

GOLDEN ARC MINING & REFINING INC.

IBLA 91-74      Decided July 14, 1995

Appeal from a decision of the Nevada State Office, Bureau of Land Management, declaring millsites null and void ab initio due to location on land unavailable for the location of mining claims. NMC 146505 and NMC 146506 through NMC 146508.

Appeal Dismissed.

1. Appeals: Generally—Rules of Practice: Appeals:  
Dismissal—Rules of Practice: Appeals: Timely Filing

An appeal will be dismissed as untimely when the record fails to establish that the Notice of Appeal was transmitted within the 30-day period established by 43 CFR 4.411(a).

2. Millsites: Generally—Mining Claims: Millsites

Absent Federal ownership of minerals, land cannot be available for the location of claims under the mining laws, including the location of millsites.

3. Estoppel

Reliance on erroneous information given by a BLM employee or found in BLM records cannot create rights not authorized by law.

APPEARANCE: Howard E. Harris, Chairman of the Board, Golden Arc Mining & Refining Inc.

OPINION BY CHIEF ADMINISTRATIVE JUDGE BYRNES

Golden Arc Mining & Refining Inc. (Golden Arc) has appealed a decision of the Nevada State Office, Bureau of Land Management (BLM), dated October 24, 1990, declaring the Nevada Hills Millsite #1 and Nevada Hills Millsite #3 through #5 (NMC 146505 and NMC 146506 through NMC 146508) null and void ab initio because they were located on land not open to the location of mining claims. BLM determined that the millsites had been located within sec. 5, T. 32 N., R. 34 E., Mount Diablo Meridian, on land that had been patented and later reconveyed to the United States without title to the minerals.

On appeal, Howard E. Harris, Chairman of the Board representing appellant, states that, prior to location of the millsites, he and two others met with BLM to determine whether the land was available. Harris explains that they discussed the fact appellant intended to construct a smelting and refining facility at a cost of \$500,000 or more. He claims they were told other land was available for sale within the section but that a sale would be time consuming and that locating the millsites would be as safe since the land was open for the location of mining claims. He states that the millsite claims were filed on April 22, 1973, and the company began operating the facility in May or June of that year. Appellant contends that these events occurred before a decision was made not to allow millsites to be located on lands owned by the United States when the minerals have been reserved to others.

As an initial matter, it appears that we must dismiss the appeal because it was untimely filed.

[1] The regulation governing the filing of appeals to the Board of Land Appeals, 43 CFR 4.411(a), provides:

A person who wishes to appeal to the Board [of Land Appeals] must file in the office of the officer who made the decision (not the Board) a notice that he wishes to appeal. A person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service.

Under 43 CFR 4.411(c), no extension of time can be granted for filing. In the absence of a timely notice of appeal, the Board lacks jurisdiction over an appeal. Gary T. Suhrie, 75 IBLA 9 (1983); James M. Chudnow, 72 IBLA 60 (1983); and cases cited.

The case record shows that BLM's decision was received by H. E. Harris at appellant's address of record on October 29, 1990. Accordingly, under 43 CFR 4.411(a), the time for filing its notice of appeal with BLM expired on November 28, 1990. 43 CFR 4.22(e). Appellant's notice of appeal was not filed with BLM until November 29, 1990, 1 day after the mandatory deadline for filing an appeal. It was therefore untimely filed.

The provisions of 43 CFR 4.401(a), establishing a grace period for filing in some circumstances, are of no comfort to appellant here. Under that provision, a delay in filing a document may be waived if the document is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which filing is required before the end of the period in which it was required to be filed. The record contains no envelope showing the transmittal date. At the top of the appellant's submission is a handwritten, pencil notation "[h]and carried to BLM. KW 11/29/90." In the absence of any other evidence showing timely transmittal, we must conclude that

the record shows that the notice of appeal was not transmitted to BLM until November 29, 1990, after the end of the filing period, when it was hand carried to BLM's offices.

However, were we to reach the merits of the appeal, we would find that BLM's decision was correct and must be affirmed. The case file contains copies of two documents which are the basis for the decision. The first is Railroad Patent No. 198, dated July 31, 1903, which grants sec. 5 of T. 32 N., R. 34 E., Mount Diablo Meridian, along with other land to the Central Pacific Railway Company. The second document is a copy of a Federal Register notice noting reconveyance of approximately 48,220 acres, including sec. 5, T. 32 N., R. 34 E., Mount Diablo Meridian. 22 FR 1643 (Mar. 14, 1957). The notice states: "These lands are not open for location and entry under the general mining laws and mineral leasing laws as the mineral rights have been reserved to former owners." Id. at 1644. Although the file does not include a copy of the document reconveying title to the United States, there is no reason to doubt that it reserved minerals as stated in the Federal Register notice.

[2] It is well established that BLM properly declares mining claims null and void ab initio where the claims are located at a time when the United States does not own the minerals because the land has been patented without a mineral reservation to the United States or the land has been reconveyed to the United States but the grantor retained the mineral rights. Absent Federal ownership of minerals, the land could not be available for location under the mining laws. Gold-West Industries, Inc., 90 IBLA 372 (1986); August F. Plachta, 88 IBLA 304 (1985); Moise & Leon Berger, 82 IBLA 253 (1984); Eagle Peak Copper Mining Co., 54 I.D. 251, 253 (1933). Because a millsite is a location under the mining laws, the land in sec. 5 was not available for the location of appellant's millsite claims. In Robert C. LaFaire, 13 IBLA 289 (1973), appellant had located a millsite claim on land which had been reconveyed to the United States by the State of Wyoming with a reservation of all minerals and mineral rights. The Board held that "as the United States does not own the mineral estate \* \* \*, the land is not open to location under the mining laws, and a mill site is not locatable thereon." Id. at 291.

As noted above, the Federal Register notice explicitly stated that the land was not open to location under the mining laws. Assuming, arguendo, that the United States owned the mineral estate, absent an order opening the lands to location, this land was not available for the location of mineral claims. Maurice Duval, 68 IBLA 1, 2 (1982).

[3] Appellant's description of his visit to BLM in 1973 is not consistent with the documents in the case file. The location certificates for the millsites show they were located March 3, 1980, by an agent for the Union Petro-Chemical Corporation of Nevada. A deed dated March 10, 1988, shows conveyance of the millsites, along with mining claims, to Golden Arc. It is possible that appellant is referring to other millsites it located

in 1973 but, if so, the Federal Register notice establishes that, like the claims at issue in this case, the land was not available for their location. Appellant's account receives some support from the master title plat which notes the section was opened to entry March 3, 1957, and bears the entry "Rstd Min Recon." Even if appellant could establish that the events he describes occurred, however, reliance on erroneous information given by a BLM employee or found in BLM records cannot create rights not authorized by law. 43 CFR 1810.3(c); Edgar Sebastian Roberts, 127 IBLA 217, 219 (1993); John & Maureen Watson, 113 IBLA 235, 238 (1990). Appellant's reliance would not alter the fact the millsites were located on land not legally available for their location.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

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James L. Bymes  
Chief Administrative Judge

I concur:

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David L. Hughes  
Administrative Judge