

WILLIAM BADE

IBLA 88-162

Decided January 10, 1990

Appeal from a decision of the Oregon State Office, Bureau of Land Management, rejecting an application for a prospecting permit for gold and silver. OR 42133 (WASH).

Affirmed.

1. Applications and Entries: Generally--Reclamation Lands

The lands listed as subject to lease under the "Hardrock Minerals Leasing" regulations at 43 CFR 3560.3 and 43 CFR Part 3580 are the only areas which have been made subject to hardrock mineral leasing as a result of either the exercise of Secretarial discretion or Congressional directive. BLM may properly reject an application for a prospecting permit for hardrock minerals when the lands described in the application are not subject to the issuance of a hardrock mineral lease.

2. Applications and Entries: Generally--Mineral Lands: Leases

Gold and silver on public domain lands are generally not subject to mineral leasing, but may be claimed only under the authority of the Mining Act of 1872, subject to the availability of the lands to mineral entry.

APPEARANCES: Steven H. Corey, Esq., Pendleton, Oregon, for William Bade; Eugene A. Briggs, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

William Bade appeals the November 9, 1987, decision of the Oregon State Office, Bureau of Land Management (BLM), rejecting his application for a prospecting permit for gold and silver. The application described the lands requested as the S $\frac{1}{2}$ SE $\frac{1}{4}$, sec. 14, the N $\frac{1}{2}$ NE $\frac{1}{4}$ and the NE $\frac{1}{4}$ NW $\frac{1}{4}$, sec. 23, and the NW $\frac{1}{4}$ NW $\frac{1}{4}$, sec. 24, T. 17 N., R. 25 E., as well as the S $\frac{1}{2}$ NW $\frac{1}{4}$, the S $\frac{1}{2}$ NE $\frac{1}{4}$, the N $\frac{1}{2}$ SW $\frac{1}{4}$, and the N $\frac{1}{2}$ SE $\frac{1}{4}$, sec. 18, T. 17 N., R. 26 E., Willamette Meridian, Grant County, Washington.

BLM's decision divides the lands described in the application into two groups. BLM rejected the application as to the first group of lands, which were acquired for reclamation purposes, because BLM "has no regulatory

authority under 43 CFR Part 3500 to issue such permits, and it is questionable whether there is statutory authority to issue permits or leases on lands acquired for reclamation purposes under the Reclamation Project Act of 1939, as amended (43 U.S.C. 387)." BLM rejected the application as to the remaining lands because it found the minerals to be public domain minerals unavailable for a prospecting permit and preference-right leasing. BLM noted that although the minerals would be available for location under the general mining laws, 30 U.S.C. § 22 (1982), these lands were "included within the Columbia Basin Reclamation Project under Secretarial Order SO 6/18/1947 * * * which constitutes a 1st form withdrawal not subject to appropriation under the General Mining Laws." 1/

Appellant argues that section 10 of the Reclamation Project Act of 1939, 43 U.S.C. § 387 (1982), quoted below, "gives the Secretary discretion to permit the removal of 'sand, gravel, and other minerals and build-ing materials' from lands acquired and being administered under the Federal Reclamation Laws," and that the Columbia Basin Project Act authorized the project subject to this provision (Statement of Reasons at 2). Appellant adds that 43 U.S.C. § 154 (1982) gives the Secretary discretion to open public lands withdrawn under Federal reclamation laws to location, entry, and patent under the general mining laws, and that 43 CFR 3500.8, listing lands not subject to mineral leasing, does not include the lands he applied for. Id. at 2-3.

Section 10 of the Reclamation Project Act of 1939, 43 U.S.C. § 387 (1982), provides:

The Secretary, in his discretion, may (a) permit the removal, from lands or interests in lands withdrawn or acquired and being administered under the Federal reclamation laws in connection with the construction or operation and maintenance of any project, of

1/ From the master title plats included in the case file it appears that, in grouping the lands, BLM properly ascertained their status. We note, however, that the case file lacks a title report from the Bureau of Reclamation. BLM's first request for a title report apparently was never received by the Bureau of Reclamation. By letter dated Sept. 15, 1987, BLM sent another copy of the request. By memorandum dated Oct. 15, 1987, the Bureau of Reclamation filed an objection to issuing the lease, but no title report. The objection states that surface interests in the lands have been sold and that the remaining lands "involve constructed Project facilities and associated works." No specific information or documentation as to the legal status of the lands described in the application was provided. The copies of documents in the case file which show the withdrawal of one area and two sales appear to have been added by BLM. The Bureau of Reclamation did submit survey plats depicting Bureau of Reclamation project boundaries and rights-of-ways for roads, canals, and drains which have been marked to show the areas claimed under management by the Bureau of Reclamation, but these documents do not establish the status of the land. Appellant has not challenged BLM's determination of the status of the two groups of land.

sand, gravel, and other minerals and building materials with or without competitive bidding: Provided, That removals may be permitted without charge if for use by a public agency in the construction of public roads or streets within any project or in its immediate vicinity; and (b) grant leases and licenses for periods not to exceed fifty years * * * affecting lands or interest[s] in lands withdrawn or acquired and being administered under the Federal reclamation laws in connection with the construction or operation and maintenance of any project.

BLM's decision justifiably characterizes as "questionable" whether this provision itself authorizes granting a prospecting permit application or a lease on lands withdrawn or acquired and being administered under Federal reclamation laws. The language of section 10 in (a) and (b) speaks of "removal" and of the granting of leases and licenses, respectively, "in connection with the construction or operation and maintenance of any project," and the House Committee report on the bill that became the 1939 Act states that "[t]he provisions of sections 10 to 14, inclusive, would permit more economical and orderly construction and operation and maintenance of reclamation projects than is possible under existing laws." H.R. Rep. No. 995, 76th Cong., 1st Sess. 5 (1939). Both this language of the Act and this statement in the committee's report indicate that the removal of "sand, gravel, and other minerals and building materials" could only be permitted for construction or maintenance of a reclamation project, and BLM argues that to the best of its knowledge "the Department has never used this section to justify a leasing of hardrock minerals on lands acquired for reclamation purposes, except for reclamation construction" (Answer at 2). 2/

However, the Department used section 10 as authority for regulations promulgated in 1955 allowing mineral leasing on lands withdrawn for reclamation purposes within what is now the Lake Mead Recreation Area (43 CFR 199.70 - 199.81, 20 FR 5778-79 (Aug. 10, 1955)). This fact led the court in Sierra Club v. Watt, 566 F. Supp. 380 (D. Utah 1983), to reject the contention that "other minerals" should be construed, under eiusdem generis, as meaning building materials, and to conclude that section 10 "is ambiguous as to the authority of the Secretary to lease locatable minerals." Id. at 383. Because the statute was ambiguous, the court said it was obliged to defer to the Secretary's interpretation if it was reasonable, found the interpretation that section 10 authorized leasing of locatable minerals reasonable, and declared the regulations valid. Id. at 383. "[S]ince Congress, in passing the Lake Mead Act, stated that the Lake Mead NRA

2/ This interpretation is also supported by the enactment in 1932 of Ch. 134, 47 Stat. 136-37, 43 U.S.C. § 154 (1982), which authorizes the Secretary to open to mineral location lands withdrawn under the reclamation laws but to reserve such rights as he deems necessary or appropriate, "including the right to take and remove from such lands construction materials for use in the construction of irrigation works." Appellant argues this statute also authorizes the granting of his application. However, it concerns the opening of withdrawn land and has no bearing on the question of authority to issue a prospecting permit.

[National Recreation Area] would continue under the 'regulations heretofore issued by the Secretary of Interior,' it is appropriate to interpret the Lake Mead Act as authorizing the leasing of 'locatable' minerals as well," the court concluded. Id.

In addition to the Department's allowing mineral leasing in the Lake Mead area, Congress has authorized removal of nonleasable minerals "in the manner prescribed by section 10" in a number of other national recreation areas. In 1965 Congress established the Whiskeytown-Shasta-Trinity National Recreation Area. P.L. 89-336, 79 Stat. 1295 (1965). In regard to the Whiskeytown lands administered by the Department of the Interior, Congress authorized the Secretary, "under such regulations as he deems appropriate," to "permit the removal of the nonleasable minerals from lands or interests in lands under his jurisdiction within the recreation area in the manner prescribed by section 10 of the Act of August 4, 1939, as amended." Id., § 6, at 1298-99, codified at 16 U.S.C. § 460q-5 (1982). Removal under section 10 was also authorized by Congress in legislation establishing the Flaming Gorge National Recreation Area (P.L. 90-540 § 5, 82 Stat. 904, 905 (1968), codified at 16 U.S.C. § 460v-4 (1982)), the Ross Lake and Lake Chelan National Recreation Areas (P.L. 90-544, § 402(b), 82 Stat. 926, 928-29 (1968), codified at 16 U.S.C. § 90c-1(b) (1982)), the Glen Canyon National Recreation Area (P.L. 92-593, § 3(a), 86 Stat. 1311, 1312 (1972), codified at 16 U.S.C. § 460dd-2(a) (1982)), and the White Mountains National Recreation Area of Alaska (P.L. 96-487, § 1312(b), 94 Stat. 2371, 2483, codified at 16 U.S.C. § 460mm-4(b) (1982)). The wording of the Glen Canyon Act is that "the Secretary shall permit the removal of the nonleasable minerals"; the other statutes provide he "may permit removal."

Section 10 authorizes the Secretary to permit removal and grant leases "in his discretion." In regard to these national recreation areas, the Secretary has exercised this discretion by promulgating regulations under which leasing could proceed. See 43 CFR Part 3580, which enumerates special areas of available land subject to leasing for hardrock minerals. See also 43 CFR 3500.0-3(c)(3)-(5).

[1] Appellant argues that BLM has authority to issue him a prospecting permit because the area covered by his application is not included in the lands excluded from leasing under 43 CFR 3500.8, which sets out general areas excluded from mineral leasing. However, gold and silver are "hardrock minerals." See 43 CFR 3500.0-5(n). Thus, if a prospecting permit were to be issued to appellant for these minerals, it could only be issued under the "Hardrock Minerals Leasing" regulations at 43 CFR Subpart 3560, which govern leasing of hardrock minerals in general. The lands listed in 43 CFR 3560.3 and 43 CFR Part 3580 are the only areas which have been made subject to hardrock mineral leasing as a result of either the exercise of Secretarial discretion or Congressional directive. 3/ The lands covered by appellant's application are not included in the available lands set forth under the

3/ The lands listed in 43 CFR Part 3580 are expressly made subject to hardrock mineral leasing under the provisions of 43 CFR Subpart 3560 by 43 CFR 3560.2-2.

regulations in either 43 CFR Subpart 3560 or Part 3580. 43 CFR 3562.1 provides that "[a] prospecting permit may be issued for any area of available public domain and acquired land subject to hardrock mineral leasing where prospecting or exploratory work is necessary to determine the existence or workability of a particular hardrock mineral(s)." Because the acquired lands specified in appellant's application for a prospecting permit are not listed as available areas for hardrock leasing, BLM properly denied the application. See Steve D. Mayberry, 82 IBLA 339 (1984); David Britton, 74 IBLA 271 (1983).

[2] As to the public domain lands covered by appellant's application for a prospecting permit, BLM correctly held that gold and silver on public domain lands (as opposed to acquired lands) are not subject to leasing unless there is a regulation authorizing it, e.g., 43 CFR 3560.3-1(d). These minerals may be claimed under the Mining Act of 1872 if the lands are available for mineral entry. See Wyoming Fuel Co., 52 IBLA 302 (1981). However, BLM has indicated the public domain lands appellant applied for are included in a first-form reclamation withdrawal and are therefore segregated from mineral entry. See Sam McCormack, 52 IBLA 56 (1981).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Oregon State Office is affirmed.

Will A. Irwin
Administrative Judge

I concur:

David L. Hughes
Administrative Judge