides for "such regulations as the Secretary may prescribe." (Emphasis added.) The BLM's interpretation of 43 U.S.C. § 1719(a) operates as a de facto withdrawal of Federal minerals from location and development by the public. Such de facto withdrawal is contrary to the Mining Law of 1872 and all acts amendatory thereto.

We disagree.

[1] Section 209 of FLPMA, provides that conveyances of title issued by the Department for sales pursuant to section 203 of FLPMA, "shall reserve to the United States all minerals in the lands, together with the right to prospect for, mine, and remove the minerals under applicable law and such regulations as the Secretary may prescribe * * *" (emphasis supplied). The operative language, emphasized above, is incorporated into the reservation clause in the patent, set out above, and in the Departmental regulations governing sales under section 203. 43 CFR 2711.5-1. 3/

Significantly, section 2 of the Act of June 1, 1938, as amended (the Small Tract Act), 43 U.S.C. § 682b (1970), 4/ contained identical language concerning reservation of mineral interests in lands patented under the Act:

Patents for all tracts purchased under the provisions of [the Small Tract Act] shall contain a reservation to the United States of the oil, gas, and all other mineral deposits, together with the right to prospect for, mine, and remove the same under applicable law and such regulations as the Secretary may prescribe. (Emphasis supplied.)

In view of its similarity to section 209 of FLPMA, Departmental interpretation of this provision is instructive.

The reservation language from the Small Tract Act was specifically interpreted in connection with the question of the availability of lands

3/ The regulation states "[p]atents and other conveyance documents issued under this part shall contain a reservation to the United States of all minerals. Such minerals shall be subject to the right to explore, prospect for, mine, and remove under applicable law and such regulations as the Secretary may prescribe" (emphasis supplied).

4/ This provision was repealed by section 702 of FLPMA, 90 Stat. 2787, subject to valid existing rights, effective Oct. 21, 1976, for lands in the contiguous 48 states and effective Oct. 21, 1986, for lands in Alaska.

subject to small tract leases for the location of mining claims. The Secretary (acting through the Deputy Solicitor in accordance with the administrative appeal system in place at that time) affirmed BLM's decision voiding mining claims located on such lands, ruling as follows:

As the [Small Tract Act] provides that the reserved minerals in lands subject to its provisions may be prospected for, mined, and removed only under applicable law and such regulations as the Secretary may prescribe and as the Secretary has not to date prescribed regulations permitting prospecting on lands under lease or patent pursuant to the Small Tract Act, it follows that those lands are not subject to location under the mining laws.

The appellant contends that the fact that the Secretary has issued no regulations relating to mining on those lands is proof that the mining laws apply. This is not so. The act makes the reserved minerals subject to disposition only under applicable laws "and such regulations as the Secretary may prescribe." The Secretary has prescribed that there shall be no prospecting for or disposition of the reserved deposits at this time and until he prescribes regulations permitting the prospecting for, mining and removal of such reserved deposits the lands in which such deposits may be found are not open to location under the mining laws. (Emphasis supplied.)

The Dredge Corp., 64 I.D. 368, 373-74 (1957), aff'd, Dredge Corp. v. Penny, 362 F.2d 889 (9th Cir. 1966).

In affirming the Secretary's decision the Ninth Circuit added its voice to the question of the effect of the Small Tract Act's reservation language:

The Act does not provide that reserved minerals shall continue open to entry and location. Instead it leaves to the Secretary the question of how and to what extent they shall be made available.

Dredge Corp. v. Penny, supra at 890.

There is one salient difference in the situations presented by Dredge and the instant appeal. At the time of Dredge, Departmental regulations expressly provided that non-leasable minerals reserved under the Small Tract Act were not subject to prospecting or disposition until regulations were adopted. See 43 CFR 257.15(a) (1955) (later redesignated as 43 CFR 257.16(a) (1959)). In contrast, no such guidance concerning the locatability of mining claims for mineral interests reserved per section 209 of FLPMA, has been provided by the Department in its regulations governing sales under section 203 of FLPMA. See 43 CFR 2711.5-1. Thus, it could be argued in this case that the lack of such a regulation dictates a result different from that in Dredge. For the reasons stated below, we think not.

Although there is nothing in today's regulations expressly forbidding location of mining claims for minerals reserved under section 209 of FLPMA, it may be fairly inferred from these regulations that such minerals are not locatable. Under 43 CFR Part 3810, entitled "Lands and Minerals Subject to Location," specific situations are listed in which minerals reserved in patents are subject to location, including minerals reserved in patents issued under the Color of Title Act, by exchange under the Taylor Grazing Act, and Forest Exchanges (43 CFR 3811.2-9), the Stock Raising Homestead Act (43 CFR 3814.1), and the Alaska Public Sale Act (43 CFR 3811.2-8 and 3822.1). 5/ Minerals reserved under patents issued under section 203 of

5/ The regulations also expressly allow location of mining claims in other specific situations where the surface estate is not patented away from Federal ownership but is nevertheless reserved for some specific purpose: lands in certain national parks and monuments (43 CFR 3811.2-2); lands in national forests (43 CFR 3811.2-4); lands in powersite withdrawals (43 CFR 3811.2-6), and reclamation withdrawals (43 CFR 3816.1); and others.

FLPMA are not included, thus strongly suggesting, in light of the affirmation that other types of reserved mineral interests are locatable, that

the Department does not wish mineral interests reserved under FLPMA to be locatable. 6/ Therefore, in the absence of any regulations either specifically approving or restricting mineral location and development of these reserved mineral interests, we deem it appropriate to follow the reading of the statutory provision to disfavor locatability, as adopted in The Dredge Corp., supra. 7/

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.

David L. Hughes
Administrative Judge

I concur:

Bruce R. Harris
Administrative Judge

6/ This impression is also strengthened by the fact that the BLM Manual expressly states that locatable minerals reserved under section 203 of FLPMA are not subject to location. BLM Manual 2711.51 A. Of course, if BLM, as a matter of policy, wishes to open mineral interests retained under FLPMA to mineral entry, it could do so by a change in regulations.

7/ See also Superior Sand and Gravel Mining Co. v. Territory of Alaska, 224 F.2d 623 (9th Cir. 1955), in which the court pointed out that, in the absence of contemplated administrative regulations for the safeguarding of the interests and the protection of the rights of those holding under the granting statute, deeming lands to be open to location of mining claims might circumvent the purpose of that statute by allowing mineral development to interfere with the contemplated use of the surface. Likewise, in the present context, we are unwilling to interpret FLPMA to provide that reserved mineral interests are subject to mineral entry without the Department's first having had the opportunity to consider (in the rulemaking context) the possibility of adopting measures to protect the surface estate granted under section 203.